



**STUDY ON THE IMPLEMENTATION AND EFFECT IN MEMBER
STATES' LAWS OF DIRECTIVE 2001/29/EC ON THE
HARMONISATION OF CERTAIN ASPECTS OF COPYRIGHT AND
RELATED RIGHTS IN THE INFORMATION SOCIETY**

Final Report

Institute for Information Law

University of Amsterdam

The Netherlands

February 2007

This study was commissioned by the European Commission's Internal Market Directorate-General, in response to the invitation to tender MARKET/2005/07/D. The study does not, however, express the Commission's official views. The views expressed and all recommendations made are those of the authors.

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Abbreviations

ALAI	Association littéraire et artistique internationale
art.	Article
arts.	Articles
BC	Berne Convention for the Protection of Literary and Artistic Works
cf.	confer
CFI	Court of First Instance (European Court of Justice)
CRI	Computer Law Review International
DRM	Digital Rights Management
e.g.	for example
EC	European Communities
ECJ	European Court of Justice
ECR	European Court of Justice Reporter
et al.	et alii (and others)
et seq.	et sequens; as follows
etc.	etcetera
EIPR	European Intellectual Property Review
EU	European Union
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
GRUR Int.	Gewerblicher Rechtsschutz und Urheberrecht - Internationaler Teil (Germany)
i.e.	id est; that is
ibid.	reference to source mentioned in previous note
IIC	International Review of Industrial Property and Copyright Law
IRDI	Intellectuele rechten/Droits intellectuels (journal)
LAB	Legal Advisory Board (of the European Commission, former DGXIII)
MMR	Multimedia und Recht
OECD	Organisation for Economic Co-operation and Development
p.m.a.	post mortem auctoris
para.	paragraph
P2P	Peer-to-peer networks
RC	International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention)
sec.	section
SCCR	Standing Committee on Copyright and Related Rights (WIPO)
TPMs	Technological Protection Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UCC	Universal Copyright Convention
UfITA	Archiv für Urheber- und Medienrecht (journal)
UK	United Kingdom
UNESCO	United Nations Educational, Scientific and Cultural Organization
USA	United States of America
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organisation
ZEUP	Zeitschrift für Europäisches Privatrecht
ZUM	Zeitschrift für Urheber- und Medienrecht

Preface

Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society entered into force on 22 June 2001.¹ The objectives of the Directive were twofold: (1) to adapt legislation on copyright and related rights to reflect technological developments, and (2) to transpose into Community law the main international obligations arising from the two treaties on copyright and related rights adopted within the framework of the World Intellectual Property Organisation (WIPO) in December 1996.² The Directive was one of the centrepieces of the original Lisbon Agenda of 2000. The recently renewed Lisbon agenda aims at fostering economic prosperity, jobs and growth, in particular by boosting the knowledge-based economy, and by enhancing the quality of Community regulation ('better regulation'). In doing so, the original Lisbon aim, to make the European Union "the most dynamic and competitive knowledge-based economy in the world" by 2010, remains intact. It goes without saying that a legislative framework for copyright and related rights in the information society that fosters the growth of the knowledge-based economy in the European Union is a crucial element in any strategy leading towards that goal.

This study, commissioned by the European Commission, examines the application of the Directive in the light of the development of the digital market. Its purpose is to consider how Member States have implemented the Directive into national law and to assist the Commission in evaluating whether the Directive, as currently formulated, remains the appropriate response to the continuing challenges faced by the stakeholders concerned, such as rights holders, commercial users, consumers, educational and scientific users. As set out in specifications of the study set out by the Commission, its aim is "to assess the role that the Directive has played in fostering the digital market for goods and services in the four years since its adoption" (Letter of Invitation to Tender, 25th July 2005). The impact of the Directive on the development of digital (chiefly online) business models, therefore, will be the focal point of our enquiry throughout this study.

The adoption of the Information Society Directive marked the conclusion of several years of enquiry and discussions at the European Commission on the challenges brought about for the information society by the emergence of the digital networked environment. One of the key documents published on the issue was the Commission's Green Paper of 1995 on Copyright and Related Rights in the Information Society.³ The Commission introduced its initial Proposal for the Information Society Directive on 10 December 1997, and an amended proposal on 21 May 1999. The Common Position followed on 28 September 2000, and the Information Society Directive was finally adopted on 22 May 2001.⁴

Member States were given until 22 December 2002 to implement it into national law, but only Greece and Denmark managed to meet the implementation deadline. Most Member States transposed the obligations of the Directive in the course of 2003 and 2004, while large Member States such as Spain and France needed considerably more time. With the adoption on 1st August 2006 of the *Loi 2006-961 relative au droit d'auteur et aux droits voisins dans la société de l'information*,

¹ OJ 2001 L 167 of 22.6.2001, p. 10.

² WIPO Copyright Treaty (WCT) and WIPO Performers and Phonograms Treaty (WPPT) both signed at the WIPO Diplomatic Conference, Geneva, 20 December 1996.

³ European Commission, *Green Paper on Copyright and Related Rights in the Information Society*, Brussels, 19.07.1995, COM(95) 382 final.

⁴ Walter in M.M. Walter (ed.), *Europäisches Urheberrecht*, Vienna, Springer Verlag, 2001, 1009-1113; S. Bechtold, "Comment on Directive 2001/29/EC", in T. Dreier P.B. Hugenholtz (ed.), *Concise on European Copyright Law*, Alphen aan den Rijn, Kluwer Law International, 2006, § 1.

France was indeed the last Member State to implement the directive,⁵ thereby finally paving the way for the ratification by the European Union and its Member States of the WIPO Treaties.

In light of the fact that the process of implementation was completed only recently, an evaluation exercise may seem quite premature. However, article 12 of the Directive expressly instructs the European Commission to submit a review report to the European Parliament no later than forty-two months after the date of entry into force of this Directive, i.e. by November 2004. In particular, article 12 calls for the examination of the application of articles 5, 6 and 8 of the Directive in the light of the development of the digital market.

Another reason for an early evaluation of the Directive lies in the dynamic nature of the 'information society' (i.e. the Internet) itself. The Directive was based initially on policies set out in the Commission's Green Paper of 1995. In other words, the Directive was designed to respond to the legal challenges posed by the information society as they were perceived in the mid-1990's – over ten years ago. Since 1995, and even after the final adoption of the Information Society Directive in 2001, numerous important technological and economical developments have changed the landscape of the information society. The new millennium has seen the spectacular rise, both in popularity and in performance, of online business models offering vast amounts of copyrighted content (music, video, software, images and even books). The roll-out of such online content services, as iTunes, and the rapid deployment of Digital Rights Management systems, that existed largely in theory when the Directive was adopted, has resulted in a real, rapidly growing and vibrant market place for digital content services in Europe and elsewhere. To what extent have the provisions of the Directive that were specifically aimed at promoting these new services, notably articles 5 and 6, been conducive to this development?

In sum, the Lisbon agenda, the Directive's built-in review process and the dynamics of the information society, all call for an unbiased and critical evaluation of the Directive. This final report is divided in two parts. Part I provides an early assessment of the impact of Directive 2001/29/EC on the development of online business models, applying a methodology that will be explained in section 1.1. Since the Directive has been transposed, in major parts of the European Union, only very recently this assessment can be tentative at best.

Part II offers a comprehensive inventory of the actual implementation of the Directive by the twenty-five Member States of the European Union. It also contains a summary of remaining disparities and highlights specific problems that have a detrimental and disharmonising effect throughout the Internal Market. Part II also includes comparative tables setting out the implementing provisions in each Member State. Particular emphasis will be given to the provisions dealing with rights and limitations, with the protection of technological measures (TPM's) and with the sanctions imposed for acts of infringement or circumvention of technological measures. The methodology followed for Part II of this study proceeded on the basis of traditional comparative law research. The approach was centred on the collection and analysis of various sources of international and national legislation, case law, and legal literature gathered among subcontractors and correspondents covering the entire territory of the European Union.

Part I of the Study was mainly written by Dr. Lucie Guibault (IViR) and Thomas Rieber-Mohn (NRCCL, Oslo), with the assistance of Mireille van Eechoud, Lennert Steijger and Mara Rossini (all IViR). Nicole Dufft and Philipp Bohn (Berlecon Research) conducted interviews with selected stakeholders, organised a workshop and contributed to Chapter 1. Part II was chiefly written and prepared by Dr. Guido Westkamp, of the Queen Mary Intellectual Property Research

⁵ Loi n° 2006-961 du 1er août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information, J.O n° 178 du 3 août 2006 page 11529.



INFORMATION SOCIETY DIRECTIVE

Centre of University of London. The entire study was produced under the responsibility of the Institute for Information Law under the supervision of Prof. P. Bernt Hugenholtz (IViR).

Part I

**The Impact of Directive 2001/29/EC on
Online Business Models**

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1 Introduction

The principal aim pursued by the European legislature when adopting the Directive in 2001 was to foster growth and innovation of digital content services in the European Union. As set out in the official specifications of this study,⁶ the first part of this study will therefore provide an assessment of the impact of Directive 2001/29/EC on the development of online business models. Examining whether this goal has actually been met, however, is a daunting task – for a variety of reasons.

In the first place, the implementation process has only recently been completed in large parts of the European Union. Important Member States, such as Spain and France, have completed transposition of the Directive in the course of 2006, at a time when this study was already well underway. Other Member States have only between one and four years of experience with the norms of the Directive, as transposed in their national laws. Not surprisingly, case law concerning the transposed provisions of the Directive is scarce or, in several Member States, non-existent. The short time frame between implementation and assessment makes it difficult, if not impossible, to measure the actual impact, if any, of the norms of the Directive on the actual business decisions of market players.

In the second place, as the European Commission has experienced itself when preparing its first review of the Database Directive, directly correlating the introduction of new norms of intellectual property with developments in the information market – a market that is in constant flux – is exceedingly difficult, if not impossible. More generally, the existing literature on the law and economics of intellectual property offers little empirical evidence linking the existence of rights of intellectual property and the structure of markets.

In addition to these ‘disclaimers’, a few more preliminary remarks are in order here. Since the present study focuses on the impact of the Directive on the deployment of online business models, this study does not purport to make an overall assessment of the Directive. In particular, cultural dimensions of the Directive are considered only insofar as they are relevant to the study’s main focus. Note, however, that in the context of this study terms such as ‘business models’ and ‘content providers’ need not refer only to commercial users. For example, we will also discuss the impact of the Directive’s rules on limitations on libraries, educational institutions and handicapped users.

For the same reason, the impact of the Directive on fundamental rights and freedoms enjoyed by the citizens of the EU will not be examined as such, even though such aspects would surely play an important role in a comprehensive assessment of the Directive. Finally, in view of the ongoing consultations within the European Commission, a discussion of article 5(2)b) of the Directive on private copying (and levies) remains outside of the scope of this study.

Finally, it should be noted that the present study does not seek to duplicate research undertaken for the IViR Study on the Recasting of Copyright for the Knowledge Economy, which was submitted to the Commission previously. General issues such as the legislative competence of the European legislature and the benefits and drawbacks of the harmonisation process have been treated *in extenso* there, and shall not be revisited in the present study.

1.1 General goals of the Directive

The adoption of the Information Society Directive in June 2001 marked the conclusion of several years of enquiry and discussions at the European Commission on the challenges brought about

⁶ Letter of Invitation to Tender, Open call for tenders no. MARKT/2005/07/D, Brussels, 25th July 2005.

for the information society by the emergence of the digital networked environment. One of the key documents published on the issue was the Commission's Green Paper of 1995 on Copyright and Related Rights in the Information Society.⁷ In the Green Paper, the Commission declared that if the information society was to develop successfully, the many new services and products to be created must be able to benefit fully from the new environment. Their expansion must take place in a regulatory framework which would be coherent at national, Community and international levels. The Commission made it clear that laws would have to be adapted in order to respond to the new and varied requirements which would appear, raising unprecedented issues.

The Commission believed that the digital networked environment would either make use of existing works or would lead to the creation of new ones. Existing protected material often needed to be re-worked before being transmitted in a digital environment; and the creation of new works and services required substantial investment, without which the scope of the new services being offered would remain very limited. This very range and variety of services was thought to encourage the development of infrastructures. Without that contribution there was little point in investing in infrastructures, at least for the range of services offered to individual consumers, oriented mainly towards leisure and education. The creative effort which provides a basis for investment in new services were only worthwhile and would only be made if works and other matter were adequately protected by copyright and related rights in the digital environment.

The Green Paper examined two essential questions. First, it considered how the information society ought to function, showing the importance of the information society for the European Community. Second, it identified a number of issues relating to copyright and related rights which should be given priority in order to ensure the proper functioning of the information society.

According to the Commission, the question of the protection of intellectual property in the information society was, and still is, a matter of interest to the Community primarily because of the need to ensure that goods and services can move freely.⁸ Copyright and related rights give the right holder sole power to authorize or prohibit the use, reproduction and the like of works and other protected matter. Unless the rules governing them were aligned from one country to another, there would inevitably be obstacles in the way of the free movement of the goods and services involved. The Commission believed that the information society would facilitate creation, access, distribution, use and similar activities, and consequently increase the number of situations in which differences between the laws of the Member States may obstruct trade in goods and services. There was a fear that this position would be aggravated by the fact that in the information society works would increasingly circulate in non-material form. This meant that the applicable rules would very often be those on freedom to provide services, rather than goods.⁹

The Commission stressed the importance of copyright and related rights as a fundamental element of Europe's cultural policy, as well as the social dimension of the provision of information services. Nevertheless, economic considerations were the most prevalent aspect of the Commission's description of a properly functioning information society. The Commission

⁷ European Commission, Green Paper on Copyright and Related Rights in the Information Society, Brussels, 19.07.1995, COM(95) 382 final [hereinafter Green Paper 1995].

⁸ The EC's legislative competence in the field of intellectual property is typically based on art. 95 EC Treaty (internal market). For a discussion of the scope of article 95 in relation to copyright and related rights, the impact of articles 151 (on culture, instructing the EC to encourage co-operation between Member States, and if necessary support, with a view to stimulate 'artistic and literary creation, including in the audiovisual sector') and 153 (on consumer protection), see para. 1.2 of the IViR Study on the Recasting of Copyright and Related Rights for the Knowledge Economy, ETD/2005/IM/D1/95, Amsterdam, November 2006, available at: http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf.

⁹ Green Paper 1995, p. 10.

emphasised that the protection of copyright and related rights became one of the essential components in the legislative framework which underpins the competitiveness of the cultural industries, compared to its international trading partners. Only if these rights were properly protected would there be an incentive to invest in the development of creative and innovative activity, which was one of the keys to added value and competitiveness in European industry. It had also become clear that the industry would invest in creative activity only if it knew that it could prevent the results from being improperly appropriated, and could enjoy the fruits of its investment over the period of protection conferred by copyright and related rights.¹⁰

At the time the Green Paper was published, the issues which arose out of the development of an information society and its impact on systems of copyright and related rights were still uncertain. Much of the uncertainty derived from the ongoing, dynamic character of the process taking place. And while technical developments were clearly on the way, it was not always clear what their practical impact would eventually be. Nonetheless, it was without any doubt that the development of content-based information society services in the Community depended on the existence of a regulatory framework which facilitates the creation of packages of services aimed at niche markets.¹¹ However, given their cost, the services being carried must, in order to be profitable, aim at a wider market than any one domestic market. These packages of services would be profitable only if the supplier were to be able to distribute them in a global fashion so as to reduce costs. Therefore, only the prospect of distribution to, and exploitation of, all the potential markets in the Member States could provide the assurance of profitability and encourage the large and risky investment needed.

Among the different issues relating to copyright and related rights which should be given priority in order to ensure the proper functioning of the information society, the Commission identified in the second part of the Green Paper the need to adapt and harmonise the right of reproduction and of communication to the public. It also foresaw the possible creation of a right of digital dissemination or transmission right, as well as of a digital broadcasting right. The Green Paper further included two issues related to the exploitation of rights, namely the acquisition and management of rights and the need to protect technical systems of identification and protection. In the Green Paper, the European Commission stressed that in order to be profitable, a service must aim at a wider market than any one domestic market. In the Commission's opinion, "only the prospect of distribution to, and exploitation of, all the potential markets in the Member States can provide the assurance of profitability and encourage the large and risky investment needed. Service providers will be reluctant to invest in new services unless the legal systems governing them are simple and reliable".¹²

The consultation that followed the publication of the Green Paper confirmed that the then existing Community framework on copyright and related rights, although not explicitly conceived for the features of the information society, would be of crucial relevance for this new technological environment. The consultation also made it clear that the framework must be adapted to respond to the new challenges of digitization and multimedia. Action was considered necessary in two areas: first, through harmonized legal protection, by adapting copyright and related rights to the new risks and opportunities, in order to achieve a level playing field for copyright protection across national borders to allow the Internal Market to become a reality for new products and services containing intellectual property. Secondly, on the technological side, by developing adequate systems allowing for electronic rights management and protection. To achieve its goal, the Communication identified four issues that, in its opinion, required immediate legislative action, namely the harmonisation of the reproduction right, the right of

¹⁰ Id., p. 11.

¹¹ Id., p. 21.

¹² Id., p. 21, § 47.

communication to the public, the legal protection of the integrity of technical identification and protection schemes, and the distribution right, including the principle of exhaustion. In response to this consultation process, the European Commission published a Follow-Up to the Green Paper in which it set out the action plan with regard to the harmonisation of copyright laws in the European Union and their adaptation to the digital environment.¹³

A Proposal for a Directive on Copyright in the Information Society was presented by the Commission in December 1997.¹⁴ Between the publication of the Green Paper and the presentation of the Proposal for a Directive, the international copyright community had proceeded to the adoption under the auspices of the WIPO of two treaties dealing with copyright and related rights in the digital networked environment: the WIPO Copyright Treaty (WCT) and the WIPO Performers and Phonograms Treaty (WPPT). The Community had pushed these instruments, to ensure a significant update of the international protection for copyright and related rights, including measures relating to the “digital agenda”, and improvement of the means to fight piracy world-wide. As a result the Proposal for a Directive on Copyright and related rights in the information society no longer aimed solely at harmonising certain aspect of copyright and related rights law throughout the Internal Market, but also took on board the issues addressed in the WIPO Treaties with a view to implementing them at European level.

The Recitals of the Directive provide precious information regarding the main goals and objectives pursued by the European legislator with the adoption of this new instrument. Among them, the desire to harmonise the laws of the Member States on copyright and related rights in order to establish an Internal Market within which competition is not distorted appears at the top of the list. To this end, Recital 2 stresses the need “to create a general and flexible legal framework at Community level in order to foster the development of the information society in Europe. This required, inter alia, the existence of an internal market for new products and services. Important Community legislation to ensure such a regulatory framework was already in place or its adoption was well under way”. The legislator further emphasised that “copyright and related rights played an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content”. In addition, the European legislator believed that the proposed harmonisation would help to implement the four freedoms of the internal market which relate to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.

Harmonisation and legal certainty also appear as a constant leitmotiv throughout the Recitals. According to Recital 4, a “harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, would foster substantial investment in creativity and innovation, including network infrastructure”. This would “lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology, and more generally across a wide range of industrial and cultural sectors”. The Directive was therefore meant to safeguard employment and encourage new job creation. Recitals 6 further emphasises that “without harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property”. This,

¹³ Commission of the European Communities, Follow-Up to the Green Paper on Copyright and Related Rights in the Information Society, Brussels, November 20, 1996, COM (96) 586 final, [hereinafter the Follow-Up to the Green Paper].

¹⁴ European Commission, Proposal for a European Parliament And Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, Brussels, 10.12.1997 COM(97) 628 final, p. 3.

feared the lawmakers, would lead to a “re-fragmentation of the internal market and legislative inconsistency. The impact of such legislative differences and uncertainties would become more significant with the further development of the information society, which had already greatly increased trans-border exploitation of intellectual property. Significant legal differences and uncertainties in protection might hinder economies of scale for new products and services containing copyright and related rights”. In this vein, Recital 9 specified that “any harmonisation of copyright and related rights must therefore take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection would help to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large”.

The sustainable character of the legal framework, e.g. its capacity to adjust and evolve with time and technological developments, also played a role in the adoption of the Directive. This preoccupation is manifest in the text of Recital 5, which stresses that “while no new concepts for the protection of intellectual property were needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation”. To this end, the “Community legal framework for the protection of copyright and related rights must also be adapted and supplemented as far as is necessary for the smooth functioning of the internal market”. Finally, the need to preserve a balance of interests is reflected in the text of Recital 31 which specifies that “a fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded”.

It is in the light of these goals that this study assesses the impact of the Directive and its implementation on the information market within the EU.

1.2 Methodology

Since measuring the actual impact of the Directive and its implementation on the information market in the EU is practically impossible, the authors of this study have sought to develop a methodology that might help *predicting* the Directive’s impact on the behaviour of market players. This methodology has an empirical and an analytical component. For the empirical part Berlecon Research has conducted a qualitative survey among stakeholders by means of interviews and a workshop organised in Berlin on the subject.¹⁵ Focused interviews took place with a representative group of stakeholders among whom were representatives from relevant industries (film, music, online service providers, etc.) and relevant user groups (consumer representatives, libraries, consumers with special needs, universities, media, etc.).¹⁶ Industry representatives were asked about their business models, their experience with technological protection measures, their licensing practices, as well as the impact of the existing framework on incentives for innovation, and investment. User representatives were questioned regarding their satisfaction with existing limitations, technological protection measures, of other obstacles observed, as well as regarding the influence of new developments, such as digitization and new business models on the exercise of limitations.

For the analytical part of the methodology we have defined a benchmark test consisting of five criteria that might influence market behaviour by digital content providers and users. The five benchmark criteria directly relate to the quality of the legislative framework resulting from the Directive and correspond to the goals that the European legislator set himself to achieve: (1) consistency with international norms, (2) actual level of harmonisation, (3) legal certainty, (4)

¹⁵ The minutes of the Workshop are appended as Annex 1 to this report.

¹⁶ A list of interview partners is included in Annex 2 of this report.

sustainability and (5) balance.¹⁷ The choice of these benchmark criteria is based on the hypothesis that online business models will be able to develop and prosper in European markets only if:

(1) the rules applicable to information service providers within the EU are roughly the same as those applying to their main competitors elsewhere in the global digital environment;

(2) the rules have created a level playing field within the EU, and are applied in a consistent manner across the EU;

(3) the rules are defined precisely enough to offer market players a sufficient degree of legal certainty;

(4) the legal framework is sustainable, i.e. sufficiently flexible and capable of adapting to changes in technology and future market conditions; and

(5) the rules reflect a fair balance between the competing interests of right holders and users of content.

Together with the empirical input, the five benchmark criteria will serve as guiding principles throughout this part of the study.

1.3 Structure of the report

This Part of the study comprises five chapters, apart from its introduction. Chapter two examines the effect of the Directive on the provision of services from the perspective of the rights and limitations on copyright. This chapter first situates the Information Society Directive in its international and European legislative context, i.e. by reviewing the key policy goals pursued by European legislator with the adoption of the Directive, in line with its international obligations. Among the key goals pursued was to foster the deployment of new online services. This portrait serves as a basis for the analysis, along the lines of the benchmark criteria described above, of the impact of rights and limitations on copyright on the development of online business models. Do new rights act as a stimulus for investment in new business models? How does the exception on transient and incidental copies in article 5(1) of the Directive affect the business models of Internet service providers? Do limitations constitute a stimulus or an impediment to the development of new business models? Did the implementation of the limitations of the Information Society Directive increase legal certainty across the European Union? This chapter concludes by setting out a number of options and recommendations aimed at preserving a fair balance between rights and limitations, as well as maintaining a flexible framework capable of adapting to a rapidly changing technological environment.

Chapter three deals with the provisions on the protection of technological protection measures (TPMs) that were newly introduced in national legislation as a result of the implementation of the Directive. As the opening section of this chapter shows, the primary goal of the introduction of specific provisions for the protection of technological measures was to implement at the European level the provisions on this subject in the WIPO Copyright Treaty (WCT) and the WIPO Performers and Phonograms Treaty (WPPT). In this context, it is important to recall what were the intentions of the WIPO Contracting Parties in this respect, as well as the extent of the obligations under the WIPO Treaties in relation to the protection of technological measures. This section also briefly examines whether there exist potential compatibility problems between the rules of the Information Society Directive pertaining to TPMs and those of the Conditional Access Directive.¹⁸ The next section of this chapter gives an account of the main forms of TPMs that are actually applied by online service providers to

¹⁷ See: *Gowers Review of Intellectual Property*, London, HM Treasury, December 2006, para. 4.48.

¹⁸ Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, L. 320/54, 28.11.1998.

control the access to and use of copyright protected material. Against this background, the next section analyses the impact of the provisions of the Information Society Directive relating to the protection of TPMs on the deployment of online business models along the benchmark criteria of consistency with the international framework, actual harmonisation, legal certainty, sustainability, and balance, as evidenced by the results of interviews with stakeholders as well as a review of the relevant case law and scholarly commentaries. The following section examines the solutions adopted in this respect in countries outside Europe, including the United States of America, Australia, and Japan, as well as the proposals pending in Switzerland and Canada. This chapter concludes by setting out a number of options and recommendations aimed at establishing a coherent system for the protection of TPMs.

Chapter four is devoted to one of the thorniest issues of the entire Information Society Directive, namely the relationship between the application of TPMs and the exercise of limitations on copyright. At the outset, a section summarises the main policy goals of the provision. The following section sheds a critical light on the provisions of the Directive itself, discussing the main problematic areas. Another section examines the solutions adopted in this respect in countries outside Europe, such as the United States of America, Japan, Australia, and Norway, as well as the proposals pending in Switzerland and Canada. A subsequent section considers, following a number of models already in place, whether the creation of a governmental body entrusted with the task of monitoring the development and acceptance of TPM's in the society could contribute in alleviating some of the problems mentioned above. Should each Member State have its own body or is this best dealt with at the European level? What could be its tasks and its power of intervention? The chapter will conclude by setting out a number of options and recommendations aimed at preserving a fair balance of interests for service providers and users in a secure online environment.

The use of contractual agreements for the online distribution of copyright protected material constitutes one element of the use of digital rights management systems (DRMs) that the Directive attempts to promote. Section 5.1 provides an overview of the legal framework established by the Information Society Directive with respect to the conclusion of contracts. Sections 5.2 and 5.3 respectively give a portrait of the main contractual practices developed in Europe for the supply of online services, including an account of the main contractual provisions contained in such contracts, and of the emerging licensing practices put forward by the Open Source Software and the Creative Commons movements that purport to offer an alternative to restrictive contractual agreements. Section 5.4 concludes by setting out a number of options and recommendations aimed at preserving a fair balance of interests for service providers and users in their online contractual relations.

Finally, chapter six provides a summary of all options and recommendations formulated throughout the study on the need to adapt the legislation in order to foster investment in creativity and innovation.

1.4 Overview of online business models

With the digitisation of content and the tools for its production, the distribution of entertainment and information is increasingly shifting from the physical to the digital environment. In recent years, a plethora of Internet based business models has developed on the European market, and new models emerge every day. Each is characterised by a combination of various elements, notably as to the type of transport technology (downloading or streaming), the type of IP-network used for distribution (proprietary or open), the type of DRM used, the type of pricing structure and level of interactivity.

The following section describes major lines of development for online business models. In so doing, it will highlight some factors that characterise this development and that are important

for the subsequent discussion of the impact of the Information Society Directive on online business models. These factors are the move from tangible to intangible distribution, convergence, individualisation and interactivity and, last but not least, the use of content control technologies governing the way consumers can access and use digital content.

1.4.1 From tangible towards intangible distribution

The proliferation of online business models goes along with a shift from tangible towards intangible distribution methods. While e-commerce transactions also facilitate the sale of traditional tangible media, such as books, CDs, DVDs, etc., the more remarkable development is without doubt the advance of various strategies to market all kinds of content - audio, video, written text, games - in electronic, intangible form. Factors that support this trend are the influence of the Internet on transaction costs, costs of transport and marketing, the progressive roll-out of high-bandwidth transmission networks, the advances in content control technologies and the development of different methods of financing and charging for intangible content. Subscription models have been created allowing customers to pay a monthly or yearly fee to access a predefined or unlimited amount of content, depending on the contractual terms. Content can be delivered as pay-per-download, pay-per-bundle, or pay-per-use. Finally, a vast pool of content is advertised-based, promotional, paid for by royalties or is simply created by amateurs with no commercial objectives. Often, users only acquire a limited set of rights to use a certain piece of content that are specified in their contract with the service provider. For example, consumers can be entitled to access purchased content on a specified number of devices they possess or to burn files to CDs or DVDs; while they may be not entitled to e.g. forward a copy to a friend who has not paid for the rights to use the particular piece of content.

When describing the development of business models in the online sector, a rough distinction can be made between traditional business models that have been transferred into the online domain, new business models that are specifically tailored to the needs and opportunities of the online sector, and a mix of both.

1.4.1.1 Traditional business models go online

One example of a traditional business model that went online is IP-based broadcasting. Traditionally, broadcasts were distributed via terrestrial, cable or satellite networks. In case of IP-based broadcasting, broadcasts are sent over the Internet (webcasting) or over proprietary networks (IPTV).

In the case of webcasting, digital content is streamed over the Internet. Webcasting can be accessed over a conventional web browser or client software such as RealPlayer, Windows Media Player or Apple's iTunes. Almost every radio station offers an online stream of its broadcasts ("simulcasting"), but there are also web-only radio stations. Webcasts are in most cases distributed free-of-charge (advertisement-based, promotional or amateur content). Many traditional broadcasters offer their content as webcasts directly from their websites. Note that in case of webcasting, content is not any longer offered by "traditional" broadcasters only but also by entrants from other sectors, such as directories and portals that act as content aggregators (e.g. online services like Yahoo or Google), telecommunications operators, physical retailers or Internet Service Providers.

IP-based TV (IPTV) offerings not only include TV broadcasts, but also movies or radio. As opposed to webcasting, IPTV is offered within proprietary networks. Consumers need the hardware and software components provided by the distributor to access IPTV services on their TV screens or similar devices. IPTV has for some time been in a developmental stage. But it is now offered commercially by almost all European telecommunication providers (e.g. France Télécom, Telefónica or Telekom Austria) or major Internet Service Providers (ISPs) (Alice, Tele2, Club Internet). IPTV is offered for monthly or yearly access fees. This can also be part of

bundled triple play¹⁹ offerings or as an accompanying service for certain consumer electronics devices such as digital video recorders with broadband access.²⁰ Pay-per-view is mostly reserved to on-demand content, such as major sports events or movies.

Another example of a traditional service that went online is IP-based publishing. Digital production and distribution also lead to significant shifts in the text publishing industry. Traditional publishers ventured early into digital distribution to make their works and catalogues available online. For example, publisher Reed Elsevier's ScienceDirect online distribution service was established online in 1997. Meanwhile, most newspapers and a (more limited) number of book publishers offer their content online. This increases potential readership and at the same time lowers the cost of production and distribution. As in the offline world, subscription-based delivery is the most widespread business model for periodicals. Other contents are offered free-of-charge, and are advertisement based or promotional. Some newspapers are only accessible for users that pay a monthly or yearly fee. Most newspapers ask for a per-download payment for older articles that are stored in the archives (the period of time after which content is transferred to the archives ranges from several days to several weeks).

1.4.1.2 *New online business models*

The IP-publishing sector is also an example of how new business models have developed for the online sector, often starting off from traditional offers. For example, digitisation gave rise to new forms of publishing: In case of scientific periodicals, open access online journals are increasingly gaining importance²¹. Institutions or individual scientists pay a one-time fee to have their papers or journal articles made publicly available. Examples of this type of business model are the online journals published by the Open Library of Science²² or BioMed Central²³. But compared to traditional sources, open access is still of marginal importance. Scientific journals also have developed a wider variety of business models, which include: Pay-per-source (e.g. a specific title), pay-per-hour/day, flat access fees (e.g. monthly, yearly), pay-per-download. Digital delivery services are another example. For instance, the British Library offers digital delivery services: Documents or eBooks are electronically sent to their customers with clearly defined usage rights and limitations. For instance, files may be viewed on the screen and printed, but not sent to any third party via email. This is possible by applying DRM systems that actively control usage (cf. section 1.4.5 on electronic content control).

Another example of new online business models is blogging. Blogs are websites that are updated on a regular basis. New content appears in a reverse-chronological order (i.e. the latest entries appear at the top of the page). Blogs are usually centred on a specific topic or on the author. Although blogs are mostly text-based, they can include images or embedded multimedia content (e.g. short video or audio clips that may be hosted on external websites such as YouTube). Where video content takes a central position within a particular blog, such blog is usually called a video blog (or "vlog"). Rather than publishing much text, the author merely uses the blog as a distribution channel²⁴. Although their potential for commercialisation is only beginning to be realised, blogs are increasingly perceived as alternatives or complements to more traditional media like newspapers or TV. While most existing weblogs are currently offered free-

¹⁹ Triple play is the bundled offering of Internet access, telephony and digital entertainment content over a single IP-based network.

²⁰ KiSS Networked Entertainment Press Release, '*KiSS technology and TV2 Sputnik provide enhanced entertainment freedom for consumers*' <<http://www.kiss-technology.com/?p=news97&v=user>>

²¹ The Economist, '*Creative destruction in the library*' (29 June 2006).

²² <http://www.plos.org>

²³ <http://www.biomedcentral.com>

²⁴ Robert Mackay, '*TV stardom at \$20 a day*', The New York Times (11 December 2005).

of-charge, the first business models for blogs as micropublishing outlets are already emerging, including advertisement-based financing, corporate sponsorship for a certain blog or a section of it, and premium segments and content (e.g. an in-depth newsletter) on a subscription basis.²⁵

A third, important example of new business models in the online sector are on-demand downloading and on-demand streaming services. On-demand downloading is viable for almost any sort of content: audio (music, podcasts)²⁶, video (movies, TV shows, video podcasts, music videos), games or text-based content (cf. also IP-based publishing above). Content is delivered from the providers' servers to the customers' digital devices, e.g. a computer or digital video recorder (DVR). An identical copy of the file is created, which can be stored and accessed according to the consumers' preferences and needs. One example is Bertelsmann's In2Movies download service²⁷. By contrast, content available for streaming is stored on the distributors' servers and can be delivered to users individually as they access it. No permanent copy remains on the consumers' hardware. The streaming process only leaves an ephemeral copy of the file on the users' devices. When the application or device used to access the stream is turned off, the ephemeral copy is deleted. In order to watch or listen to the content another time, it must be streamed again. As is the case with on-demand downloading, users can freely choose the date and time of consumption. For example, record company Sony BMG offers music videos and behind-the-scenes footage from their Musicbox Video website²⁸. On-demand content can be delivered as pay-per-download or pay-per-bundle²⁹ but also in the form of e.g. free, advertisement financed services³⁰ or subscription models. Downloads can either be permanent or rentals. For instance, Lovefilm offers movies that can be watched within a 5 to 7-day timeframe after the download is completed³¹. Virgin Games set up a similar service for PC games³². Paying for a single download is currently the most widespread business model across all types of content.

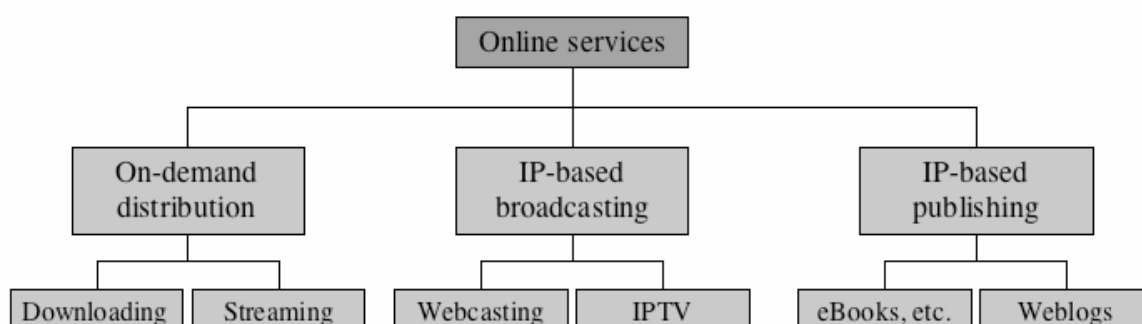


Figure 1 Overview of most important online business models

²⁵ Steve Bryant, 'Blogging for fun...then profit', Online Journalism Review <<http://www.ojr.org/ojr/stories/060627bryant>> (6 July 2006).

²⁶ The term "podcast" refers to a special type of content and its distribution.

²⁷ <http://www.in2movies.de>

²⁸ <http://www.sonybmg.com/musicbox/video>

²⁹ Customers are offered, for instance, a fixed number of TV episodes for one price <http://www.tuaw.com/2006/03/08/colbert-report-daily-show-in-itunes>

³⁰ <http://www.tuaw.com/2006/03/08/colbert-report-daily-show-in-itunes>

³¹ <http://www.lovefilm.com/static.php?tpl=download-faq#1c>

³² Paul Loughrey, 'Virgin Games unveils PC distribution service', gamesindustry.biz (23 June 2006).

1.4.2 Convergence

A feature common to all online business models is the influence of convergence on the design and distribution of services. Convergence can be understood as the amalgamation of previously distinct media, which results from the ability of different network platforms to carry essentially similar kinds of services, as well as the combination of consumer devices, such as telephone, TV set, and computer.³³ Convergence is an important objective behind the European Commission's policy for the content sector. This is to promote the so-called multi-platform approach, meaning that consumers can access broadcasting, information society services and telecommunications services from multiple platforms.³⁴

One important consequence of convergence is that the distinction between different media is less clear-cut as it is in an analogue setting. For example, while broadcasting was traditionally delivered via cable, terrestrial, and satellite networks, the means of transmission was an element of the definition of broadcasting itself. For example, the Cable and Satellite Directive still distinguishes between satellite broadcasting and cable retransmission. By contrast, telecommunications networks were reserved to telecommunications services. Because of convergence, broadcasting services are now also delivered via communications networks, such as the Internet, which is now the primary distribution channel for webcasts. Efforts are also being deployed, e.g. by mobile network operators, to establish the use of wireless IP-based networks, such as UMTS,³⁵ for digital broadcasting. One technology in this regard is Digital Broadcasting Video-Handheld (DBV-H). Webcasting and the transmission of broadcasting via mobile networks do not fit the traditional notions of broadcasting, thereby raising difficult questions as to the definition of what broadcasting is and who, consequently, benefits from the protection of the IP rules relating to broadcasting.³⁶ The distinction is even more complex due to the fact that broadcasting services are nowadays not necessarily offered by traditional broadcasters, but also by e.g. online content aggregators (such as Yahoo! or Apple iTunes), mobile operators (O2, Orange, T-Mobile), physical retailers' web portals (e.g. Fnac, Virgin Digital, Saturn), or Internet Service Providers (Fastweb, Wanadoo).

1.4.3 Individualisation and interactivity

A trend towards individualisation and interactivity is another characteristic of many online business models. Individualisation and interactivity are supported by the increase in bandwidth and new means to control who may receive what content under which conditions. For example,

³³ See European Commission, Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors and the Implications for Regulation. Towards an Information Society Approach, Brussels, 3 December 1997, COM(1997)623 final [hereinafter 'Green Paper on Convergence'], p. 7.

³⁴ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on barriers to widespread access to new services and applications of the information society through open platforms in digital television and third generation mobile communications, Brussels, 9 July 2003, COM(2003) 410 final [hereinafter 'Communication on Barriers to Widespread Access'], p. 7. European Commission, eEurope 2005: An information society for all, An Action Plan to be presented in view of the Sevilla European Council, 21 and 22 June 2002, Brussels, 28 May 2002, COM(2002)263 final [hereinafter 'Action plan eEurope 2005'], p. 7.

³⁵ Universal Mobile Transmission System.

³⁶ L. Guibault, R. Melzer, 'The Legal Protection of Broadcast Signals', *IRIS plus* 2004/10, p. 5-7. N. Helberger, *Neighbouring rights protection of broadcasting organisation: Current problems and possible lines of action*, Council of Europe, Strasbourg, 15 November 1999, Doc. No. MM-S-PR(1999)009 def., p. 3. Text available at: [http://www.coe.int/t/e/human_rights/media/5_Documentary_Resources/2_Thematic_documentation/Copyright_&_neighbouring_rights/MM-S-PR\(1999\)009%20def%20E%20Hellberger](http://www.coe.int/t/e/human_rights/media/5_Documentary_Resources/2_Thematic_documentation/Copyright_&_neighbouring_rights/MM-S-PR(1999)009%20def%20E%20Hellberger). S. Ory, "Rechtliche Überlegungen aus Anlass des "Handy-TV" nach dem DMB Standard", *ZUM* 2007/1, p. 7-13, 7. For the technical perspective: K. Flatau, "Neue Verbreitungsformen fürs Fernsehen und ihre rechtliche Einordnung: IPTV aus technischer Sicht", *ZUM* 2007/1, p. 1-7.

in case of “on-demand” offerings, consumers can decide when to watch a specific movie or other type of content. There are no limitations whatsoever regarding time or date. In case of “near-on-demand”, content is offered at time intervals, e.g. hourly or every ten minutes. This limits customers’ freedom of choice to a degree. Search functions are another feature of personalisation and interactivity. The Italian ISP Tiscali, for example, offered a service called “Jukebox”, where users could search for streams by individual artists.

Individualisation and interactivity, too, raise important questions regarding the categorisation of new business models as “broadcasting”, “communication to the public” or “making available”. The categorisation of interactive, personalised services has consequences for the scope and conditions of IP protection as well as rights clearance. This was demonstrated by the example of Tiscali’s Jukebox service. Tiscali originally negotiated with collecting societies for its streaming service the rights for communicating music to the public. However, upon adding of a search function, Tiscali received requests from the European recording industry to acquire the rights for making available from each individual recording companies.³⁷ As a result, Tiscali discontinued the service.³⁸

The degree of individualisation and interactivity is also at the heart of the distinction between “push” and “pull” services, and between “one-to-one” and “one-to-many” services, which are two of the most commonly used criteria to distinguish broadcasting from non-broadcasting services. It should be noted that given the wide array of new online business models, the many variations in levels of interactivity and in the technologies used for transport, it is increasingly difficult to categorize them neatly into the “one-to-one” or “one-to-many” concepts. The same goes for the more recent distinction between “pull” and “push”, which aims to provide a criterion to distinguish user-initiated distribution from provider-initiated distribution. In the context of broadcast regulation,³⁹ the new terminology used is “linear” versus “non-linear” services, combining the “push” and “pull” distinction with scheduled content to differentiate traditional broadcasting from competing new forms of distribution.

1.4.4 User involvement in the production and distribution of content

Interactivity and personalisation are strategies to involve users more closely in the way services are marketed. Another trend that can be observed is the growing involvement of consumers, respectively resources on the side of consumer, into the process of producing and distributing content. Example of business models that build on user-generated content are commercial distribution platforms for amateur or semi-professional content. Examples are Bildunion⁴⁰ or iStockphoto⁴¹, where users can upload their pictures and offer them for a fee or free-of-charge.

³⁷ Cf. Mario Mariani, ‘Open letter to the European recording industry’
<http://uk.tiscali.mercora.com/tiscali_letter_uk.htm> (6 July 2006).

³⁸ http://www.tiscali.co.uk/music/news/060606_tiscali_jukebox_switch_off_q_and_a.html

³⁹ On 13 November 2006, the European Council agreed on a general approach on a draft directive amending the Television without Frontiers Directive (Council Directive 89/552/EEC (OJ 1989 L 298/23), which was largely confirmed during a first reading in the European Parliament on 13 December 2006. See Press release 14965/06 (Presse 309) on the 2762nd Council Meeting Education, Youth and Culture of 13 November 2006; Draft Proposal COM(2005)646 final and European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, 13 December 2006, A6-0399/2006. Under the unofficial Consolidated Draft Proposal, ‘non-linear service’ means “an audiovisual media service where the user decides upon the moment in time when a specific programme is transmitted on the basis of a choice of content selected by the media service provider” (Article 1 e) of the draft proposal).

⁴⁰ <http://www.bildunion.de>

⁴¹ <http://www.istockphoto.com>

On websites like OhmyNews⁴², amateur reporters submit their own news stories that are edited by professionals before publication. There also already exist a small number of blog publishing companies such as Gawker Media⁴³ or Spreeblick Verlag⁴⁴. They combine a number of blogs and pay the authors who write for them, or at least provide them with a platform to raise their profile.⁴⁵

The use of consumer resources for the distribution of content is the idea behind business models that use peer-to-peer (P2P) technology to distribute their (legal) contents. P2P technology has been subject to a controversial discussion about its role in online piracy. The technology, however, can also be used as an alternative method to offer download services via multiple clients that participate in P2P networks. In the case of P2P, no centralised distribution infrastructure is required. Rather, the network's participants provide the necessary resources. In both cases, an identical copy of the file is created, which can be stored and accessed according to the consumers' preferences and needs. One example is Bertelsmann's In2Movies download service⁴⁶. For music distribution, services like iTunes or Napster are fairly well established examples. Online social sharing platforms such as YouTube⁴⁷ or Dailymotion⁴⁸ are gaining considerable popularity with younger viewers. These online platforms can be used to upload video content, which can then be viewed by anyone visiting the site. Users that are registered with the platform can also rate, comment and share the videos within the community.

1.4.5 *Electronic content control*

A growing portion of online business models use some form of electronic content control to secure electronic content from unauthorised access and to control the conditions and modalities under which content is being offered to consumers. Content control technology is used to enforce the license agreements between customers service providers, by enabling the latter to keep track of individual downloads, of the time listened to music or the times a video is watched, etc.

Content control technology comes in many different forms. The Information Society Directive itself refers to so-called Technical Protection Measures (TPMs). The notion of technical protection measures (TPM) is often used indiscriminately as an umbrella term for the following concepts and technologies:

- Mechanisms that control access to platforms where content can be obtained (i.e. personal identification, geolocation).
- Passive systems that are used to embed individual information about the work and the rights owner to make it identifiable in case of infringing uses (i.e. watermarking, fingerprinting).
- Active technical protection systems that are directly attached to a particular file and that exercise direct control over its usage (copying, distribution, etc.), e.g. anti-copying protection and Digital Rights Management (DRM).

1.4.5.1 *Digital Rights Management*

Note that the protection of protected subject matter against unauthorised use is an important

⁴² <http://english.ohmynews.com>

⁴³ <http://www.gawker.com/about>

⁴⁴ <http://www.spreeblick.com/impressum>

⁴⁵ David Carr, 'Gawker founder reorganising blog empire', The New York Times (5 July 2006)

⁴⁶ <http://www.in2movies.de>

⁴⁷ <http://youtube.com>

⁴⁸ <http://www.dailymotion.com>

element of digital rights management, but the function of DRM goes beyond this purpose. DRM systems are typically able to offer broader functionality than simply protect content against unauthorized access or copying. As the words ‘digital rights management’ suggest, DRM systems are based on technologies that describe and *identify* content, and *enforce* rules set by rights holders or prescribed by law for the distribution and use of content.⁴⁹ The fundamental difference between DRM and TPMs is that TPMs generally are designed to impede access or copying. DRM systems do not impede access or copying per se, but rather create an environment in which various types of use, including copying, are only practically possible in compliance with the contractual terms set by the rights holders. DRM is used to manage access to content by combining TPMs with elements such as payment mechanisms, customer management and authorisation schemes. DRM-based business models ensure that consumers pay for actual use of content, and that the content is protected and can be used and accessed only by authorized users.⁵⁰ DRM systems are widely deployed for all kinds of content distribution services such as Apple iTunes, Microsoft's Zune, eBooks, etc.

1.4.5.2 Access control

In case of access control, users that sign up with a content delivery platform are assigned a personal login identification and are required to define a password. This information needs to be entered prior to the purchase to validate the identity and to ensure that only legitimate customers have access to the content. An accompanying measure is the “authentication” of peripheral devices (e.g. portable media players) with a customer’s computer that is used to purchase and download content. This process is meant to ensure that purchased files can only be transferred to the legitimate user’s media players. Most portals for on-demand downloading, and many streaming and IPTV services are secured via access control mechanisms where users have to sign up and log in before starting to download.

Another technique enforces regional access limitations and is used by broadcasters that distribute content over the Internet. For instance, major sports events may only be licensed for online distribution within a specific region or country. One example is the BBC’s streaming offering of the 2006 football World Cup, which could only be accessed by UK-residents.⁵¹ The geographic point of access is determined using the Internet Protocol (IP) address. IP addresses are assigned to each node of the Internet infrastructure, including users’ computers and Internet Service Providers (ISP). Similar technology is used by download services like iTunes, where different terms and prices apply for different national markets. Based on the IP address, users are directed to the relevant portal or are denied access in case the service is not available in the particular geographic area.

1.4.5.3 Watermarking and fingerprinting

Passive systems do not have the capacity to control what users can or cannot do with content. Rather, they are identification tags that are embedded in legitimately obtained digital files. The two most important techniques in this regard are watermarking and fingerprinting, which are

⁴⁹ In the context of ‘digital rights management’, the term ‘digital’ can refer to various aspects: (1) automated management (by digital means) of (2) rights which are specified by digital means with regard to the use of (3) digitally stored content. These aspects are typically – but not necessarily – all present in a single technical measure for a given platform. However, for the purposes of this study it is not necessary to strictly limit the scope of the DRM concept.

⁵⁰ J.P. Cunard, K. Hill, and C. Barlas, *Current Developments In The Field Of Digital Rights Management*, WIPO, Geneva, 2004, SCCR/10/2 Rev., p. 11-12; P.B. Hugenholtz, L. Guibault and S. Van Geffen, *The Future of Levies in the Digital Environment*, report prepared for the Business Software Alliance, March 2003, p. 3.

⁵¹ BBC Press Release (2006): BBC to broadcast its 2006 FIFA World Cup games live on broadband in the UK. January 6, 2006.

used by the German music download shop Finetunes⁵², for instance. These marks contain information about the purchases (e.g. the credit card number or point of sale), copyright notices and information about the rights owner. In case of infringing use, the file can be tracked back to the originator (for instance, when the file is found to be distributed for free over P2P networks). MySpace.com recently announced that it will use "audio fingerprinting" technology to block users from uploading copyright music to the social networking site. The company said users who repeatedly attempt to upload copyright music files will be permanently barred from the site.⁵³

1.4.5.4 *Electronic content control as enabler of new business models?*

Content control technologies, be it TPMs, DRM, watermarking or similar techniques, can enable business models on two levels. The first level is universal for all business models: the majority of rights holders demand that their files be protected from infringing use before they make content available for online distribution. For instance, major record labels do not license their catalogues online without securing the content from infringing uses by means of TPMs. In other words: if there is no TPM in place, there is no content and hence no business model. On the second level, it is often brought forward that TPMs, and here in particular such that are imbedded in a DRM-context, are an enabler of innovative business models. However, in order to evaluate this potential, one must differentiate between the various forms of distribution. For instance, while on-demand downloads can certainly be protected by DRM, DRM does not *per se* enable them. There are download services that do not use any DRM, such as eMusic⁵⁴ (United States, UK), Beatport⁵⁵ (Germany), or Starzik⁵⁶ (France). Important reasons (not) to use electronic content control are consumer acceptability and the costs of implementing content control. The ability of DRM technologies to overrule existing exceptions and limitations in copyright law has triggered concerns about the acceptability and consumer friendliness of DRM among consumers and consumer representatives. The more DRM solutions move from copyright protection in the narrow sense to the management of digital contents in the broader sense, the more additional, non-copyright-law-related concerns of consumers are expressed.⁵⁷ Examples are privacy concerns, concerns regarding user-friendliness, interoperability, sustainability, and security issues. Apart from a potentially deterrent effect on potential customers, the implementation of electronic content control also burdens service providers with additional costs that need to be considered in their decision whether to use DRM.

Having said this, some online business models would not be possible without DRM, such as subscription services, rentals and P2P distribution of digital files. In case of subscription services, the technology is used to render files inaccessible after the expiration of the subscription term, e.g. by the end of the month. While files remain on the customer's hard disk or portable device, they can only be played after prolonging the subscription licence. After the customer has paid the subscription fee, the DRM system is set to make the files playable again. DRM also enables rental models, where users can download a movie, for example, and then watch it within a certain time window, e.g. 24 hours. The time period within which content is made accessible for customers is

⁵² <http://www.finetunes.de>

⁵³ Associated Press, "MySpace to block copyright music", *SiliconValley.com* 30 October 2006, available at: <http://www.siliconvalley.com/mld/siliconvalley/news/editorial/15887385.htm>

⁵⁴ <http://www.emusic.com>

⁵⁵ <https://www.beatport.com>

⁵⁶ <http://www.starzik.com>

⁵⁷ For a more extensive overview, see N. Helberger et al., 'Digital Rights Management and Consumer Acceptability, A multi-disciplinary discussion of consumer concerns and expectations', INDICARE State of the Art Report, December 2004, online available at <www.indicare.org> (Helberger et al.2004), p. 20 subsq. with further references.

a main differentiator between the rental and subscription business models. Subscription contracts usually provide for access based on monthly or yearly periods. Rented content is available only during a pre-determined number of hours or days after the customer has obtained the file. Also, rentals are charged on the basis of single pieces of higher value content (e.g. movies), whereas subscriptions allow for downloading an unlimited volume of content. The single piece of content usually is of lower value (e.g. songs).

2 Rights and Limitations

After an initial period of hesitation at the end of the 1990s, content creators, Internet service providers, and a wide range of different stakeholders are developing new business models for the distribution of creative content. To ensure the continued successful deployment of online business models, the legal framework pertaining to the right and limitations on copyright and related rights at the basis of the products and services of the information society should ideally meet five benchmark criteria. First, since online services are by their very nature a cross border endeavour, the rules on copyright and neighbouring rights should be consistent with international norms and second, they should lead to an acceptable degree of harmonisation across the European Union: the consistency of norms at the international and regional levels ensures a level playing field for all economic players. Third, the rules should be clear enough to guarantee a sufficient degree of legal certainty for investments to take place. Also, in view of the constant evolution of the online environment, the legal framework should be capable of adapting to changes in the technology and the market situation and of contributing to the establishment of a balance of interests between rights owners and users.

Realising that the existing *acquis communautaire* on copyright and related rights⁵⁸ needed to be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation in the digital environment, the European legislator adopted the Directive on the Harmonisation of Copyright and Related Rights in the Information Society.⁵⁹ With the adoption of the Directive, the European legislator wished to harmonise certain aspect of copyright and related rights law throughout the Internal Market, and to bring the laws on copyright and related rights in the European Union in line with the WIPO Copyright Treaty (WCT) and the WIPO Phonograms and Performances (WPPT) of 1996, otherwise known as the WIPO Internet Treaties. But the main goal was to provide the necessary underpinning to allow the music, literary, art and film markets to flourish, in the digital era, while striking a balance in its approach between the rights and limitations.

Among the provisions of the two Treaties that find a direct application in the digital environment and that the European Community must implement was a new right of making available to the public. And although the Treaties made no real mention of it for lack of consensus among the Contracting Parties, the European legislator considered it necessary to harmonise the laws of the Member States regarding the scope of the right of reproduction, as well as the limitations on copyright and related rights.⁶⁰ The harmonisation of limitations at the

⁵⁸ At the time of introduction of the Proposal for a Directive, the *acquis communautaire* was composed of the following directives: Computer Programs Directive (Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ No. L 122/42, 17 May 1991), Rental and Lending Right Directive (Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ No. L 346/61, 27 November 1992); Satellite and Cable Directive (Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ No. L 248/15, 6 October 1993); Term Directive (Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, OJ No. L 290/9, 24 November 1993; and Database Directive (Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ No. L 77/20, 27 March 1996).

⁵⁹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ No 2001/L 167/010 [hereinafter referred to as the 'Information Society Directive'].

⁶⁰ The Information Society Directive does not harmonise the right of adaptation [see IViR Study on the Recasting of Copyright and Related Rights for the Knowledge Economy, p. 54]. The recommendation made

European level proved to be a highly controversial issue, which explains in large part the delay experienced not only in the adoption of the Directive itself, but also in its implementation by the Member States.

This Chapter examines how the European framework of rights and limitations affects the deployment of online business models, measured against the benchmarks formulated above. In order to answer these questions, section 2.1 first briefly reviews the main policy goals sought by the European legislator with the adoption of the Directive. Among the key objectives pursued was to foster the deployment of new online services. In the light of this overview, section 2.2 assesses the impact on online business models of the rights of reproduction and making available, including an evaluation of the impact on the operations of online intermediaries of article 5(1) of the Directive on transient and incidental acts of reproduction. Our analysis will demonstrate that the main area of uncertainty regarding the exclusive rights concerns the indeterminate boundaries in the digital environment between the right of reproduction and the right of making available to the public. This inevitably leads to an overlap between the two rights, which is bound to create practical legal problems. A large part of our analysis in this chapter is devoted to discussion of article 5(1) of the Directive, for two reasons. In the first place, because this provision constitutes a legal innovation which is first and foremost designed to find application in the digital environment. Second, because the rule laid down in article 5(1) can fulfil a key function to delineate the respective scope of the right of reproduction and the right of making available to the public.

Next, section 2.3 evaluates the impact of limitations on copyright on the deployment of online business models. By defining the boundaries of the rights owner's exclusive rights, limitations are capable of influencing the development of business models in two ways: by allowing rights owners to invest within the bounds of their exclusive rights, and users to invest within the confines of the limitations, subject of course to the application of the three-step-test. Our analysis will reveal that the provisions of the Information Society Directive on limitations do not contribute to the establishment of a clear framework for either rights owners or users. First, Member States did not implement all optional limitations. Second, among the limitations that were implemented everywhere, significant differences exist in the scope and content of these limitations. This inevitably gives rise to a mosaic of different rules applicable to a single situation across the European Community, which forms the main source of legal uncertainty. As a result, the lack of harmonisation may constitute a serious impediment to the establishment of cross-border online services and fails to offer a consistent approach with respect to the recognition of user interests. Our overall assessment of the impact of rights and limitations relies heavily on the country reports in Part II of this study, the legal commentaries, the relevant jurisprudence and the outcome of the interviews that Berlecon Research conducted with stakeholders. The five benchmark criteria described in the Introduction, namely (1) consistency with international norms, (2) actual level of harmonisation, (3) legal certainty, (4) sustainability and (5) balance, will serve as guiding principles throughout the chapter. Section 2.4 concludes the chapter with a summary of the main findings, as well as a number of recommendations.

2.1 Goals of the Directive

The harmonisation of exclusive rights in the digital networked environment was high on the agenda of the European legislator. Until the adoption of the Information Society Directive, only piecemeal harmonisation of the exclusive rights of copyright and related rights owners had taken

by the Gowers Review to amend the Directive in order 'to allow for an exception for creative, transformative or derivative works' is therefore based on a misconception of the provisions of the Directive. Consequently, this recommendation cannot be carried out on the basis of the Directive.

place.⁶¹ True harmonisation of the exclusive rights must still be achieved on a more horizontal basis. The Green Paper of 1995 therefore devoted much attention to the need to harmonise the existing rights of reproduction and communication to the public, and it examined the possibility to introduce a right of “digital dissemination or transmission right”, as well as a “digital broadcasting right”. The Commission was then of the opinion that considering the fundamental importance of the reproduction right its definition in a digital environment required a Community response. In view of the technological development of the time, the Green Paper mentioned for example that the “digitization of works or other protected matter should generally fall under the reproduction right, as should such things as loading on to the central memory of a computer.”⁶² The Commission believed that without a harmonised response to these questions, difficulties with the Internal Market would emerge if disparities in the definition of the reproduction right remained. In the same vein, the Commission raised the issue of the scope of the reproduction right and of the many applicable limitations, more in particular the private copy exception.⁶³ The Commission made similar observations with respect to the definition and scope of the right of communication to the public and the distinction between an act accomplished in the private or the public sphere. The main preoccupation of the lawmakers concerned the fact that particular activities were lawful in certain Member States and not in others might cause difficulties for the functioning of the Internal Market.

As mentioned earlier, the Green Paper considered the possible introduction of a right of “digital dissemination or transmission”. The Commission noted that, in the information society, the possibility to send protected works and other subject matter back and forth over a network would increase. Since this activity was not yet expressly covered by the existing legal framework, legislation was deemed necessary, for reasons of clarity and legal certainty, to confirm that these activities were the object of protection. In this context, the Green Paper discussed whether a new right of “digital dissemination or transmission” should include not only point-to-point transmissions but also point-to-multipoint, e.g. broadcasting. The Commission expressed the preference for a separate right covering digital transmissions, which would include transmissions from a personal computer to one or more personal computers. The decision remained open, however, whether such right would take the form of an exclusive right or a right to equitable remuneration. A parallel was drawn in the Green Paper between the digital transmission and the electronic rental of a work. Nevertheless, the Commission considered that for reasons of clarity and legal certainty the law should confirm the definition and scope of such new right. This led the Commission to consider the potential effect of such a right on the activities of cultural and educational organisations such as public libraries and universities. In search of the appropriate balance, the Commission insisted:

“It is important to recognise the interests of the different parties concerned: authors must be able to control the use of their works, libraries must ensure the transmission of available documents and users should have the widest possible access to those documents while respecting the rights or legitimate interests of everyone.”⁶⁴

With respect to the possible introduction of a “digital broadcasting right”, the Green Paper pointed out that while broadcasting was already regulated, the fact that the digitisation of signals brought such far-reaching implications for copying by consumers might justify the grant of an

⁶¹ See: IViR Study on the Recasting of Copyright and Related Rights for the Knowledge Economy, p. 47.

⁶² Green Paper 1995, p. 52.

⁶³ Note that a discussion of art. 5(2)b) of the Directive on private copying (and levies) remains outside of the scope of this study.

⁶⁴ Green Paper 1995, p. 59.

exclusive right to broadcasting rather than merely a right to equitable remuneration. On this issue, however, the Commission concluded that further thought should be given to the need for a review of the existing balance of rights in the area.

In the Follow-Up to the Green Paper, the European Commission emphasised that the traditional reproduction right and the legitimate exceptions to it needed to be reassessed and adapted to the new environment, where necessary, in order to ensure that a clear and adequate level of protection is achieved. Moreover, there was a consensus among stakeholders that further harmonisation should also comprise legitimate exceptions or limitations to the reproduction right, although views differ with respect to the direction such harmonisation should take. The Commission agreed that the new environment implied a multitude of new forms and a new quality of reproduction and that those required clear predictability on what exactly was protected as well as an equivalent level of protection across the EU. Harmonising the limitations to the reproduction right was deemed of utmost importance.

From the Green Paper's discussions regarding a new right to "digital dissemination or transmission", the Follow-Up moved on to propose the adaptation of the right of communication to the public so as to cover transmissions of works to third parties "on-demand".⁶⁵ Less than a month after the publication of the Follow-Up to the Green Paper, the international community adopted the WIPO Internet Treaties, which among other provisions introduced a new right of "making available to the public". By that time, the European market for off-line and on-line services had witnessed some evolution, where a range of "on-demand" services had emerged in the United Kingdom, France and Germany albeit still at a prototype or trial stage.⁶⁶ Apart from clarifying the definition and scope of the exclusive right of communication to the public so as to cover acts of on-demand transmissions, it appeared indispensable in the eyes of the Commission also to harmonise the limitations and exceptions which apply to this right. Without such harmonisation, Member States could apply divergent limitations or exceptions to this right which could make rightholders hesitate to agree to on-demand exploitation of their property.

The Proposal for a Directive presented in December 1997 was the result of this preparatory work. As the Explanatory Memorandum accompanying the Proposal made clear, the establishment of a legal framework to protect and stimulate the development and marketing of new goods and services was necessary:

"Appropriate measures are critical in order to achieve a favourable environment which stimulates creativity and investment, with respect both to the traditional and the evolving new markets in intellectual property. Legal certainty through transparent, up-to-date and effective intellectual property protection will play a major role in achieving this end. Without an adequate and effective copyright framework, content creation for the new multimedia environment will be discouraged or defeated by piracy, penalizing authors, performers and producers of protected material. This would necessarily have a negative impact on related industries as well as on users of protected material, such as on-line and off-line providers of services, and notably on consumers, as these would eventually have less content at their disposal or content of lower quality."⁶⁷

⁶⁵ Follow-Up to the Green Paper 1996, p. 10.

⁶⁶ I. Griffiths and M. Doherty, "The Harmonisation of European Union Copyright Law for the Digital Age", *E.I.P.R.* 2000/22, pp. 17-23, p. 17.

⁶⁷ European Commission, Explanatory Memorandum to the Proposal for a European Parliament And Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, 10 December 1997, COM(97) 628 final, p. 9.

Besides harmonising the rights of reproduction, communication to the public and distribution, the Directive ended up dealing extensively with an issue that was mentioned only incidentally in the Green Paper: copyright limitations. The European Commission was of the opinion that without adequate harmonization of these exceptions, as well as of the conditions of their application, Member States would continue to apply a large number of rather different limitations and exceptions to these rights and, consequently, apply these rights in different forms.⁶⁸ The harmonisation of limitations proved to be a highly controversial issue, which explains in large part the delay experienced not only in the adoption of the Directive itself, but also in its implementation by the Member States. The difficulty of choosing and delimiting the scope of the limitations on copyright and related rights that would be acceptable to all Member States also proved to be a daunting task for the drafters of the Information Society Directive.²⁵² Between the time when the Proposal for a directive was first introduced in 1997 and the time when the final text was adopted in 2001, the amount of admissible limitations went from seven to twenty.

In sum, it is clear that through the adoption of the Information Society Directive the European legislator pursued several objectives in the area of rights and limitations among which was the creation of a harmonised legal framework that is consistent with international norms, which would provide legal certainty to market players, would be sustainable and would preserve an equilibrium between protecting the rights of right holders and the freedoms of users. Let us now examine whether the implementation of the Information Society Directive has yielded the expected results.

2.2 Exclusive rights in the digital environment

As the country by country analysis in Part II of this study shows, the copyright and related rights laws of Member States are quite diverse conceptually and in the categorization of exclusive rights. On one end of the spectrum are national laws that contain umbrella clauses providing broad and abstract descriptions of the author's exclusive rights (e.g. Belgium, Slovenia). On the other end are national laws that set out in intricate detail the acts restricted by copyright or related rights (e.g. UK). The terminology used for the categories of rights or restricted acts is equally diverse – or in some cases used to be until implementation of the Information Society Directive. For instance, under some laws the distribution of tangible copies traditionally has been part of a wider right of 'communication to the public'. In other laws it is included in the reproduction right, or dealt with separately. Similarly; 'making available' may be part of the right of 'communication to the public' (or public performance right), whereas in other countries 'making available' is the overarching term, covering various forms of on line and off line distribution.

Exclusive rights are generally divided in two categories: moral rights and economic rights. Moral rights protect the immaterial interests of the author; they protect the relationship that an author entertains with his work which is an emanation of his personality.⁶⁹ Since moral rights have not been harmonised by the Information Society Directive –or for that matter, by earlier directives– they will not be discussed further. The Directive does deal with the three main economic rights: right of reproduction, right distribution and right of communication to the public. These have been broadly harmonized for works of authorship and related subject matter in the Information Society Directive. The Directive in part goes beyond the substantive norms of the 1996 WIPO treaties (WCT and WPPT) and of the agreements these build upon, i.e. the Berne Convention, the Rome Convention and TRIPs.

⁶⁸ Id., p. 35.

⁶⁹ J. Ginsburg and S. Ricketson, *International Copyright and Neighbouring Rights – The Berne Convention and Beyond*, Oxford, Oxford University Press, 2005, vol. 1, p. 587.

As the implementation report in Part II of this study shows, the implementation of articles 2 to 4 of the Information Society Directive has led to a convincing degree of harmonisation, for all Member States grant the exclusive rights foreseen under the Directive to the beneficiaries mentioned. As the interviews with stakeholders have revealed, however, there remains a degree of legal uncertainty with regard to the exclusive rights due to some imprecision regarding the delineation of each right. This section on the impact of the exclusive rights on online business models centres on the two rights for the dissemination of works or other subject matter that bear the most significance for the digital networked environment: the right of reproduction and the right of making available to the public. We also consider how the exception of article 5(1) of the Directive on transient and incidental acts of reproduction functions in the digital networked environment and how the liability rules that are connected to it affect the operations of Internet service providers and other content providers. The general right of communication to the public and the distribution right remain outside the scope of this analysis.

Note that some of the observations regarding the rights of reproduction and making available to the public were already made in the IViR study on the Recasting of copyright in the knowledge economy (November, 2006). In the latter report these rights were considered from the perspective of the consistency and coherence of the *acquis communautaire*, while in this report we examine them from the perspective of their impact on the deployment of online business models. In the pages below, we therefore describe how the content and scope of each right affects online business models, in the light of the country reports in Part II of this study, the legal commentaries, the relevant decisions of the courts and the outcome of the interviews that Berlecon Research has conducted with stakeholders. The five benchmark criteria described in the introduction, namely the consistency with international norms, the actual harmonisation, the legal certainty, and the sustainable and balanced character of the legal rules, will serve as guiding principles throughout the section. In doing so we will demonstrate that there still exists some doubt about the proper delineation of each right and that, as a consequence, there is some overlap between the exclusive rights granted under the Information Society Directive. This overlap may create uncertainty for the stakeholders. Our conclusions and recommendations appear in section 2.4 below.

2.2.1 *Right of reproduction*

The Information Society Directive provides for broader protection than is required on the basis of the WCT and other international instruments to which the European Community and/or its members have adhered. At the Geneva Diplomatic Conference of 1996, the Contracting Parties could not agree on a definition of the right of reproduction, so this was left out from the WIPO Treaties. At the European level, no general harmonised reproduction right for authors existed until the adoption of the Information Society Directive. Article 2 of the Directive sets out a very broad, comprehensive definition of the reproduction right covering all acts of reproduction, whether on-line or off-line, in material or immaterial form, temporary or permanent. The reproduction right is conferred under the Information Society Directive on authors, performers, phonogram and film producers and broadcasting organizations, who all benefit from the same level of protection for their works or other subject matter as regards the acts protected by the reproduction right.⁷⁰

The definition of article 2 of the Directive includes direct and indirect reproduction, whether temporary or permanent, in any manner or form. As the Explanatory Memorandum to the Proposal of Directive 1997 explains, the first element in the definition relates to the terms “direct” and “indirect” reproduction. This term means reproducing a work or other protected

⁷⁰ L. Guibault, “Le tir manqué de la Directive européenne sur le droit d’auteur dans la société de l’information”, *Cahiers de propriété intellectuelle* 2003-2, p. 545.

subject matter directly onto the same or a different medium. The term “indirect” covers reproductions done via an intermediate stage, for example, the recording of a broadcast which itself has been made on the basis of a phonogram.⁷¹ The provision is also intended to make clear that the right is not affected by the distance between the place where an original work is situated and the place where a copy of it is made. The second element (temporary/permanent) is intended to clarify the fact that in the digital environment very different types of reproduction might occur which all constitute acts of reproductions within the meaning of this provision. The result of a reproduction may be a tangible permanent copy, like a book, but it may just as well be a non-visible temporary copy of the work in the working memory of a computer. Both temporary and permanent copies are covered by the definition of an act of reproduction.⁷²

The broad scope of the right of reproduction as set out in article 2 of the Directive had given rise, prior to its adoption, to intense debate. Stakeholders concerned, particularly providers of telecommunications services, institutional users and consumers, feared that a reproduction right that would encompass in principle all transient copies generated in the course of normal computing and digital transmission operations, would impose to undue liabilities on users, intermediaries and end users. These concerns were shared by many scholars,⁷³ as exemplified by the early cautionary reaction of the European Commission’s Legal Advisory Board to the 1995 Green Paper:

“In the opinion of the LAB, in examining (and, possibly, redefining) these rights *the European legislator should not focus on technological detail, but follow the normative approach* inherent in the realm of copyright and neighbouring rights. The notions of “reproduction” and “communication to the public” are only fully understood if they are interpreted not as technical, but as normative (man-made) notions, i.e. they are not in a simple sense descriptive but purpose-oriented and used to define and delimit existing proprietary rights in a sensible and acceptable way. Thus, if the use of a protected work transmitted over a computer network causes (parts of the work) to be intermediately stored, this technical fact does not, in itself, justify the conclusion that an exclusive reproduction right is potentially infringed.”⁷⁴

According to the LAB, stretching the reproduction right as proposed by the European Commission, would effectively create an exclusive right of digital end usage, with undesirable consequences: “In fact, the catalogue of restricted acts would be extended with a novel right of digital usage. Such a use right is antithetical to the traditional principle that copyright and neighbouring rights do not protect against acts of consumption or reception of information. Reading a book and watching television involve basic rights of privacy (Article 8 ECHR) and freedom of reception (Article 10 ECHR), and are therefore not considered restricted acts. In the opinion of the LAB, the same must be true for the digital environment. In consequence, the extension of traditional copyright to cover acts which amount to mere consumption of works is highly questionable.”⁷⁵ Indeed, as was already noted in the IViR Recasting report, in the digital

⁷¹ European Commission, Explanatory Memorandum to the Proposal for a European Parliament And Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, 10 December 1997, COM(97) 628 final, p. 32.

⁷² T. Dreier and G. Schulze, *Urheberrechtsgesetz*, München, Beck Verlag, 2004, p. 231.

⁷³ See inter alia P.B. Hugenholtz, ‘Adapting copyright to the information superhighway’, in: P.B. Hugenholtz (ed.), *The future of copyright in a digital environment*, The Hague: Kluwer Law International 1996, pp. 81-102.

⁷⁴ Legal Advisory Board, *Reply to the Green Paper on Copyright in the Information Society*, <http://www2.echo.lu/legal/en/labhome>, par. 3.1 [hereinafter “LAB, Reply to the Green Paper”].

⁷⁵ Id., par. 3.2.

environment, “the right of reproduction covers virtually any use of a work or other subject matter, even where similar acts of use in the analogue world (such as receiving a television signal or reading a book) would fall well outside the scope of what intellectual property aims to protect.”⁷⁶

Surely the introduction of article 5.1, which will be discussed in par. 2.2.3, has mitigated some of these concerns. But the broad scope of the reproduction right remains the primary cause for the problem of overlapping rights that will be discussed below.

Perhaps because its implementation in national law is relatively recent, the extended reproduction right has thus far not inspired much noteworthy case law. Older case law on reproduction rights and the Internet is primarily interesting for its treatment of deep-linking and framing. While deep-links are generally not considered to constitute a reproduction or other restricted act,⁷⁷ a number of courts have found that the act of creating links to manifestly illegal sources of copyrighted material constitutes an unlawful act.⁷⁸ The reproduction right was also at the basis of two decisions in Germany, where the reproduction of small images on the Internet, otherwise known as “thumbnails”, was held to constitute a violation of the rights owner’s exclusive right.⁷⁹

Practical problems have however emerged from the fact that the right of reproduction is increasingly perceived as overlapping the rights of communication to the public, which among other consequences makes rights clearance much more cumbersome.⁸⁰ Stakeholders interviewed by Berlecon have expressed their concern that this cumulation of rights leads to clearance problems, and does not contribute to a transparent system. The broad scope of the reproduction right practically extends to all parties involved in the dissemination and use of protected works and other subject matter, where in the world of physical distribution their roles – especially those of mere carriers – would not have involved restricted acts.”. The limitation on transient and incidental copying admittedly exempts some of these acts. However, as our analysis of article 5(1) below shows, it by no means prevents multiplication of the number of restricted acts performed by content providers, such as broadcasters or online providers, who are now compelled to enter into multiple licenses for what can be considered as unitary acts of usage. In the off-line world a

⁷⁶ See inter alia, Hugenholtz 1996, at p. 92-93; G. Westkamp, “Towards access control in UK Copyright law?”, *CRi* 2003-1, p. 11-16; M. Hart, “The Copyright in the information society directive; an overview”, *EIPR* 2002, p. 58-64, J. Spoor, “The copyright approach to copying on the internet: (over)stretching the reproduction right?”, in Hugenholtz (ed.) 1996, *op. cit.*, p. 67-79.

⁷⁷ In France: Tribunal de commerce de Paris, 26 December 2000, *Communication & Commerce électronique* 2001/26, comment C. Caron; in the Netherlands: Pres. Rb. Rotterdam 22 augustus 2000, *Informatierecht/AMI* 2000-10, p. 207-210, m.nt K.J. Koelman; Mediaforum 2000-10, m.nt. T.W.F. Overdijk (Kranten.com); Rb. Leeuwarden 30 oktober 2003, LJN AN4570 (Batavus). In Germany: BGH 17 July 2003, I ZR 259/00 (Paperboy); Hanseatisches Oberlandesgericht Hamburg Urteil vom 22.02.2001 U 247/00 Online-Lexikon JurPC Web-Dok. 147/2001, Abs. 1 – 28.

⁷⁸ In Belgium: N.V. Belgacom Skynet v. Vzw IFPI Belgium and N.V. Universal, [2002] E.C.D.R. 5 (Appeal Court of Brussels (Eighth Division)); in the Netherlands: Gerechtshof Amsterdam, 15 June 2006 (*Brein v. Ziekmp3*), LJN: AX7579; in Denmark: KODA, NCB, Dansk Artist Forbund and IFPI Danmark v. Anders Lauritzen Vestre Landset, [2002] E.C.D.R. 25 (VL (DK) Apr 20, 2001) (NO. 346402); in Norway: TONO et al. v. Bruvik, [2005] 21 *CLSR* 461–62. See: G.P. Korg, “The Norwegian “Napster case” – Do hyperlinks constitute the “making available to the public” as a main or accessory act?”, *Computer Law and Security Report* 2006/22, pp. 73-77.

⁷⁹ LG Bielefeld, Urteil vom 08.11.2005 20 S 49/05 (Schadensersatz für Urheberrechtsverletzung durch Thumbnails) JurPC Web-Dok. 106/2006; LG Hamburg, Urteil vom 05.09.2003, 308 O 449/03 (Thumbnails) JurPC Web-Dok. 146/2004.

⁸⁰ The Danish collecting society Copy-Dan was cited as a best practice for one-stop rights clearance for multiple distribution channels (<http://www.copydan.dk/>). Another positive example for international cooperation is provided by the German GEMA and British MCPS-PRS collecting societies, see: http://ec.europa.eu/internal_market/copyright/management/management_en.htm

(commercial) user would have needed permission, and paid remuneration, for either an act of communication to the public or reproduction and distribution. By contrast, the distribution over the Internet now more often than not involves acts of reproduction as well as acts of communication (broadcasting or making available) and therefore requires double authorization. For instance, right holders have claimed remuneration for webcasting based on the argument that it not only constitutes communication to the public, but also reproduction because of the intermediate copies made during the streaming process.⁸¹

In conclusion, the relationship between the economic rights conferred on rights owners should be clarified, giving particular attention to the question of the rights' overlap. Given that the right of making available was especially tailored to serve as the primary economic right involved in acts of digital transmission, it would make sense for the scope of the right of reproduction to be reduced in line with the normative interpretation of the right which has been advocated by scholars for several years.⁸² Interviews with stakeholders have revealed that this overlap is not merely an academic problem, but that it has actually led to undue and unjustifiable 'double payment' to different right holders for unitary acts of exploitation, resulting in market distortions.

2.2.2 *Right of making available*

There is no overarching, general right of communication to the public at the international level, for authors nor for holders of related rights. Article 8 of the WCT however goes a long way towards such a right for authors. It has introduced a right of communication to the public for authors which does not comprise public performance (on the spot⁸³), but does include broadcasting and making available. Likewise, article 3(1) of the Information Society Directive grants authors a general exclusive right to authorize or prohibit any communication to the public, which when read in conjunction with recital 23 does not include on the spot public performance.

For performers and phonogram producers, various communication rights are specified in the Rome Convention, TRIPs and WPPT. These tend to be quite media-specific, e.g. performers and phonogram producers have a remuneration right for wireless broadcasts but not for cable retransmission (art. 1(f), art. 15 WPPT, art. 12 Rome Convention). Broadcasting organizations cannot profit from the WPPT, but are about to be granted (re)transmission rights under the proposed WIPO Broadcast Treaty, in addition to the existing protection against simultaneous (wireless) broadcasts under the Rome Convention. A key element of the WPPT is the making available right it introduced as a stand-alone right for performers (art. 10 WPPT) and phonogram producers (art. 14 WPPT). Under article 3(2) of the Information Society Directive, performers, phonogram and film producers and broadcasting organizations, all benefit from the same level of protection as authors do as regards the acts protected by the making available right.

In line with articles 8 WCT and 10 and 14 WPPT, the newly introduced right of making available essentially covers all kinds of online interactive offerings. The second part of Article 3(1) on the communication rights of authors, clarifies that the right of "communication to the public" includes the making available to the public of works, by wire or wireless means, in such a way that members of the public may access these works from a place and at a time individually chosen by them. One of the main objectives of the provision is to make it clear that this right covers interactive "on-demand" services. It aims to ensure legal certainty by confirming that the communication to the public right is also relevant when several unrelated persons (members of

⁸¹ In the US the status of webcasting (especially of sound recordings) under the reproduction right has been the object of fierce debate and has led to diametrically opposed legislative initiatives (H.R. Bills 54 69 and 5258).

⁸² LAB, Reply to the Green Paper, par. 3.3.

⁸³ The public performance right is regulated for different right holders and different subject matter in various instruments, e.g. art. 11(2), art. 11ter BC.

the public) may have individual access, from different places and at different times, to a work which is on a publicly accessible location, e.g. through open or private network. As the country reports in Part II show, this was already recognized under the laws of many Member States, typically as part of a broad right of ‘representation’ or communication to the public.

The notion that the electronic distribution of works does not give rise to the exhaustion doctrine because it falls under the scope of the right of making a work available to the public, rather than under the right of distribution, is now part of the *acquis communautaire*.⁸⁴ Nevertheless, it could be argued that the exhaustion doctrine could apply to the tangible copy made from a digital version of a work downloaded from the Internet, especially where the on-line sale of a digital version is a substitute for the sale of a physical copy. It would indeed not be unreasonable for a lawful user of a digital work who has burned this work on a CD, to be able to transfer that specific CD to a third party without infringing the owner’s copyright, provided that the initial copy of the work is deleted from his computer. A careful reading of the ECJ’s landmark Coditel I decision does not endorse a rule of complete non-exhaustion for acts of immaterial content delivery, contrary to what article 3(3) Information Society Directive seems to prescribe.⁸⁵

From a legal perspective, although the volume of relevant case law is still relatively low, the grant to authors and related rights owners of an exclusive right of making available has given rights owners an additional instrument –next to the reproduction right– to successfully stop acts of infringement on the Internet, including illegal file-sharing activities. The possible infringement of this right also formed the basis for a number of requests made by rights owners against internet service providers for the disclosure of the names and addresses of alleged infringers, and in some cases even for the termination of internet accounts.⁸⁶ The right of making available was also invoked in a series of “streaming” cases. In the German *Streaming offer*⁸⁷ case, the Court of Appeal of Hamburg (OLG Hamburg) concluded that phonogram producers have the exclusive right to make phonograms available to the public for a price through a so-called “streaming process”. An act of making available in the sense of article 19a of the German Copyright Act does not require that a copy of the phonogram be downloaded, and become the possession of the user. Rather the act of streaming is deemed to constitute a form of making available, which is therefore subject to the prior authorisation of the rights owner. In a similar case, the British High Court came to a similar conclusion in a case opposing the Union des Associations Européennes de Football to Briscoe et al.⁸⁸ In this case, the Court ruled that the defendants had infringed the plaintiffs copyright in the broadcast signals. Finally, the Court of Appeal of Cologne ruled in another case that an Internet provider’s offer to save on an assigned storage space on his server selected digitised television programmes transmitted in Germany for the users’ deferred viewing on their own personnel computer also fell within the ambit of article 19a of the German

⁸⁴ Walter 2001, p. 1053; According to Recital 29 of the Information Society Directive: “The question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject matter made by a user of such a service with the consent of the right holder. Therefore, the same applies to rental and lending of the original and copies of works or other subject matter which are services by nature. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides.”

⁸⁵ See in more detail the IViR Study on the Recasting of Copyright and Related Rights for the Knowledge Economy, para. 2.1.1, 2.3.2.1 and the report of the expert meeting in Annex 2 thereof.

⁸⁶ See e.g. *EMI Records (Ireland) Ltd, Sony BMG Music Entertainment (IRL) Ltd*, The High Court, Dublin, Ireland, 8 July 2005, [2006] E.C.D.R. 5. *Brein et al. v. UPC et al.*, Gerechtshof te Amsterdam, 13 July 2006, LJN: AY3854.

⁸⁷ OLG Hamburg, Urteil vom 7.7.2005, 5 U 176/04, ZUM 2005/10, p. 749-751.

⁸⁸ [2006] EWHC 1268 (Ch) (Lindsay J) 8/5/2006; see: S. Sampson, “Streaming of live television broadcasts over the Internet found to infringe copyright”, *Computer Law & Security Report* 2006/22, pp. 413-415.

Copyright Act.⁸⁹

One of the most challenging aspects of the right of making available is its delineation vis-à-vis broadcasting. The practical significance of a clear distinction lies, once again, in the area of rights clearance, on two levels. On one level, any delineation decides which rights have been acquired under existing contracts in the supply chain. Notably, it affects the position of creators and performers versus publishers or other intermediaries. Where they have signed away all their rights, the question is reduced to whether the applicable national copyright and related rights law limit the transferability of rights to various new forms of exploitation that come within the scope of the making available right.⁹⁰ The same uncertainty may of course arise in other exploitation contracts – between publishers and commercial re-users – which predate the making available right.

On another level, the distinction between making available and broadcasting is relevant because of the type of rights clearing involved. Especially for music, broadcasting rights are typically managed collectively, whereas the acquisition of a license to ‘make available’ protected subject matter requires authorization of the individual right holders.

The *acquis communautaire* for intellectual property does not provide a harmonized definition of the restricted act of broadcasting which could help distinguish it from other restricted acts. At the same time, the definition given to the making available right does not allow for an *a contrario* delineation of broadcasting either. The concept of making available contains two distinctive elements “members of the public may access them *from a place* and *at a time individually chosen* by them”. In short, the user controls when and where the content is read or played. The introduction of home-recording devices in particular has already long enabled members of a broadcast audience to time-shift, i.e. view or listen to content at a time other than that of the original delivery. Digital video recorders greatly enhance this capacity and also offer other control over content, e.g. allowing the user to pause or fast forward through a broadcast. The criterion of individually chosen time therefore does not seem particularly apt to distinguish making available from broadcasting.

As regards the place where the content is used, this refers to the geographic location, thus allowing a distinction between the performance of a work or other protected matter in a location where the audience is physically present (cinema, theatre, concert hall and the like). Whether a customer has access to services communicated over a distance does not depend on his or her geographical location, but on the availability of a receiving device (TV, PC, mobile phone) and the connecting wired or wireless network over which content is delivered (e.g. cable, satellite, ADSL). This is true for traditional broadcasting and new forms of digital content services, thus robbing the ‘place’ criterion of its value for categorizing a service as either broadcast or making available. As is illustrated by the examples given further below, modern technology allows users increasing control over when, where, how and what content they view, read or listen to. Neither the ‘when’ nor the ‘where’ criteria viewed from the perspective of the audience are suitable to distinguish the act of broadcasting from that of making available.

One alternative source for a definition of broadcast of course, one would expect, is the proposed WIPO Broadcast Treaty. It aims to modernize the exclusive rights of broadcasting organizations for their broadcasts, i.e. as protected subject matter in its own right, not in terms of the restricted act performed with copyright works, phonograms, etc. However, since no agreement could be reached on the inclusion of modern forms of broadcasting, said proposal is confined to wireless transmission (traditional broadcasting) and transmission via wire

⁸⁹ OLG Köln, Urteil vom 9.9.2005, 6 U 90/05 (*Personal Video Recorder*), GRUR- Rechtsprechungs Report, 2006/1, p. 5-7.

⁹⁰ This is a question largely of copyright contract law. For a detailed overview of the law in EU Member States, see: L. Guibault and P.B. Hugenholtz, *Conditions Applicable to Contracts Relating to Intellectual Property*, report to the European Commission, DG Internal Market, May 2002, Doc. No. ETD/2000/B5-3001/E/69.

(cablecasting), of sounds and/or images. Transmissions via computer networks are excluded. In the revised Draft Basic Proposal of July 2006 (SCCR/15/2) the notion of “broadcasting” is confined exclusively to transmissions by wireless means, by radio waves propagating freely in space, i.e., radio waves or Herzian waves.

Another potential source is the proposal for a revised Television without Frontiers Directive (89/552/EEC), which ensures the free flow of broadcasting services within the EU.⁹¹ Here, a television broadcast means “a linear audiovisual media service where a media service provider decides upon the moment in time when a specific programme is transmitted and establishes the programme schedule”.⁹² The focus is on timing from the perspective of the provider rather than that of the user/audience, combined with a criterion that is lacking from the proposed WIPO Broadcast Treaty, namely the activity of scheduling content. Arguably, the core of what a (traditional) broadcaster does is the scheduling of audio(visual) content, and this characteristic should play a role in determining what constitutes an act of broadcasting in terms of copyright and related rights.

If one considers the current controversy surrounding internet-based broadcasting, the debate is about interactivity in terms of the user controlling the ‘what’ (which content) and the ‘how’ (which mode of delivery) as much as about the ‘when’ and ‘where’. As was set out in the IViR study on the Recasting of Copyright and Related Rights for the Knowledge Economy: “With digital distribution technology still developing, it is difficult to give a definite interpretation of what constitutes ‘on-demand’, i.e. delivery at a time and place individually chosen by the user (i.e. pull rather than push technology).⁹³ Precisely what level of interactivity it implies is not quite clear. In practice, dissemination on-line is done through models along a sliding scale of interactivity.⁹⁴ For instance, near-on-demand music via Internet radio may be transmitted at very short intervals, consisting of multi-channel broadcasts with a highly specific content (e.g. only certain artists, or a genre, or period music) per channel, making it similar to ‘true’ music on demand. But Internet radio can also be transmitted in less sophisticated ways, displaying no or hardly any interactivity at all.” Another dissemination method which is difficult to qualify as either broadcasting or making available is podcasting. Unlike webcasting it is not merely streaming (ephemeral, not destined to be saved) content, which suggests the application of the making available right. On the other hand, podcasts may be automatically distributed to subscribers using automated feeds, thus showing characteristics of “push technology” associated with broadcasting, or ‘linear’ services in terms of the proposed revised Television without Frontiers Directive..

The same problems of interactivity arise with respect to personalised or searchable online services. Personalised offerings allow listeners to create play-lists according to their own preferences, while searchable services allow users of webcasting services, for example, to search for individual artists or genres. One example of such a service is Tiscali’s Jukebox service where music streams could be delivered according to individual users’ tastes. However, the European recording industry contested the service provider’s right to offer this kind of functionality,

⁹¹ In the ECJ’s Mediakabel decision (2 June 2005, case C-89/04, ECR 2005, p. I-4891) broadcasting was defined as the transmission of programmes to an indeterminate number of potential viewers to whom the same images are transmitted simultaneously.

⁹² This as opposed to non-linear audiovisual media services which ‘non-linear service’ means “an audiovisual media service where the user decides upon the moment in time when a specific programme is transmitted on the basis of a choice of content selected by the media service provider.” (art. 3 sub e, AVMS proposal, consolidated version of July 2006).

⁹³ According to the Explanatory memorandum to the Information Society Directive, near-video on-demand, pay-per-view and pay-TV are not acts of making available.

⁹⁴ O. Schwenzer, ‘Töntrageauswertung zwischen Exklusivrecht und Sendeprivileg im Lichte von Internetradio’, *GRUR Int.* 2001-8/9, p. 722-732.

claiming Tiscali did not have a licence for such 'interactive' services. As a consequence, the Internet Service Provider had to discontinue the offering shortly after its market introduction. Since services like these are expected to gain popularity in the future, the issue of the delineation of the scope of the communication to the public right and the making available right is of paramount importance.

In the U.S. also, the boundaries between traditional broadcasting and modern (near on demand) broadcasting are the object of a continuing tug of war between right holders, especially in sound recordings, and commercial and non-commercial internet radio providers.⁹⁵ The music industry did not have an exclusive right of digital audio transmission (or reproduction) prior to 1995. The US Copyright Act has been revised several times since then, and currently contains a very detailed and complex three level-system of statutory licenses for broadcast like digital transmissions (DMCA 17 USC s. 114). Whether a service qualifies as exempt, subject to a statutory license or requires authorization by the right holder, depends on inter alia whether it is subscription based or not, on its level of interactivity, whether it facilitates time-shifting (e.g. by publishing programme listings such as play-lists, uses looped or repeat programs) and on the type of content streamed (e.g. the so-called 'sound recording complement' restricts how often which music by which artist may be offered in which time frame). The DMCA has been severely criticized for curtailing the development of new business models for internet radio. Both commercial and non-commercial service providers are under continuous pressure from large right holders to limit features which enable users to personalize streams (e.g. by selecting streams of a certain genre or artist).⁹⁶

The American example, as well as the European Tiscali example, illustrates how a broad making available right may encroach upon modern forms of broadcasting, which may hinder the development of new business models. A strict interpretation of broadcasting along the lines of the proposed WIPO Broadcast Treaty could cause a shift away from collective rights management as the media landscape further develops, featuring classic broadcast models which play a modest role compared to the many different business models which share the characteristic of (some degree of) interactivity.

Interviews conducted by Berlecon with stakeholders make clear that European content providers of more innovative services, e.g. those offering a greater degree of interactivity and personalisation, regard their legal position as relatively unclear. As a result of legal uncertainty, companies build financial provisions before entering a new market or introducing an innovative service. The creation of financial provisions is necessary because companies fear that their activities might be unexpectedly infringing on someone else's rights, which may give rise to a claim after market entrance or launch. In such a case, financial resources are required in order to pay fines or compensations. This constitutes a barrier to market entry for smaller companies that cannot afford these kinds of provisions. For larger corporations, this is less of a challenge but rather a matter of business routine.

⁹⁵ See J. Ginsburg, 'News from the US', *RIDA* 1999/179, pp. 142-299, at p. 249 et seq. for an overview of the 1995 and 1998 revision of the US Copyright Act. The conflict in the US revolves to a large degree around the rates and the effects on new and old business models. The rates were formerly set by the Copyright Arbitration Royalty Panel (CARP; now replaced, see Copyright Royalty and Distribution Reform Act of 2004), which according to webcasters were crippling for new business models but were not considered to reflect a price based on market value by the right holders. The right holders have united in Sound Exchange to negotiate standard licensing fees for digital performance rights. Sound Exchange has been designated by the US Copyright Office to negotiate and collect royalties for statutory licenses.

⁹⁶ See the cases discussed in J.D. Lassica, *Darknet: Hollywood's War Against the Digital Generation*, John Wiley & Sons, May 2005, p. 201 et seq.

2.2.3 *Transient and incidental acts of reproduction*

As the two previous sections show, the respective boundaries of the right of reproduction and the right of making available to the public are rather unclear. This gives rise to an undesirable overlap between the two rights. Such overlap causes practical difficulties and creates legal uncertainty which can undermine the development of online business models. The exception laid down in article 5(1) of the Directive has the potential of providing a solution to at least part of this problem. Indeed, this new rule, created first and foremost to find application in the digital environment, could fulfil a very important function in delineating the right of reproduction from the right of making available to the public. Moreover, article 5(1) has been designed to regulate the boundaries of the copyright liability of Internet intermediaries, in conjunction with the provisions of the Electronic Commerce Directive.⁹⁷ However, as the in-depth analysis below will demonstrate, the rule couched in article 5(1) has gone through a turbulent and controversial legislative history. As a result, the norm contained in article 5(1) of the Directive could also benefit from some clarification, both in terms of the scope and the conditions of its application, so as to let it fulfil the role that it is meant to do. Let us now examine in turn the following points: the legislative history and intent behind the provision, the criteria of application, the relationship with the three-step test of article 5(5) of the Directive, the relationship with the rules on intermediary liability of the Electronic Commerce Directive, and the practical experience with this provision.

2.2.3.1 *History and legislative intent*

Sector-specific extensions of the reproduction right had, already prior to the Information Society Directive, been introduced in Community legislation through the Computer Programs Directive and the Database Directive. The European Community and its Member States were also the originators of the failed attempt to include a broad reproduction right in the WIPO Internet Treaties. In its 1997 Proposal, the Commission presented the first version of the temporary copies exception of article 5(1):

“Temporary acts of reproduction referred to in Article 2 which are an integral part of a technological process for the sole purpose of enabling use to be made of a work or other subject matter, and having no independent economic significance, shall be exempted from the right set out in Article 2”.⁹⁸

According to the Explanatory Memorandum of the Proposal, the purpose of article 5(1) was to “exclude from the scope of the reproduction right certain acts of reproduction which are dictated by technology, but which have no separate economic significance of their own”.⁹⁹ During the First Reading, the European Parliament voted for an alternative text in its Amendment 33:

“Transient and incidental reproduction referred to in Article 2 which are an integral and essential part of a technological process for the sole purpose of enabling use to be made of a work or other subject matter shall be exempted from the right set out in Article 2. Such uses must be authorised by the rightholders or permitted by law and must have no

⁹⁷ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), O.J.E.C. L 178/1, 17.7.2000.

⁹⁸ Proposal for a European Parliament and Council Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, Brussels, December 10, 1997, COM (1997) 628, Article 5(1) [hereinafter the Proposal].

⁹⁹ *Ibid*, Explanatory Memorandum Art. 5, p. 29.

economic significance for the rightholders”.¹⁰⁰

It is noteworthy that Amendment 33 attaches the “no economic significance” criterion to the lawful use enabled by the technological process. Both the Proposal and all subsequent versions of the provision attach this criterion to the temporary reproduction itself. Furthermore, according to Amendment 33, the temporary reproduction must be an “integral and essential” part of the technological process, instead of just “integral”. The Commission’s Amended Proposal only partially incorporated the amendments suggested by the Parliament.¹⁰¹ As explained in the Explanatory Memorandum of the Amended Proposal, the Commission took onboard from Amendment 33 the condition that the temporary reproduction must be an essential part of the technological process. In addition, it inserted the adjectives “transient” and “incidental” to illustrate the word “temporary”.¹⁰² After months of diplomatic negotiations based on the Amended Proposal, the European Council adopted its Common Position, which *inter alia* brought further amendments to article 5(1).

Several modifications were made to the provision of Amendment 33, which formed the basis for the Common Position version of article 5(1). This provision established a new two-tier system, where *transmission-enabling* reproductions were covered regardless of the nature of the resulting use (by the recipient of the transmission), whereas *use-enabling* reproductions were covered only as far as the use was lawful. In both cases, the reproduction must also satisfy the other conditions set out in the provision. Interestingly, a certain evolution in the legislative intent can be discerned throughout the legislative process. Initially, the provision seemed to reflect a basic intention to keep necessary components of a technological process leading to the use of a work outside the scope of the reproduction right. Thus, in these early versions, the provision apparently carried the main intention of neutralising unwanted side effects of the broad reproduction right, by ensuring that it will not obstruct technically necessary reproductions ancillary to the end-use of a work. The Common Position version of article 5(1), on the other hand, appears much more complex than its predecessors in both its wording and intent. As to the intent, the Statement of the Council’s reasons explains that Amendment 33 was further “amended *in order to strike a fair balance* between the interests of rightholders and those of intermediaries (such as internet service providers) and users”.¹⁰³ This statement clearly suggests that article 5(1) has developed into a pragmatic compromise between the competing interests of the parties involved, rather than a demarcation logically deduced from the nature of the traditional reproduction right.¹⁰⁴

As such, the provision has arguably become an independent *balancing instrument*. In light of the above, there is hardly any other discernable legislative intent than to strike a fair balance between

¹⁰⁰ Legislative Resolution Embodying the Parliament’s Opinion on the Proposal for a European Parliament and Council Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, COM (97) 0628 C4-0079/98 97/0359 (COD), Amendment 33 [hereinafter Amendment 33].

¹⁰¹ Amended Proposal for a European Parliament and Council Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, ..., Article 5(1) [hereinafter the Amended Proposal].

¹⁰² *Ibid*, Explanatory Memorandum Article 5(1).

¹⁰³ Council of the European Union, Common Position, C5-0520/2000, Brussels, 26 July 2000, p. 5 [hereinafter the Common Position].

¹⁰⁴ See also Communication from the Commission to the European Parliament Concerning the common position of the Council on the adoption of a Directive of the European Parliament and the Council on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, October 20, 2000, SEC (2000) 1734 final, p. 3 (“The common position presents a proportionate response offering in many instances more subtle and balanced solutions than the amended proposal”).

the interests of rights holders, intermediaries, and users.¹⁰⁵ For example, it is difficult to defend the assertion that the provision is intended to grant a general amnesty to intermediaries. As emphasised in the Common Position (and by Recital 33 of the final Directive), even reproductions covered by alternative (a) of the provision – such as copies made in connection with Internet browsing and caching – must additionally satisfy the other conditions of article 5(1), including the requirement that the copy may have no separate economic significance. The Recitals offer little extra guidance as to the legislative intent. Apart from confirming that acts enabling caching and browsing in principle are capable of being covered by the provision, and that “lawful” should mean either authorised by the rights holder or not restricted by law, Recital 33 does little else than repeating the criteria of article 5(1).

2.2.3.2 Conditions of application of article 5.1

Article 5(1) of the Information Society Directive introduces a complex provision into Community copyright law, one which uses to new and unfamiliar terminology. Considering the importance of this provision for the delineation the boundaries between the right of reproduction and the right of making available to the public, let us in the pages below analyse the meaning and workings of each element of the provision.

Temporary and transient or incidental

The opening words of article 5(1) confine its scope to temporary reproductions. Apart from excluding permanent reproductions, the qualifications “transient or incidental” add little to the comprehension of the provision. The Oxford Dictionary defines the term “transient” as something that “passes away quickly or soon, brief, momentary, fleeting”. In article 5(1) of the Information Society Directive, the term refers to “a very short lifetime” (much shorter than “temporary”) and comprises e.g. reproductions of works in Internet routers, copies created during Web browsing or, more generally, copies created in a computer’s random access memory (RAM), which are automatically deleted at the completion of the working session.¹⁰⁶ Copies created in proxy servers and local caches of computer systems (that may last for hours, days or even longer) are, on the other hand, not transient. Such acts will be covered by the exception insofar as they meet the other conditions of article 5(1).¹⁰⁷ According to the Oxford Dictionary, the term “incidental” must be understood as something “occurring or liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part; casual”. The term “incidental” in article 5(1) of the Information Society Directive means that the copy must “have no particular significance from a copyright perspective” and comprises e.g. copies created in proxy servers and local caches of computer systems.¹⁰⁸ Such reproductions are covered by the exception as long as they are temporary. In relation to this, it may theoretically become necessary to draw an upper limit to limited duration. The other conditions of article 5(1) must also be met.

Integral and essential part of a technological process

Opinions vary regarding the meaning of the requirement of “integral and essential part of a technological process whose sole purpose is to enable”. While some commentators believe that

¹⁰⁵ M. Schippan, “Urheberrecht goes digital – Das Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft“, *ZUM* 2003/5 pp. 378-389, p. 380.

¹⁰⁶ Recital 33 of the Information Society Directive; Walter 2001, p. 1068.

¹⁰⁷ M. Hart, “The Copyright in the information society directive: An overview”, *EIPR* 2002, pp. 58-64, p. 59 (“However, it does not make it clear that browsing is actually permitted, as it states that the conditions of Article 5.1 must still be met.”).

¹⁰⁸ Loewenheim in Schricker 2006, p. 965.

the copy must be produced due to technical necessity,¹⁰⁹ most are of the opinion that a reproduction, which does not constitute a necessary part of the process but merely an integral and essential part of it, would be covered by the exception.¹¹⁰ The Directive therefore does not seem to strictly require an element of necessity in the making of a reproduction as part of the technological process.

Transmission in a network between third parties by an intermediary

The technological process referred to in the previous section must have as its sole purpose to enable either one of two acts: a transmission in a network between third parties by an intermediary (article 5(1)(a)); of a lawful use (article 5(1)(b)). Regarding the transmission in a network, the issue was raised whether certain acts of *caching* meet the requirement of the first subparagraph, since they are not *sine qua non* to the functioning of network transmissions, but significantly enhances their efficiency.¹¹¹ The European legislator clarified the issue in favour of also including acts that “enable transmission systems to function efficiently” within the scope of article 5(1).¹¹² Subsection (a) typically encompasses activities in Internet routers (which direct packages of content from A to B over the Internet) and proxy servers (which store content locally in order to speed up transmissions). Intermediaries are only covered by the exception as long as they convey third party content. According to Recital 33, intermediaries should neither modify the information nor interfere with the lawful use of technology to obtain data on the use of the information.¹¹³ Subsection (a) does not only cover traffic on the Internet, but (in principle) also transmissions in other communications networks, such as telephone networks and wireless networks. Contrary to paragraph (b) of the provision, the transient copy made to enable a transmission in a network between third parties by an intermediary is covered by the exception irrespective of the lawfulness of the use enabled by the transmission.¹¹⁴

Nevertheless, there is an undeniable economic aspect in ensuring an “efficient functioning of systems”. This begs the question what level of economic efficiency article 5(1) refers to. For example, in the Explanatory Memorandum accompanying the Dutch implementation Bill, the Minister of Justice declared that a reproduction was to be considered “essential” not only if it is essential from the technical point of view, but also if it is essential from an economic standpoint in the sense that it allows “the effective operation of the systems of transmission”. In other words, the Dutch legislator estimated that a copy should be excluded from the scope of the exclusive right, when it is economically essential for the supply of an adequate service, taking into account normal and legitimate expectations of the users in the commercial branch considered. A copy can also be considered economically essential if its realization allows avoiding the use of technical processes that are economically unjustifiable or unnecessarily unfavourable.

Lawful use

As already mentioned, the use enabled by the temporary reproduction(s) according to subsection (b) must be lawful. The lawfulness must be assessed not in relation to the status of the user, but

¹⁰⁹ Bechtold in Dreier/Hugenholtz 2006, p. 371.

¹¹⁰ G. Spindler, “Europäisches Urheberrecht in der Informationsgesellschaft”, *GRUR* 2002/2, pp. 105-120, p. 111. Dreier/Schulze 2005, p. 670; Walter 2001, p. 1069; See also the Explanatory Memorandum of the Proposal, p. 29 (referring to “acts of reproduction which are dictated by technology”).

¹¹¹ See e.g. Hugenholtz 2000a, p. 488.

¹¹² Cf. Recital 33. See also the Amended Proposal, article 5(1) with accompanying notes (where this clarification was made for the first time).

¹¹³ Spindler 2002, p. 112.

¹¹⁴ Loewenheim in Schricker 2006, p. 966.

to the purpose of the act of reproduction.¹¹⁵ Given the structure of the provision, the lawfulness requirement refers to legal norms outside article 5(1) itself. In other words, article 5(1) cannot render a use lawful that otherwise is not, and therefore, the provision does not interfere with other copyright exceptions. For example, the reproduction of a work in the RAM of a computer, which occurs in the course of making a private use copy in accordance with (a national implementation of) article 5(2)b) of the Directive, may be exempted from the reproduction right pursuant to article 5(1)b), since the use it enables – the making of a private use copy – is lawful. However, this does not affect the lawfulness of the private use copying, nor the obligation to provide fair compensation, which must be assessed pursuant to article 5(2)b). It seems evident that the making of a copy for private use itself falls outside the scope of article 5(1), since it is neither transient nor incidental to a communication process or a use – it *is* the use.

The question is what relevant external criteria must be taken into account for determining lawfulness as a triggering factor to the application of article 5(1)b). According to Recital 33 of the Directive, a use should be considered lawful “where it is authorised by the rightholder or not restricted by law”.¹¹⁶ This indicates that the relevant external criteria for determining lawfulness in the sense of the provision are either an authorization by the right holder or a limitation on copyright. Authorization by the rights holder may be express or implicit.¹¹⁷ To knowingly upload protected content (e.g. a digitized work) onto an open web-page will in most cases be regarded as an implicit consent – or authorization, in the words of Recital 33 – to others downloading it. In such a case, the downloading would be regarded as a lawful use in the sense of article 5(1).

The qualification “not restricted by law” primarily refers to copyright limitations.¹¹⁸ This expression covers temporary copies that are created to enable uses authorised under existing copyright limitations. The provision ensures that the right of reproduction “cannot be used by rights holders to undermine the copyright limitations listed in Article 5(2) and (3) of the Directive”.¹¹⁹ The reference to an absence of legal restrictions can also be interpreted more broadly than a mere reference to copyright limitations in the classical sense. In principle, *any* limitation of the copyright monopoly may be relevant, such as the (initial) definitions of the exclusive rights (reproduction, communicating to the public, distribution), the idea/expression dichotomy, the copyright term etc.¹²⁰ Such a broad interpretation raises *inter alia* questions related to the secondary use of a work.

A separate question is whether article 5(1)b) only applies to the primary use of a work (the apprehension of a work by listening to or viewing a digitized work on a computer), or whether the lawful use criterion also extends to secondary uses, such as the creation of derivative works. For example, if an artist downloads a digital work onto her computer’s RAM without creating a permanent copy and modifies it into a new and original – though derivative – work, would the RAM reproduction of the work be exempted pursuant to article 5(1)b)? The answer to this question depends on whether the term “lawful” employed in the provision also refers to the idea/expression dichotomy (in its quality as being a limitation of the copyright restriction). Another uncertainty arises in relation to the copy – whether the original or the temporary copy – upon which the assessment of the derivative work’s alleged copyright infringement should rest.

¹¹⁵ IViR Final Report on Recasting of Copyright and Related Rights for the Knowledge Economy, p. 68 (with further references).

¹¹⁶ This clarification is in line with Article 7(2) of the WIPO Basic Proposal.

¹¹⁷ Dreier/Schulze 2004, p. 670; A. Lucas and P. Sirinelli, “Chroniques – Droit d’auteur et droits voisins”, *Propriétés intellectuelles* 2006/20, pp. 297-316, p. 309 ;

¹¹⁸ G. Westkamp, “Towards Access Control in UK Copyright Law? Some Remarks on the Proposed Implementation of the EU Copyright Directive”, *Computer Law Review International* 2003/1, 11-16, p. 14.

¹¹⁹ Bechtold, in Dreier/Hugenholtz 2006, p. 372.

¹²⁰ Westkamp 2003, p. 14.

Under UK law, for instance, this ambiguity may obscure the assessment of a claim for infringement, since the substantial taking doctrine *inter alia* includes considerations such as the purpose for which the copy was used.

No independent economic significance

While they may fulfil all other requirements of article 5(1), temporary reproductions may still fall outside the scope of the provision – hence remain subject to rights holder’s exclusivity – if they have “independent economic significance”. This criterion, which according to some commentators is derived from the three-step-test,¹²¹ has been an element of the provision since the Commission’s initial Proposal. The criterion is vague and does not refer to any known principle of international (or national) copyright law(s).¹²² The fact that this requirement leaves much room for interpretation does not contribute to the increase of legal certainty.¹²³

Some interpretative guidance can be derived from the preparatory works of the Information Society Directive. The Explanatory Memorandum of the Proposal, the Commission declared: “it is appropriate to limit the scope of the reproduction right and only protect those acts of reproduction which are of a separate economic relevance. Such an obligatory exception at Community level is vital as such short lived reproductions ancillary to the final use of a work will take place in most acts of exploitation of protected subject matter, which will often be of a transnational nature”.¹²⁴ Moreover, Recital 33 of the Directive specifies that acts of browsing and caching, including those which enable transmission systems to function efficiently, may meet this requirement “provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information.”

If article 5(1) is to have any real meaning, it stands to reason not to interpret the economic significance clause solely in terms of the interests of right holders. It has been suggested that when asserting economical significance, one should look at the nature of the entire exploitation and ask whether it is performed as an independent economic activity (as e.g. proxy caching performed by an independent service provider).¹²⁵ Still, one does not fully escape the circular argument that, on the one hand, a reproduction escapes article 5(1) and remains within the realm of the exclusive right if it has economic significance; on the other, economic significance is considered to be present *because* the reproduction falls within the scope of an exclusive right (hence a restricted activity). The broad, technical rather than normative interpretation of the reproduction right seems to be causing said inconsistency.

Another suggestion is that, as point of departure, any temporary reproduction must be deemed economically significant, and that article 5(1) then excludes reproductions that either are ancillary to a use covered entirely by another economic right (e.g. the right of communication) or to a more durable reproduction based upon which the reproduction right can be asserted.¹²⁶ Recent practice shows, however, that rights holders consider reproductions that are perceived as

¹²¹ Id., p. 15 (further references); and Bechtold, in Dreier/Hugenholtz 2006, p. 373.

¹²² See e.g. G. Westkamp, “Transient Copying and Public Communications: The Creeping Evolution of Use and Access Rights in European Copyright Law”, *Geo. Wash. Int’l L. Rev.* 2004/36, pp. 1057, p. 1100 (“[N]either international conventions nor national legislation and judicature are capable of defining what can be economically significant.”);

¹²³ Lucas/Sirinelli 2006, p. 310.

¹²⁴ Explanatory Memorandum of the Proposal, p. 37.

¹²⁵ Hugenholtz 2000, p. 488; Westkamp 2003, p. 15. See also Westkamp 2004, p. 1098 (“It may be suggested (...) that the term “economic significance” refers to a material new market and new forms of exploitation therein, not to any form of exploitation conceivable”).

¹²⁶ Westkamp 2004, p. 1101.

ancillary to a final use, to have economical relevance. As explained in the Recasting report, right holders have claimed remuneration for *webcasting* based on the argument that it not only constitutes communication to the public, but also reproduction because of the intermediate copies made during the streaming process.¹²⁷ All in all, it is still remains uncertain what the correct interpretation of the criterion. The national implementations also do not give much guidance in this respect.

2.2.3.3 *Three-step-test*

How does the exception of article 5(1) on transient copies relate to the three-step-test of article 5(5) of the Directive?¹²⁸ According to the requirements of the test, exceptions must be limited to “special cases”, must not conflict with the “normal exploitation” of the work and must not “unreasonably prejudice the legitimate interests of the author”. Although the three-step-test and the conditions of article 5(1) must be applied separately, it may be argued that the requirement of the former provision concerning the absence of conflict with the “normal exploitation” of the work overlaps with the “no independent economic significance” criterion of the latter.¹²⁹ The question posed by the three-step-test on this issue can be restated as follows: does the copyright holder ordinarily expect a fee? The third part of the three-step-test (the reproduction must “not unreasonably prejudice the legitimate interests of the author”) may be interpreted as *inter alia* requiring that intermediaries comply with accepted standards or business practices, something which comes close to the requirements inherent in article 5(1).

2.2.3.4 *Transient copies and liability rules*

Recital 16 of the Information Society Directive describes the relation of this Directive to the E-Commerce Directive¹³⁰, stating that the latter Directive provides a harmonised framework of principles and provisions that are relevant *inter alia* to important parts of the Information Society Directive, and that the Information Society Directive shall be “without prejudice to provisions relating to liability in that Directive”. Articles 12 to 15 of the E-Commerce Directive lays down a number of basic rules limiting responsibility for activities such as mere conduit and caching, provided that a number of conditions are met. According to Recital 41 of the Directive, these liability exemptions only cover cases:

“... where the activity of the [intermediary] is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the some purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the [intermediary] has neither knowledge of nor control over the information which is being transmitted or stored.”

The activities exempted under the Directive are so-called “mere conduit” (Article 12), caching (Article 13) and hosting (Article 14).¹³¹ The provisions are not exclusively directed against alleged

¹²⁷ IViR Final Report on Recasting of Copyright and Related Rights for the Knowledge Economy, p. 50 (with further references).

¹²⁸ For a general discussion of the three-step-test, see section 2.3.3 *infra*.

¹²⁹ See e.g. Hugenholtz 2000a, p. 488 (“[T]his raises *once again* the question of whether caching constitutes a “normal exploitation”) (emphasis added).

¹³⁰ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), O.J.E.C. L 178/1, 17.7.2000.

¹³¹ In addition, article 15 states that intermediaries shall have no general obligation to monitor etc. the information

acts of copyright infringement, but more generally against any tortious act giving rise to liability, including defamatory statements, illegal pornography etc. Apart from regulating liability, the provisions do not affect the distinction made by applicable law between lawful and unlawful conduct. In terms of copyright law, this means that intermediary activity may still qualify as copyright infringement, even though the liability is removed. As a commentator explains, the two Directives establish a joint framework concerning the liability for copyright-related activities in network environments: “In this framework, arts. 2 and 5(1) of the [Information Society] Directive determine whether a certain activity constitutes a violation of the right of reproduction. If (and only if) such violation has been determined, arts. 12-14 of the e-Commerce Directive determine whether a service provider is liable for this activity.”¹³²

The liability framework established by articles 12 to 15 of the E-Commerce Directive and article 5(1) of the Information Society Directive is completed by article 8(3) of the latter Directive, which requires that:

“Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.”

According to Recital 59, rights holders should have the possibility of applying for such an injunction “even where the acts carried out by the intermediary are exempted under Article 5”.¹³³ Similarly, Recital 45 of the E-Commerce Directive states that this Directive’s limitations of intermediary liability shall not affect the possibility of injunctions of any kind, such as orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or disabling access to it.¹³⁴ Further, article 8(3) of the Information Society Directive is left unaffected by the more recent Enforcement Directive.¹³⁵ Accordingly, even if their activities are strictly confined within the scope of article 5(1) of the Information Society Directive and within the requirements of articles 12 to 15 of the E-Commerce Directive, ISPs may still have to respond to an injunction instituted against them pursuant to article 8(3) of the Information Society Directive. This is illustrated by a recent Belgian court decision, stating that the national exoneration of liability for access providers did not prevent an injunction to take place.¹³⁶ However, this special regulation of injunctions is without prejudice to any of the other sanctions and remedies available.¹³⁷ The Danish Supreme Court came to a similar conclusion in another case.¹³⁸

2.2.3.5 *Article 5(1) in practice*

A small-scale survey conducted among ISPs suggests that intermediaries have little interest in or little concrete knowledge of the regulations of articles 5(1) and 8(3) of the Information Society Directive. To the extent that ISPs are familiar with the Community regulation of their liability as

which they transmit or store.

¹³² Bechtold, in Dreier/Hugenholtz 2006, p. 371.

¹³³ See also the Statements of the Council’s reasons, p. 13 (Para 49).

¹³⁴ This limitation is also laid down in article 12(3) of the E-Commerce Directive.

¹³⁵ Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property right, O.J.E.C. L 157, 30.4.2004, art. 22 cf. Recital 23.

¹³⁶ SABAM v. Tiscali, Tribunal of 1st instance of Brussels (cessations), 26 November 2004, unpublished, RG 04/8975/A available at: http://www.droit-technologie.org/4_1.asp?jurisprudence_id=172 (visited 24 Oct. 06).

¹³⁷ Recital 59 of the Information Society Directive.

¹³⁸ Danish Supreme Court, 10 February 2006 (49/2005).

to third party content, they tend to confuse the rules laid down in article 5(1) of the Information Society Directive with those of the E-Commerce Directive. It further seems that, when confronted with the threat of a lawsuit, ISPs invoke the liability exemptions of the E-Commerce Directive rather than the limitation of article 5(1) of the Information Society Directive. In most cases, this suffices to prevent lawsuits from being initiated. Confronted directly with the different conditions of article 5(1) of the Information Society Directive, a recurring answer during the survey was that the meaning of the Directive's criteria should be clarified. For instance, when asked about the meaning of the "no independent economic significance" criterion, one ISP answered that:

"What is considered [to have] independent economic significance? Commercial actors will usually need some economic incentive to do something. It can be argued that a proxy server has an economic significance, as it will reduce the provider's cost, and as such, does have an economic significance. Storing SMS messages or email if the recipient is unreachable is another example of temporary storage that has an economic significance."

Generally, case law regarding the national implementations of article 5(1) is scarce. In two recent German court decisions,¹³⁹ paragraph 44a of the German Copyright Act (the German implementation of article 5(1)) was invoked unsuccessfully. In both cases the court ruled that the copy was not ephemeral enough to amount to a transient copy.

More recently, IFPI Denmark instated an action against the Danish ISP Tele2 concerning the Russian file-sharing Allofmp3 website. The City Court of Copenhagen ruled against Tele2 and ordered it to block all access to the site Allofmp3.com, judging that Tele2 was willingly infringing copyright if its customers use Allofmp3 to download music. Tele2 argued unsuccessfully that the temporary storing, which takes place in the router when the music files are sent via the Internet and which is completed in less than a millisecond, is so fleeting that it does not constitute a reproduction in the sense as is mentioned in section 2 of the Danish Copyright Act. The Court rejected Tele2's attempt to invoke the right of temporary reproduction under section 11a of the Danish Copyright Act, since this provision presupposes that the reproduction is based on a legal copy.¹⁴⁰ By establishing a connection between the lawfulness of a copy and the transient and incidental act of reproduction, the Danish decision strongly departs from the requirements set by the Directive. If confirmed on appeal, this decision could have very strong implications for ISPs in the future, for it clearly states that an ISP can be held liable for temporarily storing infringing data on their routers, contrary to what article 5(1)a) of the Directive prescribes.

In view of the above, does article 5(1) meet the Directive's intended objective of striking a fair balance between conflicting interests? The reference to fairness forms such a vague standard, however, that it is difficult to *prove* that it has failed. Instead, the question should be whether such a mere reference to fairness is suitable as the main thrust of such an important provision. This question should probably be answered in the negative, since a reference to fairness adds little or nothing both in terms of public policy considerations and in terms of guidance to the concrete application of the provision. Based on the above analysis of the legislative intent, one might argue that, in light of the very broad reproduction right laid down in article 2 of the Directive, another

¹³⁹ LG Braunschweig: "Online-TV-Rekorder urheberrechtswidrig" (Urt. v. 07.06.2006 - Az.: 9 O 869/06 (148)) <<http://www.affiliateundrecht.de/lg-braunschweig-tv-online-rekorder-urheberrechtswidrig-9-O-869-06.html>>; OLG Hamburg: "Streaming-Aufnahmen urheberrechtswidrig" (Urt. v. 07.07.2005 - Az.: 5 U 176/04), <<http://www.affiliateundrecht.de/olg-hamburg-streaming-aufnahmen-urheberrechtswidrig-5-U-176-04.html>>.

¹⁴⁰ Excerpt from Order by the City Court of Copenhagen in Case no. F1-15124/2006. Translated by Marie Elisabeth Pade Andersen on November 2, 2006 available at: <http://piratgruppen.org/spip.php?article750>

– subordinate – purpose of article 5(1) is to minimize legal obstacles to the lawful communication and reception/use of digital works, by carving out some acts of transient or incidental reproductions that are merely ancillary to a transmission process or a lawful use. It is evident from both clear statements in the preparatory works and the way the provision has been constructed that this objective is valid only to the extent it does not interfere with the economic interests of right holders.¹⁴¹ The clearest expression of this *hierarchy of objectives* is the fact that, according to article 5(1), a temporary reproduction no matter how ancillary or technically imperative still falls within the scope of the reproduction right, if it has a separate economic significance.

2.3 Impact of limitations on online business models

The attempt to harmonise limitations on copyright and related rights in the Information Society Directive has proven to be a highly controversial issue, which explains in large part the delay experienced not only in the adoption of the Directive itself, but also in its implementation by the Member States. The difficulty of choosing and delimiting the scope of the limitations on copyright and related rights that would be acceptable to all Member States also proved to be a daunting task for the drafters of the Information Society Directive. Between the time when the Proposal for a directive was first introduced in 1997 and the time when the final text was adopted in 2001, the amount of admissible limitations went from seven to twenty-three. Article 5 of the Directive is divided into five paragraphs: a first paragraph concerns a mandatory exception regarding transient and incidental acts of reproduction (see section 2.2.3 above); a second contains five optional limitations to the right of reproduction; a third paragraph sets out fifteen optional limitations to the rights of reproduction and communication to the public; a fourth paragraph allows Member States, where they provide for a limitation to the right of reproduction, to provide for a similar limitation to the right of distribution; and a fifth paragraph codifies the rule otherwise known as the “three-step test”.¹⁴²

The regime established by the Information Society Directive leaves Member States ample discretion to decide if and how they implement the limitations contained in article 5 of the Directive. This latitude not only follows from the fact that all but one of the twenty-three limitations listed in the Directive are optional¹⁴³, but more importantly from the fact that the text of the Directive does not lay down strict rules that Member States are expected to transpose into their legal order. Rather, articles 5(2) to 5(5) of the Directive contain two types of norms: one set of broadly worded limitations, within the boundaries of which Member States may elect to legislate; and one set of general categories of situations for which Member States may adopt limitations.¹⁴⁴ Moreover instead of simply reproducing the wording of the Directive, most Member States have also chosen to interpret the limitations contained in the Directive according to their own traditions. The outcome is that, as the country reports in Part II of this study show, Member States have implemented the provisions of articles 5(2) to 5(5) of the Directive very differently, selecting only those exceptions that they consider important.

In this context, the question arises whether the norms contained in articles 5(2) to 5(5) of the Directive are capable of contributing to the creation of an environment in which rights owners

¹⁴¹ See: Explanatory Memorandum of the Proposal, with accompanying text (“The purpose of Article 5(1) is to exclude from the scope of the reproduction right certain acts of reproduction which are dictated by technology, *but which have no separate economic significance of their own*” (emphasis added).

¹⁴² See IViR Study on the Recasting of Copyright and Related Rights for the Knowledge Economy, pp. 69 et seq.

¹⁴³ On the exception of article 5(1) of the Directive, see section 2.2.3 *supra*.

¹⁴⁴ M. Senftleben, *Copyright, Limitations and the Three-Step-Test*, The Hague, Kluwer Law International, 2004, Information Law Series No. 13.

and other content providers feel confident enough to invest in online services with respect to copyrighted material. To foster the deployment of online business models, the rules pertaining to the limitations on copyright and related rights should meet five key criteria. First, they should be clear enough to guarantee a sufficient degree of legal certainty for investments to take place. Moreover, since online services are by their very nature a cross border endeavour, the rules laid down in the Information Society Directive should ideally be consistent with international norms and lead to an acceptable degree of harmonisation across the European Union: the consistency of norms at the international and regional levels ensure a level playing field for all economic players. Also, in view of the constant evolution of the online environment, the limitations laid down in articles 5(2) to 5(5) of the Directive should be capable of adapting to changes in the technology and the market situation. Finally, it should be noted that limitations are but one tool in the hands of lawmakers for defining the scope of the copyright protection, and that as such, they should contribute in establishing a balance of interests between rights owners and users.

In the following pages, we analyse the norms laid down in articles 5(2) to 5(5) of the Directive in order to find out how the limitations on copyright and related rights affect the development of online business models. To this end, we first place the regime of limitations established by the Directive in context, discussing how the limitations contained therein generally relate to the relevant international norms, to the Internal Market and the digital environment. Next, we consider whether the norms laid down in the Directive have led to sensible degree of harmonisation across the European Union. Finally, we study the possible role that the three-step-test contained in article 5(5) of the Directive could play to guarantee the sustainable character of the limitations on copyright and related rights, and to preserve along with the other limitations listed in articles 5(2) to 5(4) of the Directive the balance of interests between all parties concerned.

A comprehensive review of the implementation of each limitation by the Member States appears in the country reports in Part II of this study. An analysis of the impact of every limitation included in the Directive would go far beyond the scope of this study and would only duplicate the content of the country reports. Section 2.3.2 therefore focuses on the limitations that are most likely to be invoked in the online environment or to have an impact on the respective interests of rights owners and users. Particular attention is paid to the news reporting exceptions, as well as to the limitations to the benefit of educational institutions, libraries, and disabled persons. Note that at the express request of the European Commission, a discussion of article 5(2)b) of the Directive on private copying (and levies) remains outside of the scope of this study. Although the limitations on quotations, parody, and public speeches are of fundamental importance in the information society, since they safeguard the users' freedom of expression as guaranteed by article 10 of the European Convention on Human Rights, they will not be examined in detail below.¹⁴⁵ The main reason for this is that, contrary to other limitations recognised in the Information Society Directive, these limitations have essentially the same scope whether they are invoked online or offline and that, but for some exceptions, they have remained unchanged following the transposition of the Directive.

Our analysis is based on the results of Part II as well as on the legal commentaries, the relevant decisions of the courts and the outcome of the interviews that Berlecon Research conducted with content providers, rights holders and users. This section will show that the implementation of the provisions on limitations in the Information Society Directive did not yield the expected degree of harmonisation across the European Union and that, as a consequence, there still exists some uncertainty for the stakeholders regarding the extent of permissible acts with respect to copyright protected works. Our conclusions and recommendations on this subject appear in section 2.4 below.

¹⁴⁵ See : C. Geiger, *Droit d'auteur et droit du public à l'information, approche de droit comparé*, Paris, Litec, 2004.

2.3.1 *Limitations in context*

Even in countries like France and Germany, where the copyright regimes are strongly rooted in natural law principles, the notion that the law must preserve a balance between the interests of authors and those of users is generally accepted. The safeguard of fundamental rights and freedoms, more particularly the users' freedom of expression and right to privacy, and the need to promote the dissemination of knowledge and culture constitute the two main justifications for the adoption of limitations on copyright. The need to preserve a balance of interests within the copyright regime is even reflected in the Preamble to both WIPO Internet Treaties, where Contracting Parties: 'Recogniz[e] the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention'. Nevertheless, relatively few limitations on copyright can be found in the relevant international instruments. If harmonisation efforts at the international level have so far remained mostly unsuccessful, it is probably due to the fact that many limitations on copyright and related rights are intrinsically connected to the cultural and social identity of a country and that, consequently, a broad, international consensus on the adoption of specific limitations is very difficult to achieve. The same remarks holds true in the area of neighbouring rights, where the limitations on the rights of performers, phonogram producers and broadcasting organisations are usually directly inspired by the limitations on copyright.¹⁴⁶

The limitations listed in the Berne Convention of 1971 are in fact the result of serious compromise on the part of national delegations – between those that wished to extend user privileges and those that wished to keep them to a strict minimum – reached over a number of diplomatic conferences and revision exercises. The Berne Convention establishes a set of minimum standards of copyright protection for foreign right holders that Union Members must respect when adopting limitations on copyright in their national legislation. The Berne Convention contains six rather well defined limitations that Contracting Parties are free to implement pertaining to public speeches, quotations, uses for teaching purposes, press usage and ephemeral recordings by broadcasting organisations. In addition, any limitation to the right of reproduction must comply with the requirements of article 9(2) of the Convention.¹⁴⁷

According to article 2*bis*(2) of the Berne Convention, the countries of the Union are free to determine the conditions under which lectures, addresses and other works of the same nature which are delivered in public may be reproduced when such use is justified by the informatory purpose. Pursuant to article 10(1) of the Berne Convention, quotations may be taken from any category of works, as long as they are made from works that have already been made available to the public. No element of measure regarding the length of allowable quotations was inserted in the text of the Berne Convention: quotations must simply be “compatible with fair practice” and “not exceed that justified by the purpose”¹⁴⁸. Article 10(2) of the Convention allows the “utilisation of works by

¹⁴⁶ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, signed in Rome in 1961 [hereinafter the Rome Convention 1961]. Article 15 of the Rome Convention allows Contracting Parties to provide for limitations in respect of private use; use of short excerpts in connection with the reporting of current events; ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts; and use solely for the purposes of teaching or scientific research.

¹⁴⁷ Art. 13 of the Berne Convention also allows Contracting Parties to determine conditions on the exercise of mechanical reproduction rights; whereas art. 11*bis* does the same for the exercise of broadcasting and other rights. Since these limitations have in effect been abrogated under the Information Society Directive, we will not analyse them any further. Note that while this section primarily concerns the limitations on copyright, comparable remarks can be formulated with respect to the limitations on related rights as provided for under the Rome Convention on for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, signed in Rome on October 26, 1961. See: Ricketson/Ginsburg 2005, p. 758.

¹⁴⁸ L. Guibault, “The Nature And Scope Of Limitations And Exceptions To Copyright And Neighbouring Rights With Regard To General Interest Missions For The Transmission Of Knowledge: Prospects For Their

way of illustration” for teaching purposes if it is made for the purposes of teaching, if it is “justified by the purpose” and if it is “compatible with fair practice”. Illustrations can be made by means of publications, broadcasts or sound and audio-visual recordings, provided that they fulfil the listed requirements.

Article 10^{bis}(1) lets the countries of the Union free to decide whether to permit the reproduction of articles published in newspapers or periodicals on current economic, political or religious topics and the broadcast works of the same nature.¹⁴⁹ The permissible acts not only include the reproduction of articles, but also the broadcasting of works and their communication to the public by wire. To be lawful, the material reproduced, broadcast or communicated to the public by wire must be qualified as “current” and must relate to economic, political or religious topics.¹⁵⁰ Indication of the source of the work constitutes the only condition for compliance with this provision. Article 10^{bis}(2) leaves it to the countries of the Union to determine the “conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public”. Finally, according to article 11^{bis}(3) second sentence, it is “a matter for legislation in the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts. The preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorized by such legislation”.

Apart from these six limitations, the Berne Convention establishes in article 9(2) a general norm, otherwise known as the “three-step-test”, for the recognition of limitations on the reproduction right. This norm, which was first introduced in the Berne Convention during the Stockholm Revision Conference of 1967, has in fact become the international standard for the adoption and application of limitations on copyright and related rights. In fact, the negotiations leading to the adoption of the recent international instruments failed to result in the recognition of any new limitation other than the three-step test. Article 13 of the TRIPS Agreement extends the application of the three-step test to all minimum rights recognised under the Treaty. Articles 10 of the WCT and 16 of the WPPT similarly apply the Berne formula to the minimum rights established by their respective texts.

The test provides for the right of a Contracting Party “to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author”. All reproductions permitted under article 9(2) of the Berne Convention must be for a specific purpose and conform to the two conditions set out in the article. According to the WTO Panel’s decision in the “Fairness in Music Licensing Act” case¹⁵¹, a proposed exception meets the first step if it is both clearly defined and narrow in its scope and reach, without reference to any underlying public policy justification.¹⁵² An exception does not conflict with the normal exploitation of the work, if it does not interfere with potential or actual uses or modes of extracting value from a work; and it does not unreasonably prejudice the legitimate interests of the author, if the

Adaptation To The Digital Environment”, UNESCO, *e-Copyright Bulletin*, October-December 2003, p. 7.

149 Berne Convention, art 10^{bis}(1) reads as follows: “It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire, of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed”.

150 Ricketson/Ginsburg 2005, p. 800.

151 Report of the Panel, US – Section 110(5) Copyright Act, 15 June 2000, document WT/DS/160/R.

152 Ricketson/Ginsburg 2005, p. 764.

prejudice to the author's interests is proportionate to the objectives underlying the limitation.¹⁵³ Unreasonable prejudice may be avoided by the payment of equitable remuneration under a statutory license.

Historically, the limitation of article 9(2) of the Berne Convention has been implemented at national level to allow reproductions for private use, for preservation purposes in libraries and archives, for industrial and commercial purposes, for research and scientific purposes, for judicial and administrative purposes, for parody, and for the benefit of disabled people.¹⁵⁴ Over the years, the international community has also accepted that in a number of situations where exceptions to particular rights, although not expressed in the international instruments, could be nevertheless implied. The so-called "minor reservations" or "minor exceptions" doctrine is being referred to in respect of the right of reproduction, the right of public performance and certain other exclusive rights.¹⁵⁵ As their name "minor reservations" indicate, these implied limitations usually concern *de minimis* uses that do not affect the copyright owner, such as use of works during religious ceremonies, or use by military bands. During the Stockholm Conference on the Revision of the Berne Convention, the delegations invoked the "minor reservations" doctrine to justify the maintenance in their national laws of existing exceptions of minor importance.

When came the time to devise the limitations on copyright and related rights in the Information Society Directive, the European legislator could therefore rely only on the six express limitations contained in the Berne Convention and on the open norm of the three-step test. Indeed, to the exception of the limitations on neighbouring rights in the Rental and Lending Right Directive¹⁵⁶ which follow the international norms set by the Rome and the Berne Conventions and the specific limitations included in the Computer Programs and Database Directives¹⁵⁷, the existing *acquis communautaire* with respect to limitations offered little additional concrete hold upon which the Commission could base new limitations.¹⁵⁸ Accordingly, following the specific wording of the Berne and of the Rome Conventions, Member States are allowed to adopt limitations on the rights of reproduction and communication to the public in respect of the use of public speeches (art. 5(3)f)), for quotation purposes (art. 5(3)d)), for teaching and scientific research purposes (art. 5(3)a)), and for press usage (art. 5(3)c)), as well as a limitation on the reproduction right in respect of ephemeral recordings of works made by broadcasting organisations (art. 5(2)d)). Other limitations in the Directive are inspired by the internationally recognised limitations based on article 9(2) of the Berne Convention that already existed in the national legislation of the Member States. This is the case of the limitations permitting reproductions by means of reprography (art. 5(2)a)), for private purposes (art. 5(2)b)), for preservation purposes in libraries and archives (art. 5(2)c)), as well as uses for the benefit of people with a disability (art. 5(3)b)), for judicial and administrative purposes (art. 5(3)e)), or for purpose of caricature, parody or pastiche (art. 5(3)k)).

Only a very small number of limitations included in the Directive seem to be the result of a specific attempt to adapt the system of limitations to the digital environment. Among them are the limits put on the private use exception (art. 5(2)b)), according to which such reproductions

¹⁵³ Senftleben 2004, p. 236.

¹⁵⁴ Ricketson/Ginsburg 2005, p. 783.

¹⁵⁵ Report of the Panel, US – Section 110(5) Copyright Act, 15 June 2000, document WT/DS/160/R, para. 6.33 et seq.

¹⁵⁶ Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ No. L 346/61, 27 November 1992.

¹⁵⁷ Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ No. L 122/42, 17 May 1991; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ No. L 77/20, 27 March 1996.

¹⁵⁸ See: IViR Study on the Recasting of Copyright and Related Rights for the Knowledge Economy, p. 57 et seq.

may only be “made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in article 6 to the work or subject-matter concerned”.¹⁵⁹ Another restriction established with a view to taking account of the impact of limitations on the rights owners’ interests is the fact that the library and archive exception (art. 5(2)c)) only applies with respect to the right of reproduction, and not to the right of communication to the public. Yet another limitation apparently incorporated in the Directive to meet the needs of the digital environment deals with the use of works or other subject matter by communication or making available, for the purpose of research or private study, by individual members of the public by dedicated terminals on the premises of publicly accessible establishments (art. 5(3)n)). These two provisions will be analysed in greater detail in the following subsection.

The Information Society Directive foresees the possibility to pay remuneration to the rights holder for certain of the uses covered by the limitations of article 5. As finally adopted, the Directive provides for a right to ‘fair compensation’ in three instances: for reprographic reproduction (art. 5.2 (a)), for private copying (art. 5.2(b)), and for reproduction of broadcast programs by social institutions (art. 5.2(e)). Apart from these three limitations, Recital 36 states that the Member States may provide for fair compensation for rights holders also when applying the optional provisions on exceptions or limitations, which do not require such compensation. According to Recital 35, the level of ‘fair compensation’ – an unfamiliar notion in copyright law – can be related to the possible harm to the rights holders resulting from the act in question. In cases where rights holders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. By introducing the notion of ‘fair compensation’ the framers of the Directive have attempted to bridge the gap between those (continental-European) Member States having a levy system that provides for ‘equitable remuneration’, and those (such as the United Kingdom and Ireland) that have so far resisted levies altogether.¹⁶⁰

Moreover, according to article 5(2)b) of the Directive, Member States must also take into account the application or non application i.e. the degree of use (Recital 35) of technological measures, when providing for fair compensation in the context of the private use exception as permitted under Article 5(2)b). The Directive expects Member States to arrive at a coherent application of the exception without providing any additional guideline. While two other limitations in the Directive also provide for the payment of fair compensation to the rights owner, neither one specifies that the amount of compensation must take account of the application or non application of technological measures.

Recital 32 of the Information Society Directive specifies that the list of limitations on copyright and related rights provided in article 5 is exhaustive.¹⁶¹ Nevertheless, Member States are allowed, pursuant to article 5(3)o), to provide for limitations for certain uses of minor importance where limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community. Clearly, the “grand-father clause” of article 5(3)o) reflects the principles of subsidiarity and proportionality, and removes some of the rigidity inherent to an exhaustive list of limitations.¹⁶² But this single concession made to the principle of exhaustiveness of the list of limitations is of

¹⁵⁹ At the express request of the European Commission, this report does not touch on the question of the private copying exception.

¹⁶⁰ Bechtold in Dreier/Hugenholtz 2006, p. 373.

¹⁶¹ On the exhaustive character of the list of limitations in the Information Society Directive see, IViR Study on the Recasting of Copyright and Related Rights for the Knowledge Economy, p. 60.

¹⁶² Walter 2001, p. 1065.

little practical use for the online environment, since it is confined to the analogue world.¹⁶³

Apart from this express “grand-father” clause, the following limitations in articles 5(2) and 5(3) of the Directive could probably be qualified as “minor reservations”, since they clearly have a *de minimis* character:

- 1) reproduction of broadcasts made by social institutions (art. 5(2)e));
- 2) use for purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings (art. 5(3)e));
- 3) use during religious celebrations or official celebrations organised by a public authority (art. 5(3)g));
- 4) use of works, such as architecture or sculpture, made to be located permanently in public places (art. 5(3)h));
- 5) incidental inclusion of a work or other subject-matter in other material (art. 5(3)i));
- 6) use for the purpose of advertising the public exhibition or sale of artistic works (art. 5(3)j));
- 7) use in connection with the demonstration or repair of equipment (art. 5(3)l)); and
- 8) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building (art. 5(3)m).

Since most of the *de minimis* limitations mentioned above are unlikely to find any meaningful application in the digital environment or to have any impact on the Internal Market, article 5(3)o) would probably have been broad and flexible enough to encompass them all. The situation is different with respect to the limitation allowing the reproduction by reprographic means (art. 5(2)a)), which does not focus on the technique used but rather on the result obtained, which has to be in paper form. This, clearly, would not apply to the digital environment. However, this limitation can certainly have an impact on the functioning of the Internal Market for the Commission stressed, in the Explanatory Memorandum, that the exemption allowing the implementation of reprography regimes is left as an option in the Proposal, “despite existing differences between Member States that provide for such exemptions, as their effects are in practice rather similar”. The Commission then went on to say that “the Internal Market is far less affected by these minor differences than by the existence of schemes in some Member States and their inexistence in others” and that “those Member States that already provide for a remuneration should remain free to maintain it, but this proposal does not oblige other Member States to follow this approach”.¹⁶⁴ This fact puts the limitation on reprographic reproductions in a class of its own.

In sum, almost half of the limitations included in articles 5(2) and 5(3) are not likely to be relevant for the deployment of online business models or have an impact on the Internal Market. While the remaining limitations in the Directive can generally be said to comply with the requirements of the Berne and Rome Conventions and of the WIPO Treaties, the question is whether the norms laid down in the Directive are sufficiently clear to foster legal certainty among economic players and whether they have actually produced rules that yield the same substantive result in every Member State.

2.3.2 *Actual harmonisation of the limitations*

From the analysis of the previous section, we conclude that a number of limitations included in the Directive would qualify as “minor reservations”. Since these limitations have, in practice, hardly any influence on the deployment of online business models or on the workings of the

¹⁶³ S. Dusollier, *Droit d’auteur et protection des oeuvres dans l’univers numérique*, Brussels, Larcier, 2005, p. 430.

¹⁶⁴ European Commission, Explanatory Memorandum on the Proposal for a Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, 10 December 1997, p. 36.

Internal Market, we will not consider them any further. Let us now consider whether the implementation of the norms laid down in articles 5(2) and 5(3) of the Information Society Directive contributes to the establishment of a coherent, balanced, and sustainable European legal framework capable of stimulating the development of online business models. An analysis of the impact of every limitation included in the Directive would go far beyond the scope of this study and would only duplicate the content of the country reports in Part II of this study. In the following pages, we concentrate on the limitations that are most likely to be invoked in the online environment and to have an impact on the respective interests of rights owners and users, namely the limitations to the benefit of libraries, archives and museums, educational institutions, disabled persons, news reporting, and for the communication of works on dedicated terminals.

2.3.2.1 Libraries, archives and museums

The digitisation and online accessibility of cultural material and digital preservation by libraries, archives and museums has received a lot of attention recently, especially in connection with the “i2010 initiative” of the European Commission. In the context of this European initiative, the European Commission conducted a public consultation during the year 2005, which was followed by the simultaneous publication of an Impact Assessment report¹⁶⁵, a Communication¹⁶⁶ and a Recommendation on the digitisation and online accessibility of cultural material and digital preservation.¹⁶⁷ The objective of the initiative is to develop digitised material from libraries, archives and museums, as well as to give citizens throughout Europe access to its cultural heritage, by making it searchable and usable on the Internet. The achievement of these goals inevitably raise copyright issues. As noted in Recital 10 of the Recommendation, only part of the material held by libraries, archives and museums is in the public domain, while the rest is protected by intellectual property rights. To what extent do the limitations included in the Information Society Directive allow libraries, archives and museums to comply with these objectives?

Article 5(2)c) allows Member States to adopt a limitation on the reproduction right in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage. This provision must be read in conjunction with Recital 40 of the Directive. From this Recital it is clear that the European lawmaker intended to restrict the application of this limitation to certain special cases covered by the reproduction right, and not to allow uses made in the context of on-line delivery of protected works or other subject-matter. Regarding acts of electronic delivery, libraries are encouraged to negotiate specific contractual arrangements with rights holders. The making of digital reproductions of works in a library’s collection for purposes of preservation however falls clearly within the ambit of this provision, since it makes no distinction between reproductions made in analogue or digital format.¹⁶⁸

As Part II of this study shows, not all Member States have implemented this optional limitation. And those that did have often chosen different ways to do it, subjecting the act of reproduction to different conditions of application and requirements. Some Member States only allow reproductions to be made in analogue format; others restrict the digitisation to certain types

¹⁶⁵ Commission of the European Communities, Commission Staff Working Document, Recommendation on the digitisation and online accessibility of cultural material and digital preservation - Impact Assessment, Brussels, SEC(2006) 1075, 24 August 2006.

¹⁶⁶ Commission of the European Communities, Communication on the digitisation and online accessibility of cultural material and digital preservation, Brussels, COM(2006) 3808final, 24 August 2006.

¹⁶⁷ Commission of the European Communities, Recommendation 2006/585/EC on the digitisation and online accessibility of cultural material and digital preservation O.J.C.E. L 236/28, 31 August 2006.

¹⁶⁸ Krikke, *Het bibliotheekprivilege in de digitale omgeving*, Deventer, Kluwer Law, 2000, p. 156.

of works, while yet other Member States allow all categories of works to be reproduced in both analogue and digital form.¹⁶⁹ In addition, Member States have identified different beneficiaries of this limitation. Some have simply replicated the wording of article 5(2)b), while others have limited its application to public libraries and archives to the exclusion of educational institutions. The prevailing legal uncertainty regarding the manner in which digitised material may be used and reproduced, is likely to constitute a disincentive to digitisation. This militates especially against cross-border exchange of material, and may discourage cross-border cooperation.¹⁷⁰ However, as already mentioned in the Staff Working Paper of 2004, libraries face another problem by the fact that pursuant to article 1(2) of the Directive, which leaves the provisions of earlier directives unaffected, the limitation of article 5(2)c) of the Information Society Directive does not apply to databases.¹⁷¹ This may create severe practical obstacles for the daily operations of libraries.

Case 2 – Subito

The legal framework established in the Member States pursuant to the implementation of the Information Society Directive has had a noticeable impact on the activities of public libraries, as well as other non-profit document delivery services. The most telling example is undeniably that of Subito, a German non-profit document delivery service that, in cooperation with a network of university libraries in and outside Germany, reproduces scientific articles at the request of individual end users worldwide and sends them per mail, fax, email, active or passive FTP. In June 2004, the German Publishers and Booksellers Association together with the International Association of Scientific Technical and Medical Publishers instituted a copyright infringement action against Subito and one participating university library. The plaintiffs argued that, contrary to the situation prevailing in the *Kopienversanddienst* case,¹⁷² where documents were sent to users by analogue means, the electronic document delivery by Subito did not fall within the ambit of the statutory licence of article 54a of the German Copyright Act. The defendants contended that Subito's activities amounted to a technically advanced form of inter-library loan authorised pursuant to articles 17(2) and 27(2) of the Copyright Act. They also argued that none of the articles reproduced in the context of the service was made available to the public in the sense of article 19a of the Act, since only the person who had made the request was given access to the articles via a password. The District Court of Munich granted the action in part, making a distinction according to the country where the orders and deliveries were made, and to the delivery modes. The reproduction of scientific articles and their delivery within Germany is covered by the statutory licence of article 53(2)(4) of the Act, as long as the copies were transmitted to the individual user who made the request for his own personal use, to the exception of any third party. However, where an order comes from or is delivered outside of Germany, such act must fall under a limitation not only in Germany, but also in the country of destination.¹⁷³ On this last part, the Court reserved judgement, declaring that the case was not sufficiently ripe to be decided.

The Subito case has become a test case in Germany concerning the reproduction and delivery of

¹⁶⁹ U. Gasser and S. Ernst, *Best Practice Guide – Implementing the EU Copyright Directive in the Digital Age*, s.l., Open Society Institute, December 2006, p. 16.

¹⁷⁰ See : European Commission, '2010: Digital Libraries', SEC (2005) 1194, Brussels, 30 September 2005, p. 9.

¹⁷¹ Staff Working Paper 2004, p. 13.

¹⁷² BGH, 25 February 1999, GRUR 1999, 707 (*Kopienversanddienst*).

¹⁷³ Landgericht München, 15 December 2005, Az.: 7 O 11479/04.

scientific articles by libraries and non-profit document delivery services. The arguments put forward by the parties in the context of the dispute have now been carried over to the debate around the ongoing German copyright law reform, otherwise known as the “2nd basket”.¹⁷⁴ In the Explanatory Memorandum accompanying the Proposal for Amendment Act, the German legislator noted that a revision of the limitations on copyright allowing for the delivery of articles at the request of a public library patron may be necessary in view of the most recent technological developments.¹⁷⁵ The current legislative proposal contains a provision on the use of copyrighted material by public libraries, museums and archives. Article 53a of the Proposal introduces a limitation allowing the reproduction of articles from newspapers and periodicals and their communication to public library patrons for their own private purposes, provided that the digital reproduction and the electronic delivery occur exclusively as graphic data, and not as an interactive service. In addition, equitable remuneration must be paid to the rights owners for the reproduction and the communication of their works. According to the Explanatory Memorandum, the transmission of copies to users located in Germany in the context of a document delivery service located outside Germany would also be covered by the obligation to pay equitable remuneration. This would guarantee that the provision will not be circumvented by the relocation of the document delivery service in a foreign country.¹⁷⁶ This provision is highly controversial, as shows the complaint lodged by the Association of German Book Publishers before the European Commission against the German government for failure to properly implement the Directive.¹⁷⁷ It will be interesting to see whether the Proposal for Amendment Act will remain unchanged in the final version of the act. The question is, however, whether this provision and especially the ensuing obligation to pay equitable remuneration for all services delivering documents to Germany might be seen as a barrier to the free movement of services within the European Union.

The scope of limitations in favour of public libraries, museums and archives is also a debated issue in the United Kingdom. In a letter to the European Commission, sent in a reaction to the Staff Working Paper of 2004, the British Library pointed out that one issue of great concern relates to the lack of a harmonised implementation of copyright fees within and between individual Member States.¹⁷⁸ More recently, the British Library published a Manifesto,¹⁷⁹ in which it acknowledged the challenge of updating the copyright framework while ensuring that the balance required for a thriving creative economy and education sector is maintained in the digital age, so as to maintain a competitive advantage in a changing international environment. Relevant to this part of our study is the recommendation made by the British Library that limitations and exceptions be explicitly extended to the digital environment as is the case in international law, and that copying for preservation purposes be extended to all copyrightable works as is the case in many countries. Indeed, the UK Copyright, Designs and Patents Act of 1988 (CDPA) does not permit copying of sound, television programme and film items for preservation, as a result of which the United Kingdom is losing a large part of its recorded culture. The argument was heard by the Gowers Review who included a recommendation in his report, according to which section

¹⁷⁴ Gesetzentwurf der Bundesregierung, Entwurf eines Zweiten Gesetzes zur Regelung des Urheberrechts in der Informationsgesellschafts, Deutscher Bundestag, 16. Wahlperiode, Druksache 16/1828, 15 June 2006.

¹⁷⁵ Id., p. 28.

¹⁷⁶ Id., p. 62.

¹⁷⁷ ‘Börsenverein legt Beschwerde gegen die Bundesrepublik Deutschland bei EU-Kommission ein’, available at <http://www.urheberrecht.org/news/1928/>; U. Rosemann, ‘Kopienlieferung an Bibliotheken und berechtigte Personen’, in N. Forgo (ed.), *Urheberrecht in digitalisierter Wissenschaft und Lehre*, TIB/UB Hannover, UrheberrechtTagung, 2006, p. 31.

¹⁷⁸ British Library, Response to Consultation on Staff Working Paper 2004, p. 1.

¹⁷⁹ British Library, “Intellectual Property: A Balance – The British Library Manifesto”, London, September 2006.

42 of the CDPA should be amended to permit libraries to copy the master copy of all classes of works in their permanent collection for archival purposes and to allow further copies to be made from the archived copy to mitigate against subsequent wear and tear.¹⁸⁰

Interviews conducted with representatives from the copyright industries, public institutions and consumer groups have revealed that, in view of the uncertainty left by copyright law, copyright owners are increasingly resorting to contractual terms and conditions in order to more clearly delineate the scope of what libraries and archives purchasing or licensing the copyright material may do with the works in their collections. Libraries are increasingly limited by the rightsholders in what they can do with the content, although certain copyright limitations would normally apply. The statutory limitations are in many cases overridden by contract law. To summarise, the lack of clarity with regard to the limitations on copyright and related rights lead to a multitude of different individual initiatives from the sides of rightsholders, libraries, and publishers. This contradicts the value proposition of digital libraries, i.e. to make knowledge broadly and easily available over the Internet.

2.3.2.2 *Illustration for teaching*

Article 5(3)a) of the Information Society Directive allows the use of works for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved. As it is the case of most, if not all, optional limitations contained in articles 5(2) and 5(3) of the Information Society Directive, this provision has been implemented, if at all, quite differently from one Member State to the next. As the analysis in Part II of this study demonstrates, the limitation has been implemented in some Member States as an exemption; while in others, the use of works for educational or research purposes is subject to the payment of a fair compensation to the rights holders. In some Member States, the limitation to the benefit of educational institutions is worded in very narrow terms. In yet other Member States, like the Netherlands, the law authorises educational institutions, under specific conditions, to make course packs (*bloemlezingen*) and anthologies for teaching purposes. Sharp variations exist in national laws regarding the length of the excerpts that educational institutions are permitted to reproduce from articles and books, and regarding the possibility to make this material available to students through distance learning networks.¹⁸¹

As an illustration of the vastly diverging ways these provisions could be implemented, let us mention the highly criticised article 52a of the German Copyright Act.¹⁸² Germany implemented article 5(3)a) of the Directive by granting an exemption from copyright, for specified non-profit purposes, to “privileged institutions”, meaning schools, higher-education institutions, and public research organizations. According to the first paragraph of this provision, only “small parts” of copyrighted material or single articles from newspaper or periodicals may be used strictly as illustration for teaching purposes in non-commercial privileged institutions involving ‘a defined, limited, and small’ number of students or researchers. The second paragraph of this article subjects the use works that are created for educational purposes and of cinematographic works to the prior authorisation of the rights holder, and in the last case only after the expiration of two years from the date of first exploitation of the film in the theatres. Fair compensation must be paid to the rights owners. Academics argue that this provision gives them the same rights over copyrighted material in digital form as they already have over such material in printed form.

¹⁸⁰ Gowers Review 2006, p. 65.

¹⁸¹ S. Ernst and D.M. Haeusermann, *Teaching Exceptions in European Copyright Law – Important Policy Questions Remain*, Berkman Center for Internet & Society, Harvard Law School, Research Publication No. 2006-10, August 2006, p. 16.

¹⁸² Schippan 2003, p. 381.

Article 52a of the German Copyright Act is highly contested, among others by the Association of German publishers which contends that this provision is contrary to article 5(3)a) of the Directive and in violation of the German Basic Law. The Association filed a complaint in this sense before the European Commission for improper implementation of the Directive.¹⁸³ At the time of its adoption in 2003, the German Parliament provided that, to remain valid, this section of the law would have to be reviewed by Parliament and re-approved by the end of 2006. The draft Proposal for Amendment Act has been presented to the Bundestag on 15 June 2006. Not only would article 52a still be in the Act, but it would remain essentially unchanged. If enacted in its current state, the period of application of the provision would be prolonged until 31 December 2008.

With the implementation of the Information Society Directive, the French legislator ceased in the last stage of the adoption process the chance to introduce an entirely new limitation in the Intellectual Property Code with regard to educational uses. Until then all attempts to accommodate the needs of educational establishments in copyright matters had always met strong resistance from rights owners, who found support in the legal commentaries according to which such a limitation would have gone against the French *droit d'auteur* tradition.¹⁸⁴ This statutory provision will take precedence, as of 1st January 2009, over the contractual regime that had only recently been set up as a result of rather difficult negotiations between representatives of rights owners on the one side, and of the Ministry of Education on the other side. Article L. 122-5, 3^o e) of the Code allows the reproduction and the communication to the public of “small parts” of copyrighted material or single articles from newspaper or periodicals may exclusively as illustration for teaching purposes in non-commercial privileged institutions involving a public composed primarily of students, teachers or researchers, who are directly concerned. This provision excludes works created for educational purposes and foresees the payment of fair compensation to the rights holder.

In the UK, the Gowers report highlights the need to ensure that the limitations provided under the CPDA allow educational establishments to take advantage of new technology to educate pupils regardless of their location. As the report explains:

“In 2003 the exception was modified so that educational establishments could allow students on the premises to see the programme in their own time. However, the exception does not extend to situations where students are not on the premises of the educational establishment. This means that distance learners are at a disadvantage compared with those based on campus and thus these constraints disproportionately impact on students with disabilities who may work from remote locations.”¹⁸⁵

The ongoing discussions around the scope of the limitations on educational use in the Member States illustrate that the line between what is permissible and what is not is difficult to draw on the basis of the current wording of the national provisions transposing the Directive. The question also arises whether the legal framework is capable of adapting to the constant technological developments so as to allow educational institutions to step into the 21st century and engage in distance education programs. As Ernst and Haeusermann put it, a “sclerotic

¹⁸³ Börsenverein des Deutschen Buchhandels, “Stellungnahme zu den Auswirkungen von § 52a Urheberrechtsgesetz“, Frankfurt, 3 January 2005, available at http://www.boersenverein.de/global/php/force_dl.php?file=%2Fsixcms%2Fmedia.php%2F686%2FAuswirkungen%2520von%2520%25A7%252052a%2520Urheberrechtsgesetz.pdf

¹⁸⁴ A. Lucas, *Droit d'auteur et numérique*, Paris, Litec, 1998, p. 219.

¹⁸⁵ Gowers Review 2006, para. 4.17.

regime would have great potential to compromise the quality of higher education in Europe and elsewhere, and therefore be contradictory to the official policy of the EU”.¹⁸⁶

2.3.2.3 *Disabled people*

Although the limitation on copyright to the benefit of physically impaired individuals has not generated much public debate, its application in practice leads to certain difficulties in some Member States. Blind and partially sighted people need to be able to modify the way in which information is presented in order to access it. This may involve enlarging text or graphics, turning text into speech, describing graphical material, or producing a tactile output. People suffering from dyslexia may need to have text put into speech, while the hearing impaired may need audiovisual works to be sub-titled. Article 5(3)b) of the Information Society Directive allows Member States to adopt a limitation on the rights of reproduction and communication to the public in respect of “uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability”. The European legislator was not very loquacious regarding the possible shape of a limitation concerning the disabled. As long as the limitation meets the requirements of the three-step-test and provided that the use is non-commercial in nature and directly linked to the disability, the limitation may take any form that the national legislator will give it. This limitation, like most others, is optional and it has therefore been implemented, if at all, in numerous different ways by the Member States. In addition, as already mentioned in the Staff Working Paper of 2004, disabled people face another problem by the fact that pursuant to article 1(2) of the Directive, which leaves the provisions of earlier directives unaffected, the limitation of article 5(3)b) of the Information Society Directive does not apply to databases.¹⁸⁷

As Part II illustrates, article 5(3)b) of the Information Society Directive has been transposed in a wide range of different ways. Several Member States have incorporated the provision of the Directive almost word-by-word into their national legislation. For example, article 15*i* of the Dutch Copyright Act declares that “reproduction and publication of a literary, scientific or artistic work exclusively intended for handicapped individuals, provided it is directly related to the handicap, is not of a commercial nature and is necessary because of the handicap, shall not be regarded as an infringement of copyright.” This provision foresees the payment of fair compensation to the rights holders. Article 45*a* of the German Copyright Act is essentially to the same effect. By contrast, other Member States have attached very strict conditions of exercise to this limitation. Article L. 122-5, 7° of the French Intellectual Property Code is a good illustration of this legislative approach, for it grants persons suffering from a range of disabilities (“*des personnes atteintes d’une ou de plusieurs déficiences des fonctions motrices, physiques, sensorielles, mentales, cognitives ou psychiques*”) the right to “consult” works for private purposes only in the premises of “authorised” legal entities or publicly accessible establishments, like libraries, museums and archives. This provision is further subject to extensive requirements of evidence and control regarding the extent of the handicap of the individual claiming the application of the limitation, as well as effectiveness of the measures put in place by the establishment offering individuals the means to benefit from the limitation. On the other hand, the French Act expressly applies this limitation to databases.¹⁸⁸ This provision is completed by article L. 311-8, 3° of the Code which provides for a reimbursement to the benefit of disabled persons of the remuneration paid for acts of private copying. However, the French Code foresees no payment of fair compensation to the rights owners. In comparison to the French Act, articles 31A and B of the Copyright Act of the

¹⁸⁶ Ernst/Hacusermann 2006, p. 21, referring to the Lisbon Agenda of 2000.

¹⁸⁷ Staff Working Paper 2004, p. 12.

¹⁸⁸ Lucas/Sirinelli 2006, p. 310.

UK recognise a limitation only to the benefit of the visually impaired.¹⁸⁹

In view of the vagueness of the terms used in article 5(3)b) of the Directive, national implementing provisions not only end up setting out diverging conditions of application, but also being addressed to different individuals or entities. Some legislative regimes designate particular organisations as beneficiaries of exceptions. For instance, it is not entirely clear from the Dutch and German provisions whether they are directed to the physically impaired themselves or to any other legal or physical person engaged in the reproduction and publication of works for disabled persons, provided that they meet the criteria of the law. On the other hand, the French provision would seem to be directed primarily at the disabled individuals themselves, via the institutions that make the works available on their own premises and subject to the strict conditions of application. These divergences in the national legislation are not likely to be conducive to the development of viable business models aimed at the production and distribution of digital content that can cater to the needs of the physically impaired, for neither the rights owners nor the beneficiaries know where they stand regarding the boundaries set by this limitation. The emphasis should be on the non-commercial nature of the activity – and on its compliance with the “three-step test” – rather than on the status of the person or entity carrying it out.

Interviews conducted by Berlecon Research confirm that businesses are reluctant to engage in this type of activity, for it complicates their operations for a relatively limited group of consumers.¹⁹⁰ This issue can be expected to become more relevant in the near future, when a critical mass of individuals claiming exemption will be reached. While not being granted exceptions by rightsholders, self-help initiatives are often blocked based on copyright infringement claims. One example is Bezmonitor.com, which is a website operated by a blind person in order to provide information and tools for visually impaired users of the Internet and digital media. The site also included a number of texts in the ASCII format, which is particularly accessible by voice reading software. The collection included copyrighted texts published by Trud, a Bulgarian publisher owned by a German parent. Under threat of a claim of copyright infringement, Bezmonitor was compelled to remove these texts from its website.¹⁹¹

2.3.2.4 News reporting

Article 5(3)c) of the Information Society Directive allows Member States to provide for a limitation allowing reproduction of articles from newspapers and periodicals to take place under certain conditions without the prior authorisation of the rights owner. This limitation is directly inspired by article 10*bis* of the Berne Convention and has, in many Member States, a long history. Article 5(3)c) of the Directive actually combines both sub-paragraphs of article 10*bis* of the Berne Convention on the making of press reviews and the reporting of current events. According to the first part of this provision, Member States may provide for exceptions in respect of the “reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated (...)”. The wording of this part of article 5(3)c) corresponds roughly to the formulation of article 10*bis*(1) of the Berne Convention. The second part of article 5(3)c) corresponds to article 10*bis*(2) of the Berne Convention on the use of works in the context of news reporting.

As Part II of this study demonstrates, the optional limitation provided in article 5(3)c) of the Directive has been implemented in different ways by the Member States. The review of the

¹⁸⁹ Copyright (Visually Impaired Persons) Act 2002, which came into force on 31 October 2003.

¹⁹⁰ N. Garnett, *Automated Rights Management Systems and Copyright Limitations and Exceptions*, WIPO Standing Committee on Copyright and Related Rights, Geneva, 27 April 2006, SCCR/14/5, p. 28.

¹⁹¹ <http://protest.bloghub.org/2006/06/27/fight-for-copyrights-in-bulgaria-turns-ugly/>

implementation is made particularly difficult by the fact that article 5(3)c) of the Directive combines two distinct limitations which have different conditions of application, and which may or may not have been implemented separately by the Member States. The most striking differences in the conditions of application relate to the fact that, contrary to the press review exception, the limitation on the reporting of current events makes no reference to the possibility for a rights owner to reserve the rights on his work nor does it restrict the type of works that can be reproduced only to articles on current economic, political or religious topics. In principle, the reproduction of articles, pursuant to the first part of article 5(3)c), is only possible if it is made by a daily or weekly newspaper, under certain conditions: if the moral rights of the author are taken into account, if the source is clearly indicated, together with the indication of the author if it appears in the source and provided that the copyright is not explicitly reserved. Important variations exist in the way Member States have implemented the first part of article 5(3)c), even though the text of the provision would seem to be rather explicit. Some Member States have failed to require the mention of the source or of the author's name; others have attached the obligation to pay fair compensation; while others have included translations within the scope of the provision. Moreover, although courts are bound to interpret the provisions in their law in conformity with the text of the Directive, it is important to point out that important differences can still arise in the judicial interpretation of the provision throughout the Member States.

A narrow interpretation of the news report exception in principle restricts the possibility to reproduce newspaper articles and broadcast commentaries only by press or broadcasting entities of the same nature, provided that the copyright is not explicitly reserved. On the other hand, a broad interpretation of this limitation extends the privilege to institutions and enterprises that offer second-hand information on selected topics to their subscribers or employees in the form of collections of newspaper clippings, provided that the copyright is not explicitly reserved. In practice, whereas the exemption would normally allow only the use of articles or broadcast commentaries by the press or by broadcasting entities of the same nature, some Member States have extended through case law the application of this provision to institutions and enterprises that offer second-hand information on selected topics to their subscribers or employees in the form of collections of newspaper clippings.¹⁹² In other Member States, the courts even went so far as to allow, on the basis of this limitation, the practice developed in the digital environment that consists in scanning entire newspapers and periodicals before distributing them in the form of 'electronic press clipping services'.¹⁹³

Could the use of newspaper articles by news aggregation services like Google News fall, in the countries that have introduced such a provision, under the limitation pertaining to the use of newspaper articles by press reviews or news services? The possibility for a newspaper to reproduce articles published in other newspapers or periodicals always had an important economic component, apart from contributing to the free flow of information.¹⁹⁴ The basic idea behind this limitation is the fact that newspaper publishers and broadcasting organisations constantly borrow articles from each other, and that through this *quid pro quo*, the limitation ultimately does not affect their respective interests. If second-comers can freely reproduce articles of newspapers and periodicals without offering the original newspaper publisher with the opportunity to do the same, then the *quid pro quo* rationale underlying the limitation is put under pressure. On the other hand, distinguishing between value-added news media that 'deserve' to

¹⁹² Dutch Supreme Court, 10 November 1995, No. 15.761 (*Knipselkranten*), in *IER* 1996, p. 20 with note by Hugenholtz, p. 28.

¹⁹³ In Germany, see: BGH, decision of 11 July 2002, I ZR 255/00 (*Elektronischer Pressespiegel*), *JurPC Web-Dok.* 302/2002, para. 1-44; and VG Wort licences: http://www.vgwort.de/pre_herausgeber.php. A contrario: *Rechtbank 's-Gravenhage*, 02 March 2005 (*Uitgevers/The State*) LJN: AS8778.

¹⁹⁴ L.M.C.R. Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright*, The Hague, London, Boston, Kluwer Law International, 2002, Information Law Series No. 9, p. 58.

benefit from the exemption, and other media that do not, bears the risk of passing judgment on the social value of the media, and would therefore rest uneasily with freedom of expression. Consequently, it is uncertain whether services like Google News would be covered by the limitation of article 5(3)c) of the Directive, in the countries that have implemented it. The direct consequence of the prevailing legal uncertainty regarding the (un)lawfulness of Google's use of copyrighted newspaper articles, drawings and photographs has been to launch the company on the path of negotiations with the newspaper publishers, photographers and journalists in order to contractually determine the conditions for the use of copyrighted material on its different services.¹⁹⁵

On another level, it should be noted that some elements of the ongoing discussions around the adoption of a revised "Television Without Frontiers Directive"¹⁹⁶ could have an impact on the scope of the news reporting exception. This Directive would provide for a set of new rules for television regulation to bring it into line with new developments in audiovisual technology and advertising. It would include, *inter alia*, new rules on advertising and the extension of the directive to more audiovisual services than just "classic" on-air television. The Proposal would widen the scope of the directive also to "non linear audiovisual media services", i.e. on demand services and on the Internet. In December 2006, the European Parliament made numerous amendments to the Commission's Proposal. Among them is the introduction of Recital 2a, according to which "the provisions of this Article shall apply without prejudice to the obligation of individual broadcasters to respect copyright legislation". However, the Parliament's amendments also proposed the introduction of a new Recital 27:

"Therefore, in order to safeguard the fundamental freedom to receive information and to ensure that the interests of viewers in the European Union are fully and properly protected, those exercising exclusive rights concerning an event of high public interest must grant other broadcasters and intermediaries, where they are acting on behalf of broadcasters, the right to use short extracts for the purposes of general news programmes on fair, reasonable and non-discriminatory terms taking due account of exclusive rights. Such terms should be communicated in a timely manner before the event of public interest takes place to give others sufficient time to exercise such a right. As a general rule, such short extracts should not:

- exceed 90 seconds,
- be transmitted before the event concludes, or for sports events before the end of a single day's play - whichever is the sooner,
- be screened later than 36 hours after the event,
- be used to create a public archive,
- omit the logo or other identifier of the host broadcaster, or
- be used in non-linear services other than if offered on a live or deferred basis by the same media service provider.

The right to trans-frontier news access should apply only where it is necessary; accordingly, if another broadcaster in the same Member State has acquired exclusive rights to the event in question, access must be sought from that broadcaster. For pan-European broadcasters, the relevant legislation is that of the Member State in which the event takes place."

¹⁹⁵ J. Oates, "Old media wants new deal with search engines", *The Register*, 1st February 2006, available at: http://www.theregister.co.uk/2006/02/01/newspapers_go_for_google/.

¹⁹⁶ European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (COM(2005)0646 – C6-0443/2005 – 2005/0260(COD)), Brussels, 13 December 2006.

If adopted in its current state, this amendment could certainly have an impact on the manner in which broadcasters exchange information pursuant to article 5(3)c) of the Information Society Directive.

Case 1 – Google News

The controversy that has arisen around the numerous activities carried out by Google, the world leading search engine company, including Google Books, Google News, Google Video, exemplifies how interests can diverge between right owners and providers of innovative services. Google started building up a news archive through its Google News service, a computer-generated news site that aggregates headlines from more than 4,500 English-language news sources worldwide, groups similar stories together and displays them according to each reader's personalized interests.¹⁹⁷ Google News' goal is to offer readers more personalized options and a wider variety of perspectives from which to choose. Google News offers links to several articles on every story, so users can first decide what subject interests them before selecting which publishers' accounts of each story they would like to read. Users can then click on the headline that interests them and go directly to the site which published that story. Google News' articles are selected and ranked by computers that evaluate, among other things, how often and on what sites a story appears online. As a result, stories are sorted without regard to political viewpoint or ideology and users can choose from a wide variety of perspectives on any given story. Google intends to continue to improve the service by adding sources, fine-tuning our technology and providing Google News to readers in even more regions.¹⁹⁸ At this time, for the English language Google News service, only a few publications, like *Time* magazine and the UK's *Guardian* newspaper, have given their news content over for free.

The Google News project has not been received with equal enthusiasm by all European newspaper publishers. In most Member States, newspaper publishers have not reacted openly to the service. In some countries, however, newspaper publishers have threatened to or actually engaged proceedings against Google for the unauthorised publication of their news items on the Google site. Agence France Press instituted proceedings in the United States against Google, claiming copyright infringement in its news articles.¹⁹⁹ As a result of this, Google abandoned the project of re-publishing news items (headlines, introductions and photographs) taken from the Agence France Presse.²⁰⁰ More recently, Copiepresse, the collective right management society entrusted with the rights of the French and German newspaper publishers on the Belgian territory, instituted an action against Google Inc. Copiepresse claimed that Google infringed the copyright in the articles of its members, by republishing newspaper excerpts without permission. The Tribunal of First Instance of Brussels ruled in favour of the collective rights management society, and ordered Google to remove all Copiepresse articles from its service.²⁰¹ The Court appointed expert in the case concluded that Google News "must be considered to be an

¹⁹⁷ The service runs more than 30 regional editions in many different languages, including Arabic, Chinese, Dutch, English, French, German, Hebrew, Italian, Japanese, Korean, Portuguese, and Spanish. Each edition is specifically tailored with news for each audience.

¹⁹⁸ See: http://news.google.com/intl/en_us/about_google_news.html.

¹⁹⁹ J. Oates, "AFP sues Google News", *The Register*, 21 March 2005, available at: http://www.theregister.co.uk/2005/03/21/afp_sues_google/ (visited 11 October 2006).

²⁰⁰ C. Manara, "Référément en droit d'auteur", *Propriétés Intellectuelles* 2006/19, 147-154, p. 149; <http://www.njuris.com/ShowBreve.aspx?IDBreve=752>

²⁰¹ Court of First Instance of Brussel, 5 September 2006 (*Copiepresse v. Google, Inc.*), available at: http://www.droit-technologie.org/jurisprudences/commerce_bruxelles_050906.pdf

information portal and not a search engine". Consequently the Court ruled that Google could not exercise any limitation provided for in the Belgian Copyright Act of 1994 or in the Database Act of 1998 and that the activities of Google News and in particular the use of the Google "cache" infringed the rights of the newspaper publishers in their articles.²⁰²

Since, pursuant to article 2(8) of the Berne Convention, news items are not protected by copyright, and since hyperlinks have been held in several European jurisdictions not to constitute an infringement copyright,²⁰³ the core of the dispute between Google and European newspaper publishers concerns Google's reproduction of headings, article excerpts, photographs, graphics and the like in the cache memory of its servers. The dispute focuses on whether the reproduction of newspaper articles falls under the press review exception. Moreover it is unclear whether such reproductions in Google's cache amount to a transient or incidental act of reproduction that might be excluded under article 5(1) of the Information Society Directive, since articles are stored on the server for extended periods of time.

2.3.2.5 *Communication on dedicated terminals*

With respect to the making available of the digital archives, article 5(3)n) of the Directive states that Member States make adopt limitations on the reproduction and the communication to the public rights for 'use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections'. Not only is the implementation of this provision, just like the previous one, not mandatory, but even where it has been implemented, its scope remains extremely narrow: a work may only be communicated or made available to individual members of the public, if each patron establishes that the use is for his exclusive research or private study. The works may only be communicated or made available by means of dedicated terminals on the premises of non-commercial establishments, which excludes any access via an extranet or other protected network connection that users can access at a distance. Moreover, this provision only finds application insofar as no purchase or licensing terms provide otherwise, which is in practice rarely the case. As the following remark illustrates, this provision was met with much scepticism within the library community:

"While this is a laudable regulation, it is incomprehensible that this exception is tied to "dedicated terminals on the premises" of named establishments and to the condition that these works are not subject to purchase or licensing terms."

(...) The second condition is another example of the lack of balance in the Infosoc Directive. By allowing rights holders to contractually evade any exception, it grants them unlimited exclusive rights in the online realm. This condition prevents public libraries from fulfilling their public task of making published works available to their users without prejudice to their ability to pay their market price".²⁰⁴

²⁰² M. Boribon, "Google doit respecter les créateurs et les producteurs de contenus", *Légipresse* 2006/236, p. 165-166.

²⁰³ In France: Tribunal de commerce de Paris, 26 December 2000, *Communication & Commerce électronique* 2001, No. 26, comment C. Caron; in the Netherlands: Pres. Rb. Rotterdam 22 augustus 2000, *Informatierecht/AMI* 2000-10, p. 207-210, m.nt. K.J. Koelman; *Mediaforum* 2000-10, m.nt. T.W.F. Overdijk (Kranten.com); Rb. Leeuwarden 30 oktober 2003, LJN AN4570 (Batavus). In Germany: BGH 17 July 2003, I ZR 259/00 (Paperboy).

²⁰⁴ *Privatkopie.net & Aktionsbündnis Urheberrecht & FIF*, Response to Consultation on Staff Working Paper 2004, p. 8.

As Part II of this study shows, in countries that chose to implement it, article 5(3)n) was transposed almost word-for-word in the national legislation. Several Member States have, however, decided not to incorporate this article into their law; the extent to which library patrons are allowed, in these Member States, to consult digital material on the library network is therefore unclear. However, considering the default nature of this provision and the fact that its application is most often overridden by contract, libraries advocate for specific contracts or licenses which, without creating an imbalance, would take account of their specific role in the dissemination of knowledge.

2.3.3 *The role of the three-step-test*

Article 5(5) of the Directive subjects the application of all limitations to the requirements of the three-step test. It states that “the exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases (...)”. At the time of implementing the Directive, the question arose with respect to the norm laid down in article 5(5) of the Directive as to whether the Member States were required to transpose it in their national legislation. If so, this the test would not only bind the national legislator during the implementation process, but also the court interpreting a national provision that constitutes an implementation of one of the limitations listed in the Directive.²⁰⁵ Since the true addressee of the test could not be inferred from the text and the legislative history of the Directive, the Member States came to varying conclusions.²⁰⁶ As Part II of this study reports, the Czech Republic, France, Greece, Hungary, Italy, Luxembourg, Malta, Poland, Portugal and Slovakia have incorporated the test into substantive law. Likewise, even if their national law does not specifically mandate the courts to apply it, the test was referred to and applied by courts in Austria, Belgium, Finland, and the Netherlands. According to these findings, more than half of the Member States recognise implicitly or explicitly that the three-step test constitutes a norm to be applied by the courts in the interpretation of the limitations on copyright recognised in their national copyright law.²⁰⁷

For example, the criteria of the three-step-test played an important role in the French Supreme Court’s decision in the *Mulholland Drive* case.²⁰⁸ In reversing the Court of Appeal’s decision which had admitted the user’s defence of private copying, the Supreme Court declared:

« (...) l’arrêt, après avoir relevé que la copie privée ne constituait qu’une exception légale aux droits d’auteur et non un droit reconnu de manière absolue à l’usager, retient que cette exception ne saurait être limitée alors que la législation française ne comporte aucune disposition en ce sens; Qu’en l’absence de dévoiement répréhensible, dont la preuve en l’espèce n’est pas rapportée, une copie à usage privé n’est pas de nature à porter atteinte à l’exploitation normale de l’œuvre sous forme de DVD, laquelle génère des revenus nécessaires à l’amortissement des coûts de production; Qu’en statuant ainsi, alors que l’atteinte à l’exploitation normale de l’œuvre, propre à faire écarter l’exception de copie privée s’apprécie au regard des risques inhérents au nouvel environnement numérique quant à la sauvegarde des droits d’auteur et de l’importance économique que l’exploitation de l’œuvre, sous forme de DVD, représente pour l’amortissement des coûts de production cinématographique, la cour d’appel a violé les textes susvisés.»

²⁰⁵ Hart 2002, p. 61.

²⁰⁶ See: Senftleben 2004, p. 279.

²⁰⁷ See: K.J. Koelman, “Fixing the Three-Step Test”, *E.I.P.R.* 2006/28, pp. 407-412, p. 408.

²⁰⁸ Cour de cassation, Civ. 1ère ch., 28 February 2006, www.legalis.net.

The second criterion of the test, namely “the absence of conflict with a normal exploitation of the work”, proved to be the key element in both courts’ evaluation of the factual situation before them. But the application of the test led to radically opposed results, with a negative final outcome for the user.²⁰⁹ The question put to the courts was in fact a daunting one: what is a normal exploitation of a film work distributed to the public on DVD? Even more daunting would be to ask a court what the normal exploitation of work is in the online environment.

In contrast to the French court, the German Federal Supreme Court applying the three-step-test of article 5(5) of the Information Society Directive came to an entirely different conclusion in the *Elektronische Pressespiegel* case.²¹⁰ In this case, the Supreme Court had to decide whether the practice of scanning newspapers and of distributing them as “electronic press clipping service” fell under the exception of article 49(1) of the German Copyright Act, for which a regime of equitable remuneration already existed. Rather than examining the phenomenon of “electronic press clipping service” from the perspective of the normal exploitation of the works, the German Supreme Court focused on the third criterion of the test, namely that the use should cause unreasonable prejudice to the legitimate interests of the rights owners. Considering that authors and publishers were better off with a remuneration right than with an exclusive right that they could not effectively control, the Court concluded that the reproduction of newspaper articles in the form of electronic press reviews, although not expressly foreseen by the legislator at the time of enactment of the provision, could be covered by the limitation provided that remuneration was paid. Should the Court have first put the case at hand to the second step of the test instead of directly applying the third step? Had the German Court done so, it might then have concluded, like the Court of Appeal of Amsterdam in a similar case, that the practice of making “electronic press clipping services” does conflict with the normal exploitation of the work.²¹¹

This very partial account of the judicial application of the three-step-test is not meant to discuss the extent of the exclusive right or the specific limitations involved in a particular case, but to ask whether the test can play a role as an open norm in copyright infringement cases so as to improve the sustainable and balanced character of the regime of limitations established by the Information Society Directive. Some commentators fear that the application of the test on a case-by-case basis would only result in less predictability and act as an additional restriction on the statutory limitations.²¹² Others believe, however, that the use of the three-step test by the judge is inevitable to guarantee a more evolutionary and balanced interpretation of the limitations.²¹³ These authors argue that the judge could play an important role in the interpretation of the often vague conditions of application of the limitations and that the test could serve as a tool to make an assessment, on a case-by-case basis, of the respective boundaries of the rights and limitations. The courts can also be called upon to intervene in cases where the silence of the law fails to provide for a concrete solution.²¹⁴ An indication from the European legislator concerning the

²⁰⁹ P.-Y. Gautier, “L’élargissement des exceptions aux droits exclusifs, contrebalancé par le “test des trois étapes””, *Communication Commerce électronique* 2006/11, pp. 9-13, p. 12.

²¹⁰ BGH, July 11, 2002, *Elektronischer Pressespiegel* [2002] GRUR 963.

²¹¹ Rechtbank 's-Gravenhage, 02 March 2005 (*Uitgevers/The State*) LJN: AS8778.

²¹² Ernst/Haeusermann 2006, p. 19 ; P.-Y. Gautier, “L’élargissement des exceptions aux droits exclusifs, contrebalancés par le “test des trois étapes””, 2006/11 *Communication Commerce électronique*, pp. 9-13, p. 12.

²¹³ A. Granchet, “La mise en œuvre de la loi DADSVI par les médias”, *Légipresse* 2006/236, pp. 140-144, p. 143.

²¹⁴ C. Geiger, “Right to Copy v. Three-Step Test, The Future of the Private Copy Exception in the Digital Environment”, 2005/1 *Computer Law Review International*, p. 9; M. Senftleben, “Die Bedeutung der Schranken des Urheberrechts in der Informationsgesellschaft und ihre Begrenzung durch den Dreistufentest”, in Reto M. Hilty and Alexander Peukert (eds.): *Interessenausgleich im Urheberrecht*, Nomos Verlagsgesellschaft Baden-Baden, 2004, fn.52, at p.168; Senftleben 2004; M. Senftleben, “Beperkingen à la carte: Waarom de

role of the judge in this matter, as well as some guidance regarding the proper working of the test would certainly improve its usefulness as an interpretative tool. In particular, it would be advisable to clarify that national lawmakers and, where relevant, national courts apply the three-step test in a flexible and forward-looking manner. This could be achieved by not interpreting the first and second steps too narrowly, and thereby making the third step, which allows a certain balancing between the interests of right holders and the needs of society, the focal point of the three-step analysis.²¹⁵

2.4 Assessment of the impact of rights and limitations on online business models

Having examined the problems associated with the implementation of the Directive's provisions regarding rights and limitations, we can now summarize their impact on the deployment of online business models. At the outset, it is worth pointing out that the effect of copyright legislation on the market should not be overestimated. The stakeholders interviewed by Berlecon Research have expressed the common view that the rights granted under the Directive do not actually initiate or promote the establishment of new innovative business models, e.g. models that go beyond rather straightforward on-demand downloading, but rather that they contribute in affirming and legitimising the business models that were already in place at the time the Directive was introduced in 2001. Especially smaller online content and service providers seem to be sceptical regarding the ability of legislation to promote more innovative online business models. In the same vein, the stakeholders consulted indicated that the copyright regime has had little or no impact on time to market for online services, and that it did not create obstacles to the entry of a new service in a specific regional market.

Nevertheless, on the basis of the findings of the previous sections, we are now in a position to draw some conclusions on whether the European legislature has reached its objectives in respect of the definition of exclusive rights, and the harmonisation of limitations. Our assessment of the impact of rights and limitations on the deployment of online business models follows the benchmark criteria set out in introduction, namely: the consistency with international norms; the degree of actual harmonisation across the Member States; the level of legal certainty yielded by the implementation of the Directive; the sustainability of the norms over time; and the balanced character of the legal framework established by the Information Society Directive. We will first look at the economic rights (par. 2.4.1) and then at limitations (par. 2.4.2). Our summary will allow us to make some suggestions for improvement of the legal framework with a view to establishing a fair balance between rights and limitations.

2.4.1 *Economic rights*

Consistency with international norms. If one compares the rights as laid down in the Information Society Directive with the internationally agreed standards of protection, the conclusion must be that the EU provides for a higher level of protection in certain areas. The reproduction right is wider in its definition than it internationally is for authors (in the Berne Convention) and holders of related rights (WPPT, Rome Convention, TRIPS). The making available right conforms to WCT and WPPT norms, albeit that those instruments do not recognize a making available right for broadcasting organisations and producers of first fixations of films. A general right of communication to the public as laid down in article 3 does not exist at the international level. The broadcasting rights laid down in treaties are generally more limited.

Auteursrechtlijn ruimte laat voor fair use", AMI 2003/27, pp. 10-14; C. Alberdingk Thijm, "Fair Use: het auteursrechtelijk evenwicht hersteld", Informatierecht/AMI, 1998/22, pp. 145-154.

²¹⁵ Senftleben 2004, p. 300.

Actual harmonisation. Bearing in mind the fact that the Directive as a legislative instrument gives Member States the flexibility to adjust their law so that its substantive norms are met, there is by and large actual harmonisation of the rights of reproduction and making available right throughout the EU. National concepts and categorizations have remained, but this is to be expected as literal transposition from the Directive's provisions is not required.

Legal certainty. The broad definitions of restricted acts given by articles 2 and 3 of the Information Society Directive, increase legal certainty for economic players on an abstract level at least. The Information Society Directive makes clear that, in principle, authorization must be sought for any type of use of copyright works. For subject matter protected as related rights this is less clear, as these are not subject to a general right of communication to the public. The exclusive nature of acts of online dissemination of content was not completely clear throughout the EU, so the making available right in particular has increased legal certainty in that area. This much can also be concluded from the interviews conducted by Berlecon Research with stakeholders, online content providers and creators. On the other hand, as was said above, the combination of a broad reproduction right and a broad communication to the public right has raised questions about their interplay, especially when the provision on incidental and transient copying is factored in.

In a number of Member States, the courts or the legislature have clarified that making available, or the wider notion of communication to the public, comprises the offering of content for downloading, but not the downloading itself, which is regarded as a user-induced act of reproduction. From a systemic and practical perspective making such a distinction makes sense because it prevents the simultaneous application of two different exclusive rights to a single act of dissemination online. In the context of streamed broadcasts, a similar result may be achieved if the authorization of the broadcast is taken to mean that subsequent reproductions during the streaming process constitute a lawful use with no independent economic significance under the exemption of article 5(1).

Turning to the limitation of transient copies, its imprecision is one of the main sources of uncertainty regarding the scope of exclusive rights conferred by the Information Society Directive. Two elements in article 5(1), in conjunction with article 8(3), tend to reduce the general predictability of the law. First, in the case of transient copies made as an integral part of a technological process whose sole purpose is to enable a transmission in a network between third parties by an intermediary, such intermediary cannot avoid being targeted by injunctions, however lawful are his own activities. As discussed above, even if the intermediary complies with the requirements of article 5(1) of the Information Society Directive and articles 12 to 15 of the E-Commerce Directive, article 8(3) of the Information Society Directive still entitles rights owners to initiate proceedings against it. This means that ISPs and other intermediaries cannot rule out the risk of lawsuits.

Second, the requirement in article 5(1), according to which a transient copy must be devoid of any "independent economic significance", generally makes the line between infringing and non-infringing activities unpredictable. One might argue that, for all practical purposes, the "no economic significance" criterion supersedes all other conditions of article 5(1).²¹⁶ Even though a temporary copy meets all other hurdles of article 5(1), it can still remain within the scope of the reproduction right insofar as it has economic significance. Neither the Information Society Directive nor its preparatory works elaborate on the meaning of this criterion, and the assessment of economic significance must to a large extent depend upon external factors. This renders the assessment as such, hence the boundary between infringing and non-infringing conduct,

²¹⁶ See: Westkamp 2004, p. 1097; Hart 2002, p. 59.

uncertain and unpredictable. The current provision further hides the following danger: in an attempt to exert greater control over the use of their works, rights holders may try to take advantage of the emphasis put on the “no economic significance” criterion and assert economic significance with respect to any temporary reproduction that otherwise satisfies the conditions of the provision. This arguably threatens to undermine the entire exception rule.

Sustainability. The communication to the public right is broadly defined, and phrased in technology-neutral terms. In the future it should therefore not be necessary to adapt it to new forms of supply of information services. By focussing on the technology of actual copying, the harmonised right of reproduction, by contrast, is much less sustainable. This is certainly the case for article 5(1), the terms of which clearly appear to have been written with a certain state of technology in mind.

Where the making available right is concerned, a remark on its sustainability is in order. As we have seen, the qualification of an act as ‘making available’ rather than broadcasting (or other form of communication), hinges on access at a time and place determined by the user. The possibilities of time shifting will continue to increase (e.g. from analogue VCR to high capacity digital PVR, looped streamed broadcasts accessed via PC). A narrow interpretation of the ‘user determined place’ criterion already makes it applicable to broadcasts, since users do not have to go to a provider-specified geographical location to access programmes i.e. their television set, or other device for viewing (PC, mobile phone). The convergence of platforms combined with users’ insistence on portability could well mean that place or device shifting becomes as common as time shifting. Consequently, ever fewer information services could be considered as forms of (traditional) broadcasting, thus affecting the way rights are cleared in many markets.

Balance. There is cause for concern about the scope of the reproduction rights. Article 2 Information Society Directive testifies to a purely technical approach to reproduction rather than a normative one. On the face of it, the broad definition of what constitutes reproduction (direct or indirect, temporary or permanent copy by any means or in any form, in whole or in part) gives right holders absolute control over acts which in the off-line world were not the right holder’s prerogative. For users and end users (consumers) the actual impact of this broadly defined reproduction right seems to go further than the limitation of article 5(1) accommodates. Of special concern is the reach of private copying exemptions, combined with the effect of technological protection measures and digital rights management systems.

For providers of digital content, the reproduction right looms large as the ultimate leverage of right holders to control virtually all aspects of how they run their businesses. This is especially so in the cases where the communication rights (‘public performance rights’ in collective rights management parlance) is to be cleared through other channels than reproduction rights. The resulting legal uncertainty could in part be addressed by a sufficiently broad interpretation of article 5(1), especially where it concerns the criteria of ‘lawful use’ and ‘no independent economic significance.’ More fundamentally, it may be questioned whether a normative approach to the reproduction right would not have provided a better balance of interests upfront, which is more conducive to the development of innovative business models and market access for new actors.

Recommendations

To remedy the legal uncertainty that arises with respect to the respective scope of the exclusive rights, the European legislator might consider reviewing the scope of the reproduction right. The legislator could envisage adopting a normative approach to the reproduction right, whereby the purpose of a reproduction would determine whether an independent restricted act occurs for which the authorisation of the right holder is needed.

Furthermore, since one of the main sources of uncertainty regarding the scope of exclusive rights conferred by the Information Society Directive comes from the imprecision of the

transient copying exception, the legislator could consider reviewing the limitation of article 5(1). There are at least two possible strategies for clarifying this provision. First, one could reshape the entire regulation on temporary reproductions, including both articles 2 and 5(1) of the Directive, by introducing a purpose-oriented definition of the concept of reproduction. This solution would eliminate the need for additional exceptions such as the current article 5(1).²¹⁷ Alternatively, one could choose to follow the course of the current model defined by a broadly defined right of reproduction subject to a limitation. In that case, the Community legislator should consider clarifying certain aspects of the limitation.

The “no separate economic significance” requirement could be aligned with the “lawful use” criterion of article 5(1)(b). If a specific use of a work is lawful, technical reproductions necessary to enable such use should be deemed as not having independent economic significance (hence copyright relevance). If not, the provision is self-contradictory and confusing because it gives rights holders potential control over uses they should not be able to control, based on copyright law and their own contractual obligations. In such a case, a right holder would only need to successfully assert that the use has economic importance. In cases covered by article 5(1)(a), namely transmission by intermediaries, the situation is slightly different. Since the use made by the recipient of the transmission in these cases need not be lawful, asserting economic significance is not self-contradictory. However, also in this relation, the application of the criterion can result in an extension of the rights holders’ control beyond the traditional scope of the reproduction right, as even the elements of mere communication could be covered. This creates a troublesome overlap between the reproduction right and the right of making available to the public.

The Community legislator could also clarify the meaning of “lawful use”. As demonstrated above, the reference in Recital 33 to uses “not restricted by law” is ambiguous, especially since it does not specify whether it only refers to copyright limitations or to any limitation of the restrictions imposed by the copyright regime, such as the initial definitions of the exclusive rights, the idea/expression dichotomy etc. These questions should be expressly addressed in order to improve legal certainty.

2.4.2 Limitations

Consistency with international norms Since only a handful of limitations can be found in the international instruments, it is not surprising to see that the regime of limitations on copyright and related rights established by the Information Society Directive is generally consistent with the international norms. The limitations in the Directive that are directly inspired by the provisions of the Berne Convention often reproduce the formulation of the Convention. One exception to this general observation concerns the two press usage limitations provided for under article 10*bis* of the Berne Convention which, in the Directive, have been combined into a single provision. This can give rise to confusion for two reasons: first, because not all Member States may have implemented both provisions; and second, because the two provisions do not use the same conditions of application. As a result, it may be difficult to tell which paragraph of article 10*bis* of the Berne Convention has actually been implemented and whether the national laws are consistent with the international norms.

The Directive seems also to be consistent with international copyright law by allowing the adoption and application of limitations on copyright and related rights provided that they meet the criteria of the three-step test. This test constitutes the only other foothold in international copyright law regarding limitations apart from the small number of express limitations appearing in the Berne Convention. For the rest, most limitations contained in the Directive are inspired by

²¹⁷ See: IViR Study on the Recasting of Copyright and Related rights for the Knowledge Economy, especially pp. 64 and 69 (with further references).

the long internationally recognised limitations based on article 9(2) of the Berne Convention that already existed in the national legislation of the Member States. Only a very small number of limitations included in the Directive seem to be the result of a specific attempt to adapt the system of limitations to the digital environment.

Actual harmonization As mentioned earlier, articles 5(2) to 5(5) of the Directive contain two types of norms: one set of specific, but broadly worded limitations, within the boundaries of which Member States may elect to legislate; and one set of general categories of situations for which Member States may adopt limitations. In other words, the Directive generally lacks concrete guidelines that Member States are to follow in order to determine the scope and conditions of application of the limitations. Since in many cases, simply reproducing the wording of the Directive was not an option, most Member States have chosen to interpret the limitations contained in the Directive according to their own traditions. As a consequence, stakeholders are confronted, in respect of similar situations, with different norms applicable across the Member States.

In view of the optional character of the list of limitations contained in articles 5(2) to 5(5) of the Directive, the harmonising effect is very modest at best. In practice, not only are Member States free to implement the limitations they want from the list, but they are also free to decide how they will implement each limitation. The fact that Member States have implemented the same limitation differently, giving rise to a mosaic of different rules applicable to a single situation across the European Community, could ultimately constitute a serious impediment to the establishment of cross-border services. In view of this mosaic of limitations in place throughout the European Community, it is safe to say that the aim of harmonisation has hardly been achieved and legal uncertainty persists.

The lack of true harmonisation across the European Union has practical implications. In order to reach economies of scale and leverage the opportunities of online distribution, many services are operating in multiple European countries or even on a global scale. Especially for smaller companies, the lack of harmonisation of the limitations on copyright is a serious issue. The level of knowledge required for the conclusion of the necessary licensing agreements per territory is too high and costly to make the effort worthwhile. Larger content providers who wish to extend their services across Europe suffer from the lack of harmonisation, because it raises transaction costs. They institute extensive legal due diligence searches prior to entering a new market or offering a service. This procedure enables them to offer centralised licenses to their providers, which in turn no longer have to mind heterogeneous regional provisions. This might be less of a problem for major rights holders compared to their smaller competitors and service providers in other fields, given their financial situation. Minor competitors are said to be more likely to compromise with providers, as they have less negotiating power. Moreover, finding proper legal counsel in the EU countries appears to be an onerous task, especially for innovative start-up companies. Clearer and more harmonised national legislation guided by the Information Society Directive would be helpful and improve the opportunities for small companies and less powerful rights holders who cannot afford expensive legal counsel.

Moreover, the diversity of ways that each limitation has been transposed in the Member States is bound to give rise to differences in treatment between citizens of different countries, which could be contrary to the principle of non-discrimination laid down in the EC Treaty. For example, a person suffering from a wide range of disabilities would benefit from a limitation on copyright and related rights in France, but certainly not in the UK, where only the visually impaired may invoke the benefit of a limitation. There is no justification for such a difference in treatment between EU citizens.

Legal certainty The lack of harmonisation described above has a direct effect on the legal certainty flowing from the regime of limitations. Not only have the limitations in the Directive not been

systematically implemented throughout the European Union, but when they have been transposed their scope and conditions of application vary considerably from one Member State to the next. In some Member States' laws, the limitations on copyright have received a much narrower scope than those of the Information Society Directive. This can be explained by the "homing" tendency of the Member States' legislatures when translating provisions of the Directive into national law, preserving as much as possible the old formulations and adding further specifications.²¹⁸ Moreover, even where a specific limitation has been implemented in roughly similar terms in the different Member States, there is a risk that the national courts will give this limitation a diverging interpretation, thereby contributing to the legal uncertainty in respect of the use of copyright protected works and other subject matter.

The transposition of article 5(2)c) of the Directive, permitting specific acts of reproduction by publicly accessible libraries and similar institutions, provides a good illustration of the prevailing uncertainty. In some Member States, the limitation applies to libraries and archives who may make reproductions of all types of works for purposes of preservation or restoration of their collection. In other Member States, this very limitation is restricted either to certain categories of works or to specific institutions. Finally, in a number of Member States, this limitation has not been implemented at all. Legal uncertainty inevitably arises from this mixture of applicable rules.

The same observation can be made with respect to the limitation pertaining to disabled persons. Article 5(3)b) of the Directive merely allows Member States to adopt limitations in the general category of uses for the benefit of people with a disability, without providing any concrete guideline other than the requirement that the use be restricted and directly related to the disability, and of a non-commercial nature. In the absence of any useful parameter in the Directive, the schemes put in place by the Member States end up accommodating different addressees, e.g. the disabled persons themselves, a competent institution, or a content provider. In some states, the schemes cover all types of disabilities, e.g. physical or mental disability. In other states, the limitation is restricted only to certain physical disabilities, like blindness and deafness, or to certain categories of works, excluding databases for example.

The assessment of the boundary between infringing and non-infringing conduct, remains therefore highly uncertain and unpredictable. One consequence of the prevailing uncertainty regarding the scope of limitations in the digital networked environment has been to force users to negotiate the conditions of use of protected works with every single rights holder, for every territory involved. In an online cross-border setting, this can be a very cumbersome endeavour, indeed. Moreover, legal uncertainty is no solid ground for negotiations, for it inevitably leaves the outcome to the strongest party. All in all, the regime of limitations established by the Information Society Directive does not appear to offer the necessary legal certainty to promote online business models.

Sustainability. Since, as was mentioned above, the Directive lays down a set of broadly worded limitations alongside a set of general categories of situations for which limitations are possible, the result is that most – but not all – limitations included in the Directive are formulated in technology-neutral terms. These limitations are therefore more likely to evolve with time and to withstand changes in the technology and in market conditions. Nevertheless, some limitations do contain references to a particular state of technology, making them more vulnerable to changes in the technology and less suited for long-term application. This is notably the case for the limitation permitting the reproduction by reprographic means, which is restricted to reproductions in paper form, as well as the limitation permitting the "use by communication or making available, for the purpose of research or private study, to individual members of the

²¹⁸ See: IViR Study on the Recasting of Copyright and Related rights for the Knowledge Economy, p. 38; M. Favale, "Publication Review - Copyright Exceptions: The Digital Impact", *E.I.P.R.* 2006/28, pp. 505-506.

public by dedicated terminals on the premises of establishments”. The private copying exception is in a situation of its own since it links not its existence but the payment of a fair compensation to the rights owner to application or non-application of technological protection measures (see section 4.2.5 below). The formulation of the reprography and scientific consultation provisions may already be obsolete.

More importantly, the sustainability of the list of limitations included in articles 5(2) to 5(5) of the Directive may be seriously affected by the exhaustive character of the list of limitations. As mentioned in the recent IViR Study on the Recasting of Copyright and Related Rights for a Knowledge Economy, one of the main arguments against the establishment of an exhaustive list of limitations is that a fixed list of limitations lacks sufficient flexibility to take account of future technological developments. A dynamically developing market, such as the market for online content, requires a flexible legal framework.²¹⁹ While an exhaustive list obviously gives more legal security to established rights holders and content providers, it may also hinder the emergence of new services and business models.

Balance

While the substance and broad wording of the limitations contained in the Directive may initially suggest a certain balance between the interests of rights holders and those of users, this inherent balance may be seriously undermined not only by the optional character of most limitations, leaving Member States discretion to arrive at ‘imbalanced’ legislative solutions, but also by the fact that they are not imperative. As we shall see in much greater detail in chapter 5 below, nothing precludes rights owners from restricting their exercise by means of contractual agreements. The status of a number of limitations is also unclear in relation to the application of technological protection measures, as discussed in Chapter 4. The possibility to restrict the exercise of limitations through the application of TPMs and by stipulation in a contract gives rights owners a clear advantage over users.

Recommendations

To remedy the lack of harmonisation with respect to limitations on copyright and related rights, the European legislator could consider adopting a two-tiered approach, which would take into account the principles of subsidiarity and proportionality. First, since a list of optional and broadly worded limitations has led to such a mosaic of different limitations across the Member, the Community legislator could consider declaring a small number of strictly worded limitations mandatory for transposition in all Member States. These limitations, no longer optional as under the Information Society Directive, should reflect the fundamental rights and freedoms enshrined in the European Convention on Human Rights, principles which are part of Community law.²²⁰ Among the limitations contained in article 5 of the Directive that could possibly be given mandatory status based on the safeguard of fundamental rights are the following:

- Use for quotations for purposes such as criticism and review (art. 5(3)d);
- Use for news reporting and press reviews (art. 5(3)c);
- Use of political speeches as well as extracts of public lectures (art. 5(3)f);
- Use for the purpose of caricature, parody or pastiche (art. 5(3)k);
- Use for educational and scientific purposes (art. 5(3)a);
- Use by disabled persons (art. 5(3)b);

²¹⁹ IViR Study on the Recasting of Copyright and Related Rights for the Knowledge Economy, p. 62.

²²⁰ See: V. Grassmuck, “Ein Plädoyer für durchsetzbare Schrankenbestimmungen für Privatkopie, Zitat und Filesharing”, *ZUM* 2005/2, pp. 104-109; P. Von Braunmühl, “Entwurf für den Zweiten Korb des neuen Urheberrechts bringt weitere Nachteile für Verbraucher”, *ZUM* 2005/2, pp. 109-112.

In addition, a list of mandatory limitations should include those that have a noticeable impact on the Internal Market or concern the rights of European consumers. Among the limitations contained in article 5 of the Directive that could possibly be given mandatory status based on their potential or actual impact on the Internal Market are the following:

- Transient copies (assuming this would not be converted into a carve-out of the economic rights) (art. 5(1));
- Reprographic reproductions (art. 5(2)a);
- Private copying (art. 5(2)b);
- Reproductions by libraries, archives and museums (art. 5(2)c);
- Use of works for research and private study (art. 5(3)n); and
- Ephemeral recordings by broadcasting organisations (art. 5(2)d).

In the proposed model, these mandatory limitations should be reformulated in very specific terms leaving little room for interpretation by the national legislators. Only then, would the rules concerning the limitations on copyright and related rights be sufficiently clear to incite rights owners and other content providers to invest in cross-border services.

The second tier of our proposal would be to adopt an open norm leaving Member States the freedom to provide for additional limitations, subject to the three-step test and on condition that these freedoms would not have a noticeable impact on the Internal Market. Needless to say, such national limitations could be invoked only within the borders of a Member State. Among the limitations contained in article 5 of the Directive that could be left to the discretion of the national legislator by virtue of this open norm are the following:

- Reproduction of broadcasts made by social institutions (art. 5(2)e);
- Use for purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings (art. 5(3)e);
- Use during religious celebrations or official celebrations organised by a public authority (art. 5(3)g);
- Use of works, such as architecture or sculpture, made to be located permanently in public places (art. 5(3)h);
- Incidental inclusion of a work or other subject-matter in other material (art. 5(3)i);
- Use for the purpose of advertising the public exhibition or sale of artistic works (art. 5(3)j);
- Use in connection with the demonstration or repair of equipment (art. 5(3)l);
- Use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building (art. 5(3)m); and
- Use in cases of minor importance where limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community (art. 5(3)o).

Clearly, the “grandfather clause” of article 5(3)o) reflects the principles of subsidiarity and proportionality, and removes some of the rigidity of the exhaustive list of limitations.²²¹ It could, on the basis of this provision, be envisaged to remove the requirement laid down in Recital 32 of

²²¹ Walter 2001, p. 1065.

the Information Society Directive that the list of limitations included in the Information Society Directive be exhaustive.²²² A non-exhaustive list of limitations would allow Member States to adopt *ad hoc* solutions in answer to pressing situations, unforeseen by the Community legislator.

In particular, the European legislator could consider clarifying that national lawmakers and, where relevant, national courts apply the three-step test in a flexible and forward-looking manner. This could be achieved by not interpreting the first and second steps too narrowly, and thereby making the third step, which allows a certain balancing between the interests of right holders and the needs of society, the focal point of the three-step analysis.

²²² On the “exhaustive character” of the list of limitations, see: IViR Study on the Recasting of Copyright and Related Rights for the Knowledge Economy, p. 64-65.

3 Technological Protection Measures

Article 6 on the legal protection of TPMs turned out to be one of the most intricate and controversial provisions of the entire Information Society Directive. Its complexity is also reflected at the national level. In this context, the question arises whether the provision offers sufficient legal certainty to support the investment in and creation of new online business models. Although the legal protection of TPMs does not confer, as such, an exclusive right on the rights holder, article 6 of the Information Society Directive deserves careful attention for two main reasons: first, because this article constitutes the main adjustment to Europe's copyright framework as a result of the implementation of its international obligation under the WIPO Internet Treaties; and second, because the use of TPMs – and their legal protection – is seen as one of the main component to the establishment of digital rights management systems (DRMs).²²³ In view of the intricacy of the provision, the study of article 6 of the Directive is divided in two: chapter 3 examines the protection afforded to rights owners against the circumvention of technological measures, while chapter 4 concentrates on the intersection between the application of TPMs and the exercise of limitations on copyright.

Section 3.1 first briefly reviews of the key policy goals pursued by the European legislator with the adoption of the provisions on technological protection measures. Among the key objectives was to foster the deployment of digital rights management mechanisms. Section 3.2 then describes the main technological protection measures that are currently used in the market. In the light of this overview, section 3.3 analyses the protection granted under article 6 of the Information Society Directive and highlights the problem areas from the perspective of Europe's international obligation under the WIPO Treaties. In view of the complexity of the matter, it appears useful to compare the system put in place under the Information Society Directive with those of other countries. Section 3.4 therefore describes the solutions adopted in certain countries outside of the European Union, namely the United States, Australia, Japan, Canada and Switzerland.

Our overall assessment is made on the basis of the country reports in Part II of this study, the legal commentaries, the relevant decisions of the courts and the outcome of the interviews that Berlecon Research conducted with stakeholders. The five benchmark criteria described in the introduction, namely the consistency with international norms, the actual harmonisation, the legal certainty, and the sustainable and balanced character of the legal rules, will again serve as guiding principles throughout the chapter. We will demonstrate that the norms couched in the Information Society Directive are characterised by a large degree of uncertainty and that, as a consequence, true harmonisation of the protection of TPMs has hardly been achieved. Moreover, the comparative analysis will show that the European protection regime differs in important respects from the international framework set by the WIPO Internet Treaties, and from other national systems. This analysis paves the way for section 3.5, in which we summarise our main findings and assess the impact of technological protection measures on the development of digital rights management mechanisms.

3.1 Goals of the Directive

The emergence of the digital network environment as a commercially viable platform for the distribution of copyright protected content sparked, in the early 1990s, the need on the part of rights holders to increase legal protection in order to safeguard content from unauthorised access and use. At the international level, the call for the recognition of legal protection for TPM's

²²³ Cunard/Hill/Barlas 2004, p. 39.

became particularly vibrant during the last phase of the negotiations leading to the adoption of the WIPO Internet Treaties in December 1996.²²⁴ Indeed, in the preamble to the WIPO Copyright Treaties (WCT), the Contracting Parties said to recognise “the need to introduce new international rules (...) in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments”. This Treaty, together with the WIPO Performers and Phonograms Treaty (WPPT), introduced a new form of protection to the benefit of rights holders by establishing, for the first time in an international copyright instrument, that technological measures used by authors and related right holders to protect their works or related subject matter enjoy independent protection.²²⁵ The norm laid down in article 11 of the WCT requires Contracting Parties to provide:

“adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.”

Article 18 of the WPPT contains a similar provision with respect to performances and phonograms. These broad provisions give Contracting Parties substantial leeway in determining how to implement these obligations, for they do not specify the particular means of achieving the desired result. Contracting Parties are merely required to ensure that the implementation is adequate and effective to protect technological measures.²²⁶ As we shall see in the sections below, the latitude left to the Contracting Parties with respect to the implementation of the Treaties led, as one might expect, to a range of different national solutions.

At the European level, one of the principal objectives behind the adoption of the Information Society Directive was to transpose into Community law the main international obligations arising from the WIPO Internet Treaties. Among the main international obligations arising from these Treaties was, of course, the implementation of articles 11 WCT and 18 WPPT. This is not to say that the European Commission had not previously touched upon the issue. In the Green Paper on Copyright and the Challenge of Technology,²²⁷ the Commission had already considered the development of technical devices that might be used to prevent or control copying of recorded material. The Commission feared that, with the emergence of digital recording equipment, home copying activities would drastically increase, bringing about important revenue losses for the music and the software industries. Whereas the suggestion made in the Green Paper of 1988 to oblige manufacturers of digital recorders to build in a technological protection mechanism was never followed, a provision on the protection of technological measures did make it into the Computer Programs Directive.²²⁸ Under article 7(1)(c) of the Directive, Member States were required to provide appropriate remedies against persons putting into circulation, or possessing for commercial purposes, “any means the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of any technical device which may have been applied to protect a computer program”.

²²⁴ Ricketson/Ginsburg 2005, p. 976.

²²⁵ U. Gasser, “Legal Framework and Technological Protection of Digital Content: Moving Forward Towards a Best Practice Model”, *Fordham Intell. Prop. Media & Ent. L.J.* 2006/17, pp. 39-113, p. 45.

²²⁶ Dusollier 2005, p. 69; N. Braun, “The Interface Between The Protection of Technological Measures and the Exercise of Exceptions to Copyright and Related Rights: Comparing the Situation in the United States and the European Community”, *E.I.P.R.* 2003/25, 496-503, 396.

²²⁷ European Commission, *Green Paper on Copyright and the Challenge of Technology*, Brussels, 31 January 1989, COM(88) 172 def., para. 3.6.4-3.15.9, pp. 128 et seq.

²²⁸ Council Directive 91/250/EEC on the legal protection of computer programs, O.J.E.C. L 122/42, 17.5.1991.

As appears from the Green Paper of 1995, the Commission was initially contemplating the possibility of imposing an obligation on copyright holders to apply technological protection measures to their works, as soon as a technology would have been developed and generally accepted by the industry.²²⁹ The Follow-Up to the Green Paper published in November 1996 discussed the possible impact of specific rules protecting technology on the development of business models. The Commission made the following observation:

“A large range of products and services with a diversity of content is, at the same time, imperative to attract users. Rightholders will, however, only make their protected material available if the rights granted to control its exploitation offer them adequate protection. Thus, it is important that adequate and secure investment conditions as well as legal security are available across the EU and that the Single Market itself will not be jeopardised by inconsistent national responses to these technological developments.”²³⁰

The Commission further recognised that a “successful large-scale introduction of electronic copyright management and protection systems or devices by the private sector, once they are developed, is dependent upon (...) the implementation of measures that provide for legal protection in relation to acts such as the circumvention, violation or manipulation of these systems”.²³¹ Not surprisingly, responses to a consultation process conducted before the publication of the Follow-Up to the Green Paper revealed that rights holders were eager to obtain greater legal protection for the technological measures.

The discussions on the extent of the legal protection to be afforded to technological measures intensified when the Commission presented its Proposal for an Information Society Directive, in December 1997. Together with article 5 on limitations on copyright, article 6 on TPMs became the most contentious issue of the Directive. Regarding the need for action, the Commission declared in the Explanatory Memorandum accompanying the Proposal for a Directive:

“A fragmented approach at Member States’ level with respect to the legislation that should flank the technical protection and identification schemes used by holders of copyright and related rights would not only entail difficulties for the protection of copyright and related rights, but also adversely affect the proper functioning of the Internal Market. Disparities in levels of protection might hinder the development of new services at European level, and will imply serious distortions of competition.”²³²

The aim of the European Commission was therefore to create a solid legal framework for the development and growth of digital rights management systems, which would foster the development of ‘pay-as-you-go’ (on-demand) type business models, in which users would pay for each use of every (portion of a) work retrieved from the Internet.²³³ In this vein, Recital 53 of the Directive states that “the protection of technological measures should ensure a secure environment for the provision of interactive on-demand services, in such a way that members of

²²⁹ K.J.Koelman, *Auteursrecht en technische voorzieningen: juridische en rechtseconomische aspecten van de bescherming van technische voorzieningen*, Den Haag, Sdu Uitgevers, 2003, p. 58.

²³⁰ Follow-Up to the Green Paper 1996, p. 4.

²³¹ *Id.*, p. 16.

²³² Explanatory Memorandum to the Proposal for a Directive on the harmonization of Copyright and Related Rights in the Information Society, Brussels, 10 December 1997, COM(97)628 final p. 27.

²³³ See: Koelman 2003. See e.g. the description of ‘the “on-line” market’ in the Explanatory Memorandum accompanying the Directive (original proposal), § 6-8.

the public may access works or other subject-matter from a place and at a time individually chosen by them.”

The discussions that took place in the context of the Information Society Directive on the issue of the legal protection of TPMs should not be considered in isolation, however. Indeed, while the process leading towards adoption the Information Society Directive was only beginning, the European Conditional Access Directive was about to be enacted. This Directive, adopted in 1998, aims to protect access to and remuneration for various kinds of services delivered electronically and through means of conditional access.²³⁴ The Directive is targeted at ensuring that the service provider is remunerated, rather than at protecting the content of the service itself.²³⁵ The Conditional Access Directive applies to television and radio broadcasting, whether by wire or over the air (including by satellite), as well as “information society services.” Conditional access is defined as “any technical measure and/or arrangement whereby access to the protected service in an intelligible form is made conditional upon prior individual authorization.” The Directive prohibits the business of trafficking in “illicit devices,” where “illicit devices” are defined as “equipment or software designed or adapted to give access to a protected service in an intelligible form without the authorization of the service provider.”²³⁶

The Conditional Access Directive requires Member States to prohibit the manufacturing, sale and rental of such devices, and their possession for commercial purposes, as well as their installation, maintenance or replacement and commercial promotion.²³⁷ The sanction and remedy provisions in article 5 are somewhat similar to those set out in the Copyright Directive. Contrary to the Information Society Directive, however, neither the act of circumvention nor the possession of an illicit device for personal use is prohibited by the Directive. In the Explanatory Memorandum to the Proposal for a Directive on Copyright in the Information Society, the European Commission explained the relationship between the two directives, as follows:

“It should be stressed that such legal protection is complementary with the initiative already proposed by the Commission in the field of the protection of conditional access services. This latter proposal addresses in fact harmonized protection against unauthorized reception of a conditional access service, which may or may not contain or be based upon intellectual property, whilst this proposal deals with the unauthorized exploitation of a protected work or other subject matter, such as unauthorized copying, making available or broadcasting.”²³⁸

As a result, Community law now comprises two different legal regimes applicable to TPMs: on the one hand, a regime that prohibits the business of trafficking in illicit devices, pursuant to the Computer Programs Directive and the Conditional Access Directive; and, on the other hand, a regime that prohibits both the act of circumvention of TPMs, as well as the business of trafficking in illicit devices or circumventing services, pursuant to the Information Society

²³⁴ Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, Official Journal L 320/54, 28/11/1998 [“Conditional Access Directive”].

²³⁵ N. Helberger, *Controlling Access to Content: Regulating Conditional Access in Digital Broadcasting*, The Hague, Kluwer Law International, 2005; Cunard/Hill/Barlas 2004, p. 79; T. Heide, “Access Control and Innovation under the Emerging EU Electronic Commerce Framework”, *Berkeley Technology Law Journal* 2000/15, p. 993-1048.

²³⁶ Conditional Access Directive, article 2(e).

²³⁷ Conditional Access Directive, article 4.

²³⁸ Explanatory Memorandum, Proposal for a Directive on the Harmonisation of Copyright and Related Rights in the Information Society, COM(97) 628 final 10 December 1997, pp. 41-42.

Directive.²³⁹

3.2 Legal protection pursuant to the Information Society Directive

Article 6 of the Information Society Directive represents the European Community's implementation of its international obligations under the WIPO Treaties regarding the legal protection of technological protection measures. The adoption of this provision was no easy task, however. It gave rise to intense debates during the entire legislative process, both at Community level and at Member State level. The difficulty for the Community and its Member States in determining the proper scope of protection for TPMs was not only in the complexity of the matter at hand, but also in the vagueness of the rule contained in articles 11 of the WCT and 18 of the WPPT. This rule, which now serves as the basis for national legislation, was itself the product of a serious compromise by the Contracting Parties, for the final text substantially differed from the draft text proposed to the Diplomatic Conference in December 1996.²⁴⁰ The broad formulation of articles 11 of the WCT and 18 of the WPPT according to which Contracting Parties must provide 'adequate legal protection and effective legal remedies against the circumvention of effective technological measures' offered several options to the lawmakers. Among the most obvious options available were the adoption of a prohibition on acts of circumvention, or a prohibition of preparatory acts of circumvention, or a combination of the two. As Ricketson and Ginsburg point out in relation to the provisions of the WIPO Treaties:

"The text appears most directly to cover the acts of removing, breaking, or bypassing a technological measure. But relatively few individual users are likely to be able to engage in these acts unaided by a device that will overcome the protection. The question therefore arises whether the formulation 'the circumvention' covers only that act, or also reaches the more economically significant activity of 'preparatory acts', including supplying a device that will enable the circumvention".²⁴¹

The authors conclude that "an interpretation that disfavors effective protection against circumvention by limiting the prohibited conduct to the sole circumvention, rather than encompassing the provision of devices as well" would be inconsistent with the requirements of the Treaties.

Like the provisions of the international instruments, article 6 of the Directive went through numerous amendments before the European legislator finally agreed on a text introducing a "third" layer of protection for rights owners, according to which not only the dealing in circumventing devices for commercial purposes is prohibited, but also the act of circumventing technological protection measures. However, due to the deep controversy that surrounded its adoption, the final text of article 6 of the Directive ended up being very convoluted and complex, not to mention imprecise and ambiguous.²⁴² Moreover, the regime established by the Information Society Directive therefore leaves Member States ample discretion to decide how they implement the provisions contained in article 6 of the Directive, which establishes a general framework for the protection of technological measures composed of broadly worded

²³⁹ See: Koelman 2003, p. 117 et seq.; P. Wand, *Technische Schutzmassnahmen und Urheberrecht*, München, Verlag C.H. Beck, 2001, p. 77 et seq.; and K.J. Koelman, "A Hard Nut to Crack: The Protection of Technological Measures", *E.I.P.R.* 2000/22, pp. 272-288, p. 277.

²⁴⁰ Ricketson/Ginsburg 2005, p. 968.

²⁴¹ *Id.*, p. 976.

²⁴² K.J. Koelman, "De derde laag: bescherming van technische voorzieningen", *Auteurs & Media* 2001/1, pp. 82-89.

provisions, within the boundaries of which Member States may legislate. Since then, countless articles²⁴³ and doctorate theses²⁴⁴ have been written on the subject, trying to decipher this provision's intricacies and intended purpose. The question now is whether the legal framework established by the Information Society Directive contributes to the deployment of online business models. Is the protection conferred pursuant to article 6 of the Directive a reassuring factor for rights owners and content providers who wish to venture into the online world? Does it increase legal certainty for the suppliers of online content?

Despite the presence of a similar provision in the Computer Programs Directive²⁴⁵ and the Conditional Access Directive, the legal protection of TPMs still constitutes a rather new phenomenon in the realm of copyright law. Indeed, most Member States have implemented article 6 of the Information Society Directive less than three years ago. For rights owners and content providers, it may be difficult to identify any tangible effect that flows directly from the implementation of this new legal protection regime, apart from the actual application of technological protection measures for the distribution of copyright protected works.²⁴⁶ To provide a definite answer to the questions set out above would be, at this point, purely speculative on our part. Nevertheless, case-law on the application of this is slowly emerging in the Member States.

This section analyses the different elements of the protection granted on TPMs pursuant to article 6 of the Directive, including the definition of 'effective technological measure', (defined in article 6(3)), the prohibition against acts of circumvention (covered by article 6(1)), and the prohibition against preparatory acts (covered by article 6(2) of the Directive). For a description of the implementation of these provisions in national legislation, we refer the reader to Part II of this study. In the pages below, we identify the remaining areas of uncertainty for each provision, taking into consideration both the European Community's international obligations under the WIPO Internet Treaties and the intended purpose of the Directive.

3.2.1 Definition of "effective technological protection measure"

In accordance with articles 11 of the WCT and 18 of the WPPT, article 6 of the Information Society Directive grants legal protection in regard of "effective technological protection measures". Hence, only those TPMs that meet the criterion of effectiveness benefit from the protection under the Information Society Directive. But what is to be understood as an "effective" technological protection measure? The text of the WCT and the WPPT contain no definition of the concept. By contrast, article 6(3) of the Directive does define "effective technological protection measures". This definition, which is applicable to both the anti-circumvention and the anti-facilitation provisions contained in articles 6(1) and 6(2) of the Directive, reads as follows:

²⁴³ See for example : Gasser 2006; Cunard/Hill/Barlas 2004; K.J. Koelman and N. Helberger, "Protection of technological measures", in P.B. Hugenholtz (ed.), *Copyright and electronic commerce*, The Hague, Kluwer Law International, 2000, pp. 165-227; K.J. Koelman, "Hoe een koe een haas vangt. De bescherming van technologische voorzieningen", *Computerrecht* 2000/1, pp. 30-36; A. Latreille, « La protection des dispositifs techniques. Entre suspicion et sacralisation », *Propriétés intellectuelles* 2002, pp. 35-51 ; G. Vercken, "La protection des dispositifs techniques. Recherche clarté désespérément: à propos de l'article 6.4 de la directive du 22 mai 2001", *Propriétés intellectuelles* 2002, pp. 52-57 ; A. Strowel, "La protection des mesures techniques: une couche en trop?", *Auteurs & Media* 2001, pp. 90-95.

²⁴⁴ See for example : Dusollier 2005; Koelman 2003; S. Bechtold, *Vom Urheber- zum Informationsrecht - Implikationen des Digital Rights Management*, München, Verlag Beck, 2002; Wand 2001; and G. Lubinski, *Mesures techniques de protection, droit d'auteur, droits voisins et droits du public*, Paris, Université Panthéon-Assas, 2005.

²⁴⁵ Computer Programs Directive, art. 7(1)c).

²⁴⁶ The perspective of users, as provided for under article 6(4) of the Information Society Directive, is analysed in chapter 4, *infra*.

“any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the sui generis right provided for in Chapter III of Directive 96/9/EC. Technological measures shall be deemed “effective” where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.”

This definition is not a model of clarity. Three main elements give rise to interpretation problems: 1) the meaning of the word “effective”; 2) the scope of the expression “designed to prevent or restrict acts, (...) which are not authorised by the rightholder”; and 3) the nature of the “acts, (...) which are not authorised by the rightholder”. The meaning of the first element has been discussed in the legal commentaries and will be elucidated, with time, by the courts. The second and third elements, however, raise more fundamental questions and may give rise to different levels of protection across Member States, depending on the interpretation given.

With respect to the criterion of “effectiveness”, this term has been construed so far as reflecting the legislator’s intention to avoid granting protection with regard to obsolete devices, or devices the circumvention of which is too easy, accidental, or simply possible.²⁴⁷ Completely useless TPMs are not protected, while TPMs that do achieve the protection objective and exercise at least some control over the use of the work are protected, even if they eventually get circumvented. The requirement of effectiveness also expresses the legislature’s intention that the TPM be proportionate to the objective that it pursues, that is, the protection of copyright and related rights on a work. Furthermore, a TPM is not effective if it negatively interacts with the normal operation of playing or reading equipment.²⁴⁸ An example of a TPM that is not “effective” and therefore not protected would be a technological protection measure barring digital uses that can be circumvented by making analogue copies.²⁴⁹

With respect to the second element, e.g. the scope of the expression “designed to prevent or restrict acts, (...) which are not authorised by the rightholder”, it appears from the country reports of Part II of this study, that the implementation of this part of the provision has resulted in some important deviations. Some Member States, like Austria, Denmark and Germany, have restricted the scope of TPM’s as understood in article 6(3) to those devices that are designed to objectively protect works against restricted acts under copyright. Other Member States have not clarified whether there must exist a certain relationship between the application of a TPM and the prevention of act of copyright infringement. The lack of harmonisation in this respect certainly does not contribute to the establishment of a coherent legal framework for the protection of TPMs within the European Union and gives rise to legal uncertainty.

With respect to the third ambiguous element of the provision, a technological protection measure is deemed effective “if it controls the use of a work through an access or copy-control mechanism.”²⁵⁰ According to the second sentence of article 6(3) of the Directive, a TPM is protected if it controls use through “application of an access control or protection process”. This part of the definition of article 6(3) has generally been interpreted in the legal commentaries as

²⁴⁷ E.A. Caprioli, “Mesures techniques de protection et d’information des droits d’auteur”, *Communication Commerce électronique* 2006/11, pp. 25-31, p. 29.

²⁴⁸ Dusollier 2005, p. 138.

²⁴⁹ LG Frankfurt, 31 May 2006, 2-06 O 288/06 (*napster DirectCut*) available at: <http://www.affiliateundrecht.de/lg-frankfurt-umgehungssoftware-kopierschutz-wettbewerbswidrig-2-06-O-288-06.html>

²⁵⁰ Bechtold in Dreier/Hugenholtz 2006, p. 388.

granting protection on TPMs that are applied to protect against access to a work.²⁵¹ Opinions are divided, however, on whether this is a correct reading of the article 11 WCT and on whether the protection of TPMs should extend to access control technology. On the one hand, the argument has been put forward that, traditionally, “access” to a work is not considered to fall within the scope of copyright protection.²⁵² As such, TPMs that prevent access should, according to these commentators, not receive legal protection.²⁵³ On the other hand, some commentators have argued that the act of accessing a work “in digital form implicates the reproduction right under the Berne Convention given the fact that every apprehension of a digital work involves the making of a temporary copy in the user's random-access memory (RAM). In addition, it is argued that access controls underpin the communication and distribution right, and that therefore Member States are obliged to protect both copy and access controls against circumvention”.²⁵⁴ As the country report of Part II shows, most EU Member States have taken the latter view upon implementing article 6(3) of the Information Society Directive. In practice, the grant of protection against the circumvention of TPMs that control the use of a work through access control mechanisms is akin to recognising a *de facto* “right of access” to the rights owner.

3.2.2 *Protection against acts of circumvention*

According to article 6(1) of the Information Society Directive, Member States must “provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective”. In other words, this provision requires that Member States prohibit acts of circumvention of TPMs by any person who knows or should have reasonable grounds to know that she is committing an act of circumvention. This provision did not appear in article 6 of the Proposal for a Directive presented in December 1997. As we shall see in greater detail in the next subsection, the European Commission was at the time satisfied that a provision prohibiting any commercial activities, including the manufacture or distribution of devices or the performance of services, designed to enable or facilitate without authority the circumvention of a TPM, was sufficient to meet the requirements of articles 11 of the WCT and 18 of the WPPT. In the Explanatory Memorandum to the Proposal for a Directive, the Commission explained:

“It is not directed simply against the “circumvention of technological measures” as in the WIPO Treaties, but covers any activity, including preparatory activities such as the manufacture and distribution, as well as services, that facilitate or enable the circumvention of these devices. This is a fundamental element, because the real danger for intellectual property rights will not be the single act of circumvention by individuals, but the preparatory acts carried out by commercial companies that could produce, sell, rent or advertise circumventing devices”.²⁵⁵

It is fair to say that the entire provision of article 6 went through several controversial rounds of negotiations between the European Commission, the Council and the Parliament. Because the text of the initial provision was considered too vague and prone to interpretation, the European Parliament insisted that a separate provision for acts of circumvention and for the facilitation of

²⁵¹ Caprioli 2006, p. 27; Gasser 2006, p. 47; Lucas/Sirinelli 2006, p. 316 ; Dusollier 2005, p. 528.

²⁵² See par. 2.2.1 *supra*.

²⁵³ Heide 2001, p. 470; Koelman 2000, p. 277.

²⁵⁴ Gasser 2006, p. 47.

²⁵⁵ Explanatory Memorandum to the Proposal for a Directive on Copyright in the Information Society, p. 41.

acts of circumvention be incorporated into the Directive.²⁵⁶ The current text is therefore the result of a political compromise between the three institutions which, like most political compromises, is far from being a model of clarity.

Article 6(1) of the Directive requires therefore that Member States provide adequate legal protection against acts of circumvention. Clearly, the provision imposes no obligation, either on the Member States or the rights owners, to apply a technological protection measure. The related sanctions find application only once a person has actually circumvented a TPM. As Koelman point out, in view of the formulation of this provision, an “innocent” act of circumvention, e.g. accomplished without the knowledge or grounds to know that the act would result in the circumvention of a TPM, would not fall under the prohibition of the Directive.²⁵⁷ For the rest, the vague wording of article 6(1) leaves a number of questions unanswered. What is an “adequate legal protection”? Who may invoke it: the rights owner, the content provider, or both? Must the circumvention of the TPM give rise to a copyright infringement or is circumvention itself sufficient to trigger the application of the provision? What is the nature of this adjunct protection? What type of technological measure is covered by the legal protection?

The Directive contains no definition or any other indication of what constitutes “adequate legal protection” for the purposes of this provision. As Part II of this study shows, Member States have given varying interpretations to this expression. The reference to the words “adequate legal protection” is directly inspired by the international obligations under the WCT and the WPPT. To constitute an adequate protection under the WCT and the WPPT, the implementing provision must meet the three following criteria: 1) the technological protection measure must be “effective” to deserve legal protection; 2) it must be applied by authors in the context of the exercise of their rights; and 3) it must restrict the effectuation, with respect to a work, of acts that are not authorised by law or by the rights owner.²⁵⁸ The first element of this equation is discussed in section 3.3.1 above.

The examination of the second element of the protection under the WCT and the WPPT brings us to one of the remaining areas of uncertainty under the Directive. The question is: what constitutes the author’s “exercise of his rights”? Opinions vary on this point. It has been argued that a broad interpretation of this expression, which would encompass the exercise of any right, moral or economic, would be protected under the WIPO Internet Treaties irrespective of the form in which the right is exercised.²⁵⁹ The fact remains that articles 6(1) and 6(3) of the Information Society Directive both fail to mention that the protection of TPMs is granted to authors in the exercise of their rights.

Another question concerns the person entitled to claim the application of this provision. The formulation of article 6(1) does not specify who is entitled to invoke the protection: the rights owner, an intermediary, or both. According to Wand, the rights owners are in any case entitled to invoke the protection, but Member States would be, in his opinion, allowed to designate the maker and distributor of technological protection measures as parties entitled to invoke the protection. This position is contested, especially if one takes account of the words “which are not authorised by the rightholder of any copyright or any right related to copyright” included in the definition of an “effective protection measure” in article 6(3). This reference to the right holder would tend to exclude any other person who is not right owner, from exercising this protection. In practice, technological protection measures are “not used or applied by the authors themselves but rather by their agents or licensees acting with the author’s consent”.

²⁵⁶ Amended Proposal for a Directive on the Harmonisation of Copyright and Related Rights in the Information Society, 21 May 1999, COM(1999) 250 final, O.J.E.C. C 180/6, 25 June 1999; see: Wand 2001, p. 103.

²⁵⁷ Koelman 2003, p. 83.

²⁵⁸ Dusollier 2005, p. 87.

²⁵⁹ Gasser 2006, p. 47.

Moreover, if right holders bundle their exploitation rights through licensing agreements in the hands, for example, of a record company, this licensee's authorisation or non-authorisation is the relevant consent for the purposes of article 6(3).²⁶⁰ While individual authors undeniably bundle their rights in the hands of one producer, it is far from obvious that the producer will always be the one applying the technological protection measure. In many cases, the TPM is applied by the content provider of the work, like an Internet service provider, not the rights holder or licensee himself.²⁶¹ Who then has standing to sue over the circumvention of a TPM?

The WIPO Internet Treaties also require that Contracting Parties adopt "adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are *not authorized by the authors concerned or permitted by law*" (our italics). In the Basic Proposal to the WIPO Copyright Treaty, one can read that "Contracting Parties may design the exact field of application of the provisions envisaged in this Article taking into consideration the need to avoid legislation that would impede lawful practices and the lawful use of subject matter that is in the public domain".²⁶² There is, under both international instruments, a clear connection between the legal protection of TPMs and copyright law, where the protection of the WCT and the WPPT is granted only in relation to acts of circumvention that result in a copyright infringement.²⁶³

The initial text of article 6(1) was much closer to the intent of the international instruments. Article 6(1) of the Proposal for a Directive 1997 read as follows:

"Member States shall provide adequate legal protection against any activities, including the manufacture or distribution of devices or the performance of services, which have only limited commercially significant purpose or use other than circumvention, and which the person concerned carries out in the knowledge, or with reasonable grounds to know, that they will enable or facilitate without authority the circumvention of any effective technological measures designed to protect any copyright or any rights related to copyright as provided by law or the *sui generis* right provided for in Chapter III of European Parliament and Council Directive 96/9/EC". (Our emphasis)

In the Explanatory Memorandum to the Proposal, the Commission had insisted that:

"Finally, the provision prohibits activities aimed at an infringement of a copyright, a related right or a *sui generis* right in databases granted by Community and national law: this would imply that not any circumvention of technical means of protection should be covered, but only those which constitute an infringement of a right, i.e. which are not authorized by law or by the author."²⁶⁴

The provision was substantially modified in the course of the legislative process to the version that we now know. Article 6(1) of the Directive makes no connection between the protection of intellectual property rights and the legal protection of TPMs. At most, article 6(3) of the Directive, which gives a definition of what constitutes an "effective measure", states that "such

²⁶⁰ Bechtold in Dreier/Hugenholtz 2006, p. 387.

²⁶¹ Ricketson/Ginsburg 2005, p. 973.

²⁶² WIPO Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to Be Considered by the Diplomatic Conference, CRNR/DC/4, 30 August 1996, para. 13.05.

²⁶³ Koelman 2003, p. 66.

²⁶⁴ Explanatory Memorandum to the Proposal for a Directive on Copyright in the Information Society, p. 41.

legal protection should be provided in respect of technological measures that effectively restrict acts *not authorised by the rightholders* of any copyright, rights related to copyright or the sui generis right in databases without, however, preventing the normal operation of electronic equipment and its technological development” (our emphasis). Considering the major changes brought to this provision and the fact that the text that was finally enacted no longer expressly links the act of circumvention to an act of infringement, it is very doubtful whether the quote above still reflects the intent of the European legislator. The final text of article 6(1) departs in substantial respects from the provision of the WIPO Treaties: first, it does not specify that the technological measures must be used in connection with the exercise of a right; second, it fails to specify that the technological measure must restrict acts not permitted by law and not only acts not authorised by the rights holder. The logical consequence of these two omissions is that the act of circumvention is not linked in any way to an act of copyright infringement.²⁶⁵

The protection afforded under the Information Society Directive therefore goes far beyond the European Union’s international obligations since it can, in principle, be invoked for acts of circumvention accomplished for purposes that would be lawful under the copyright act. As the country reports in Part II of this study show, this went too far for some Member States who have taken very different approaches in relation to categorizing acts of circumvention. In several Member States, article 6 (1) was implemented so as to clarify a direct relationship with copyright infringement, in that authorisation is only required for acts which constitute a use of the work in a legal sense.

What is the nature of a protection granted under article 6(1) of the Directive? The Directive leaves this issue entirely to the Member States.²⁶⁶ Scholarly literature tends to consider this type of protection at most as an ancillary (*flankierende*) form of protection.²⁶⁷ In the Basic Proposal for a Treaty on Copyright, the International Bureau of the WIPO wrote that “the obligations established in the proposed Article 13 are more akin to public law obligations directed at Contracting Parties than to provisions granting “intellectual property rights”.²⁶⁸ This view was confirmed by the District Court of Cologne where the court declared that the protection against circumvention of TPMs provided for under article 95a of the German Copyright Act does not constitute a new intellectual property right (*Leistungsschutzrecht*), but rather a right that is ancillary to the exclusive rights of the author.²⁶⁹ As the country reports of Part II show, however, some Member States have adopted another view, granting to the legal protection of TPMs the status of “right” of the rights owner.

3.2.3 Protection against circumventing devices and facilitation

As a complement to the protection afforded under article 6(1) of the Directive, article 6(2) provides for a prohibition on the supply of any product or service which primarily enables or facilitates the circumvention of TPMs or, a prohibition on acts preparatory to actual circumvention. According to article 6(2) of the Information Society Directive, Member States must provide:

“adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which:

²⁶⁵ Koelman 2003, p. 89.

²⁶⁶ For an account of the national implementation, see Part II of this study.

²⁶⁷ Wand 2001, p. 102.

²⁶⁸ Basic Proposal, para. 13.03.

²⁶⁹ LG Köln: "Abmahnkosten bei Online-Privatauktion einer urheberrechtswidrigen Kopier-Software" (Urteil v. 23.11.2005 - Az: 28 S 6/05), available at: <http://www.jurpc.de/rechtspr/20060049.htm>

- (a) are promoted, advertised or marketed for the purpose of circumvention of, or
- (b) have only a limited commercially significant purpose or use other than to circumvent, or
- (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of,
any effective technological measures.”

For more certainty, recital 48 of the Directive declares that “such legal protection should be provided in respect of technological measures that effectively restrict acts not authorised by the rightholders of any copyright, rights related to copyright or the sui generis right in databases without, however, preventing the normal operation of electronic equipment and its technological development. Such legal protection implies no obligation to design devices, products, components or services to correspond to technological measures, so long as such device, product, component or service does not otherwise fall under the prohibition of Article 6. Such legal protection should respect proportionality and should not prohibit those devices or activities which have a commercially significant purpose or use other than to circumvent the technical protection.” According to the Explanatory Memorandum to the 1997 Proposal, this solution would “ensure that general-purpose electronic equipment and services are not outlawed merely because they may also be used in breaking copy protection or similar measures.”²⁷⁰

Article 6 (2) therefore prohibits certain commercial dealings in devices which enable the circumvention of technological protection measures. In addition, it prohibits certain services and advertisements for circumvention devices, including any online transmission of circumvention tools.²⁷¹ For instance, article 95a(3) of the German Copyright Act, which implements this provision of the Directive, was invoked successfully to prevent the dissemination of circumventing software, as well as its description and use inside magazine articles or online news services. Indeed, in the *heise.com* case, the Court of Appeal of Munich ordered the removal of a link from an editorial article of a news service to the website of a circumvention software provider.²⁷²

However, as in the case of article 6(1) of the Directive, the link between copyright protection and the legal protection against certain commercial dealings is not readily apparent. Apart from the requirement in paragraph 3 that the TPM concern restricted acts “in respect of works or other subject matter”, the provision is silent on whether such devices must facilitate copyright infringement or whether any technology which facilitates the circumvention of technological protection measures is covered. Paragraphs a) to c) of the provision make no distinction between circumvention devices that protect against copyright infringement and those that do not. This derives in part from the broad definition of “effective technological protection measure” in article 6(3) of the Directive, which is also applicable to the prohibition of article 6(2).²⁷³

The requirement of paragraph b) is certainly the most controversial part of the provision, since it does not require intent on the part of the manufacturer or distributor of devices. As many commentators have noted, the provision casts a cloud on technology with ‘dual-purpose’ capabilities, which might inhibit technological innovation.²⁷⁴ Moreover, absent any interpretative guidelines it is exceedingly difficult to interpret. When does a device or software have only a

²⁷⁰ Explanatory Memorandum to the Proposal for a Directive on Copyright in the Information Society, p. 41.

²⁷¹ Bechtold in Dreier/Hugenholtz 2006, p. 389.

²⁷² LG München I, 7 March 2005, 21 O 3220/05 – *Heise Online*. The decision was upheld by the Munich Superior Court on 28 July 2005, ZUM 2005/12, pp. 896-901.

²⁷³ Cunard/Hill/Barlas 2004, p. 72.

²⁷⁴ Götting in Schricker 2006, p. 1844; Dusollier 2005, p. 60; Koelman 2003, p. 110; Spindler 2002, p. 116; and Wand 2001, pp. 111 et seq.

“limited commercially significant purpose or use other than to circumvent”? Is it when it can be used sixty, fifty, twenty or ten per cent of the time to circumvent? How must the commercial significance be evaluated? According to the generated income? To the number of devices sold? In the absence of any indication in the Directive, it is up to the courts to decide the issue.

3.2.4 Sanctions and remedies

The WCT and the WPPT’s main requirement is that the remedies provided be effective and thus constitute a deterrent and a sufficient sanction against the prohibited acts. Article 8(1) of the Information Society Directive requires Member States to “provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive”. The second paragraph of the same article obliges Member States to “take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2)”. Member States are free to determine whether civil or criminal sanctions are the adequate response to an act of circumvention or to the facilitation of such acts of circumvention.²⁷⁵ As the summary of the implementation of the Directive in Part II of this study shows, the vagueness of article 8(1) of the Directive has resulted in a plethora of different national regimes, ranging from a regime of exclusively civil remedies, to criminal sanctions for acts of circumvention or to a combination of both types of remedies.²⁷⁶

In practice, once circumvention has been detected, the question is whether sanctions and remedies are sufficient to stop illegal practices, e.g. to prevent users from engaging in infringing behaviour and to compensate for possible damages. Interviews with stakeholders have revealed that by and large, it is still too early for the industry to tell if sanctions and remedies are appropriate. After all, with the possible exception of music downloading services, many services have only been offered from a few years to a couple of months only.

3.3 Legal Protection of Technological Measures outside Europe

In countries outside the European Union, article 11 of the WCT and article 18 of the WPPT directly provide the framework for national legislation. The broad wording these provisions, according to which Contracting Parties must provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures”, offered several options to the national lawmakers. Among the most obvious options available was the adoption of a prohibition on acts of circumvention, or a prohibition of preparatory acts of circumvention, or a combination of the two.

In view of the relative novelty and complexity of the matter at issue, we consider it useful to compare the TPM regime of the Information Society Directive with corresponding rules in other countries. The following section briefly describes legislative solutions in the United States, Australia, Japan, Canada and Switzerland.

3.3.1 USA

As one of the first countries to implement the WIPO Internet Treaties, the United States enacted the Digital Millennium Copyright Act (“DMCA”) in 1998. The DMCA introduced anti-

²⁷⁵ Wand 2001, p. 104.

²⁷⁶ See Part II of this study.

circumvention provisions by adding a new section 1201 to the US Copyright Act.²⁷⁷ Section 1201 is built upon a basic distinction between access- and rights controls. Both are protected, but to different extents. Protected *access controls* are defined as TPMs that: “in the ordinary course of [their] operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work”.²⁷⁸ Protected *rights controls* are defined as TPMs that “in the ordinary course of [their] operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under this title”.²⁷⁹

Section 1201(a) (1) of the DMCA contains a general prohibition against circumvention of access controls, the scope of which is very broad since even non-infringing acts of access control circumvention are forbidden.²⁸⁰ Circumvention of rights controls is, on the other hand, not prohibited. Section 1201(a)(2) and 1201(b)(1) of the Act contain anti-trafficking provisions that apply to both access- and rights controls and target both devices and services. Acts covered are “the manufacture, import, offer to the public, provide, or otherwise traffic”. The test applying to circumvention devices and services resembles the one laid down in article 6(2) of the Information Society Directive, where a tool will be prohibited under the DMCA, if it:

- “(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;
- (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title;
- or
- (C) is marketed by that person or another acting in concert with that person with that person’s knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title”.

The DMCA therefore prohibits tools that can be used for circumvention purposes based on their primary design or production, regardless of whether they can or will be used for non-infringing purposes. Like the criterion laid down in article 6(2) of the Information Society Directive, however, uncertainty remains regarding the exact meaning of the criterion “primarily designed or produced”.²⁸¹

The anti-circumvention provisions of the DMCA provide both criminal sanctions²⁸² and civil remedies²⁸³.

3.3.2 Australia

The Copyright Amendment (Digital Agenda) Act 2000²⁸⁴ introduced important amendments to the Australian Copyright Act of 1968. The Digital Agenda Act was part of the Australian implementation of the WIPO Treaties, and it, among others, included the adoption of anti-circumvention provisions. The protection scheme implemented by the Digital Agenda Act is still

²⁷⁷ 17 U. S. C. On the US implementation see: Gasser 2006, pp. 62 et seq.; C.D. Kruger, “Passing the Global Test: DMCA § 1201 as an International Model for Transitioning Copyright Law into the Digital Age”, *Houston Journal of International Law* 2006/28, pp. 281-322; Cunard/Hill/Barlas 2004, pp. 45-69;

²⁷⁸ 17 U. S. C. § 1201(a)(3)(B).

²⁷⁹ § 1201(b)(2)(B).

²⁸⁰ § 1201(a)(1)(A).

²⁸¹ Gasser 2006, p. 19.

²⁸² § 1204(a).

²⁸³ § 1203(b).

²⁸⁴ Copyright Amendment (Digital Agenda) Act 2000, No. 110 of 2000, entered into force on 4 March 2001.

in force. Several reviews have been held since its adoption; partly mandated by the Act itself, and partly as part of the ongoing general copyright debate. As we shall see in greater detail below, however, the 2004 Australia-United States Free Trade Agreement (“AUSFTA”)²⁸⁵ has come to supersede all prior reform proposals, since it requires quite substantial changes to the Australian anti-circumvention regime. The Digital Agenda Act defines a TPM as:

“a device or product, or a component incorporated into a process, that is designed, in the ordinary course of its operation, to prevent or inhibit the infringement of copyright in a work or other subject-matter by either or both of the following means:

- (a) by ensuring that access to the work or other subject matter is available solely by use of an access code or process (including decryption, unscrambling or other transformation of the work or other subject-matter) with the authority of the owner or exclusive licensee of the copyright;
- (b) through a copy control mechanisms.”²⁸⁶

This definition has already been the object of judicial consideration. In the *Stevens v. Sony* case,²⁸⁷ the Australian High Court found that the TPMs used in Sony’s PlayStation consoles, which prevented the playing of unauthorized copies but not the actual copying of PlayStation games, did not satisfy the statutory requirement that the measure must “prevent or inhibit the infringement of copyright” (emphasis added). Thus Sony’s TPMs were not regarded as TPMs within the definition of the Act. The reasoning of the High Court was that the measure did not prevent copyright infringement per se,²⁸⁸ but it prevented access only after infringement had already occurred.

The Australian Act does not prohibit circumvention of TPMs by an individual, or the use of circumvention devices. However it prohibits trafficking in circumvention devices and services.²⁸⁹ The anti-circumventing devices provision makes it illegal to make, sell, let for hire, advertise, market, distribute for purpose of trade, exhibit, import circumvention devices for any purposes mentioned above or make circumvention devices available online in a way that prejudicially affect the rights holder.²⁹⁰ The anti-circumventing service provision similarly makes it illegal to provide, advertise or market circumvention services.²⁹¹ The test applying to a circumvention device or service is quite similar to the criterion laid down in the Information Society Directive, i.e. whether the device or service has: “only a limited commercially significant purpose or use, or no such purpose or use, other than the circumvention, or facilitating the circumvention, of a technological protection measure”.²⁹²

Both criminal sanctions and civil remedies are available against violation of the provisions mentioned above.²⁹³

Australia/United States Free Trade Agreement

²⁸⁵ The Trade Agreement entered into force on 1 January 2005.

²⁸⁶ See § 10.

²⁸⁷ *Stevens v Kabushiki Kaisha Sony Computer Entertainment*, [2005] HCA 58.

²⁸⁸ At the time of the case it was no infringement of copyright to play an infringing copy of a game (although it was of course a copyright infringement to make an unauthorised copy of a game).

²⁸⁹ Copyright Act of 1968, § 116A.

²⁹⁰ Copyright Act of 1968, § 116A(1)(b), (i)-(vi).

²⁹¹ Copyright Act of 1968, § 116A(1)(b)(vii).

²⁹² Copyright Act of 1968, § 10.

²⁹³ See the Copyright Act §§ 116A and 132(5A)-132(5B).

The anti-circumvention rules described above will have to be modified in order to implement the provisions of the AUSFTA. Chapter 17 of the AUSFTA deals with intellectual property and includes a number of provisions in the area of copyright law. Although several of these provisions have already been transposed into Australian law, the AUSFTA requirements in relation to TPMs must still be implemented before 1st January 2007.²⁹⁴ In September 2006, the Australian government presented its Draft Bill for the implementation of the AUSFTA obligations regarding the TPM protection scheme. The Copyright Amendment (Technological Protection Measures) Bill 2006²⁹⁵, which is meant to implement Australia's AUSFTA obligations with respect to TPMs, would change the Australian regime in (at least) three important respects: 1) the definitions of protected TPMs, 2) the targeted conduct and 3) the exceptions. The proposed changes within these three categories will be presented and briefly discussed below.

The Bill 2006 introduces completely new definitions for several key elements of the anti-circumvention rules. The proposed definition of protected TPMs ("technological protection measures") shall include any:

- "[...] device, product or component (including a computer program) that:
 - (a) is used with the permission of, or on behalf of, the owner or the exclusive licensee of the copyright in a work or other subject matter; and
 - (b) is designed, in the normal course of its operation, to prevent or inhibit the doing of an act:
 - (i) that is comprised in the copyright; and
 - (ii) that would infringe the copyright;
 and includes an access control technological protection measure."²⁹⁶

The Bill further defines one *subset* of "technological protection measures", namely those that control access. An "access control technological protection measure" shall be any device, product or component (including a computer program) that is designed, in the normal course of its operation, to prevent or inhibit the doing of a copyright relevant act "by preventing those who do not have the permission of the owner or exclusive licensee from gaining access to the work or other subject matter".²⁹⁷

Although the definition has been completely re-written, it is uncertain whether the modification is meant to change its scope. When comparing some key elements, it is worth pointing out first, that the current definition explicitly refers to (and includes) access controls. The judicial test applied in *Sony vs. Stevens* requires that an access control – like any other TPM – prevents or inhibits copyright infringement *per se*.²⁹⁸ According to the proposed new definition, access controls must be designed to prevent or inhibit the doing of an act that is covered by copyright and that would infringe copyright. The definition requires causality between the blocking of access and the prevention or inhibition of such acts as mentioned. Consequently, the two definitions appear to be quite similar with respect to the inclusion of access controls within the scope of the protection.

²⁹⁴ See the US Free Trade Agreement Implementation Bill 2004, available at <http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/Bills/Linked/23060406.pdf>.

²⁹⁵ See the Copyright Amendment (Technological Protection Measures) Bill 2006, available at: [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(0C3FC6E500CE9F81CFAAA22DF670141F\)~Draft+exposure+bill.pdf/\\$file/Draft+exposure+bill.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(0C3FC6E500CE9F81CFAAA22DF670141F)~Draft+exposure+bill.pdf/$file/Draft+exposure+bill.pdf).

²⁹⁶ Subsection 10(1).

²⁹⁷ *Ibid.*

²⁹⁸ As explained above, a TPM that solely prevents a user from accessing an unauthorised copy of a work does not satisfy this test, since it does not *per se* prevent unauthorized reproduction, but only the subsequent act of access (which is not itself a copyright infringement)

Second, the reference to copyright infringement has been altered: the current definition requires that TPMs be designed “to prevent or inhibit *the infringement* of copyright”. By contrast, the proposed new definitions encompass TPMs designed “to prevent or inhibit *the doing of an act*: (i) that is comprised in the copyright; and (ii) that would infringe the copyright”. Again, however, the two definitions appear to be quite alike as to their substance. The proposed new definition further includes a note that sheds some light on the practical application of the test:

“Note: To avoid doubt, a device, product or component (including a computer program) that is solely designed to control market segmentation is not an access control technological protection measure”.

In light of this, differences between the current and the proposed definitions of protected TPMs *as to their substance* can hardly be noted. However, the re-structuring of the definition has one obvious *technical* effect in that it enables discrimination of access controls where needed. This may have been the sole purpose of the new definitions, since the AUSFTA requires a ban on circumvention only as far as access controls are concerned. As the quoted definition shows, however, when the Bill uses the general term “technological protection measure”, this also includes access controls.

One may ask whether the definitions of the TPMs protected under the Technological Protection Measures Bill meet the AUSFTA requirements. The AUSFTA definition refers to any measure that “controls access to a protected work [...] or protects any copyright”.²⁹⁹ This definition seems to encompass access controls *as such*, regardless of whether the measures prevents or inhibits copyright infringement *per se*. This interpretation is supported by the requirement of Article 17.4(7)(d) of the Treaty according to which circumvention and trafficking are to be regarded as “separate civil or criminal offence[s] and independent of any infringement that might occur under the Party’s copyright law”. On the other hand, the proposed definition is in accordance with the Australian Parliamentary Standing Committee Report, which recommended that:

“in the legislation implementing Article 17.4.7 of the Australia-United States Free Trade Agreement, the definition of technological protection measure/effective technological measure clearly requires a direct link between access control and copyright protection.”³⁰⁰

Through separate provisions, the pending Bill targets the different acts of circumvention,³⁰¹ trafficking in circumvention devices³⁰² and trafficking in circumvention services.³⁰³ The ban on circumvention relates to access control technological protection measures only, whereas the other two prohibitions relate to technological protection measures in general (incl. access controls). The test applying to a circumvention device or service is whether it (i) is promoted, advertised or marketed as having the purpose of circumventing; (ii) has only a limited commercial significant purpose or use or no such purpose or use other than the circumvention of; or (iii) is primary or solely designed or produced for the purpose of enabling or facilitating the circumvention of, a

²⁹⁹ Article 17.4(7)(b).

³⁰⁰ House Standing Committee on Legal and Constitutional Affairs, *Review of technological protection measures exceptions*, Canberra, 1 March 2006, § 2.61, available at: <http://www.aph.gov.au/house/committee/laca/protection/report.htm>.

³⁰¹ Section 116AK.

³⁰² Section 116AL.

³⁰³ Section 116AM.

technological protection measure.³⁰⁴

The proposed prohibitions seem to fulfil the requirements of the AUSFTA, which requires a prohibition on both circumvention and trafficking activities, but, like the DMCA, confines the requirement of a prohibition on circumvention to access controls.³⁰⁵ Both civil remedies and criminal sanctions are foreseen under the Bill.³⁰⁶ Civil remedies include injunctions, damages and destruction of circumvention devices. The criminal penalties, which are generally severe,³⁰⁷ correspond to the provisions included in the chapter of the Bill on civil remedies.

3.3.3 Japan

Japan has a twofold anti-circumvention regime. Following the implementation of the WIPO Treaties in 1999, the Copyright Law of Japan (“CLJ”)³⁰⁸ contains provisions targeting acts of trafficking in certain circumvention devices and programs, and acts of circumventing as a business in response to a request from the public.³⁰⁹ Additionally, the Japanese Unfair Competition Prevention Law (“UCPL”)³¹⁰ also contains rules targeting acts of trafficking in circumvention devices, where such acts are regarded as unfair competition. The UCPL provisions were enacted at the same time as the implementation of the WIPO Treaties under the Copyright Law. However, the general opinion seems to be that they mainly fall outside the scope of the WIPO requirements, which are regarded as fully satisfied through the CLJ provisions.³¹¹ Japan chose to implement such a twofold system for the following reason: since the grant of anti-circumvention protection is mandatory under the WIPO Treaties only to the extent that technological measures regulate acts governed by copyright, a prohibition on the circumvention of access control technology does not belong in the CLJ, since “access” to works is not a copyright relevant act.³¹²

The anti-circumvention provisions of the UCPL, on the other hand, should be seen as a response to the new threats to fair competition in a digital, networked society. A general goal of

³⁰⁴ Subsection 10(1).

³⁰⁵ Respectively, Article 17.4(7)(a)(i) and (ii).

³⁰⁶ Respectively Section 116 AO and Sections 132APA-132APC.

³⁰⁷ *Ibid.*

³⁰⁸ Law No. 48, promulgated on May 6, 1970 as amended by Law No. 77, of 15 June 1999. An unofficial English translation of the statute is available at <http://www.cric.or.jp/cric_e/clj/clj.html>.

³⁰⁹ Prior to the implementation of the WIPO treaties, anti-circumvention protection was an unknown concept in Japanese copyright. See: T. Koshida, *A Law Partly Amending the Copyright Act*, Japan Copyright Office/Ministry of Cultural Affairs, 1999, available at <http://www.cric.or.jp/cric_e/cuj/cuj99/cuj99_5.html>, 2: “Measures to protect rights through technology to protect such rights rather than the rights relationships themselves have never previously been seen in the copyright protection legislation of Japan, so these amendments are characterized as a new step in the protection of copyright in Japan”

³¹⁰ Law No. 47, promulgated on May 19, 1993.

³¹¹ See e.g. Koshida 1999: “With these amendments [to the CLJ], Japan has met the conditions for ratification of the WIPO Copyright Treaty”. See also: M. Katoh, “Intellectual Property and the Internet: A Japanese Perspective”, *U. Ill. J.L. Tech. & Pol’y* 2002/2002, 333, 338: “The Copyright Law Amendments prohibit the distribution of devices that circumvent technological measures that protect copyright and related rights (copy control measures). Additionally, the Japanese Government went beyond the treaties’ requirements by adopting amendments to the Unfair Competition Prevention Law (“UCPL”) that prohibit the distribution of devices that circumvent access control measures”

³¹² See Koshida 1999, p. 5. See also: J. de Werra, “The Legal System of Technological Protection Measures under the WIPO Treaties, the Digital Millennium Copyright Act, the European Union Directives and other National Laws”, in ALAI-USA, *Adjuncts and Alternatives to Copyright*, New York, Columbia Law School, 2001, pp. 198-237, p. 230, available at <http://www.alai-usa.org/2001_conference/1_program_en.htm>; Y. Noguchi, *Toward Better-Balanced Copyright Regulations in the Digital and Networked Era: Law, Technology, and the Market in the U.S. and Japan*, PhD Thesis, Stanford University 2006, p. 190.

Japanese unfair competition law is to “protect private interests in the form of entrepreneurial business interests, and the public interest, that is maintenance of fair competition order”;³¹³ among others by putting restrictions on “imitation goods without creativity, such as counterfeit products and pirated goods”.³¹⁴ The anti-circumvention provisions are intended to “prevent transactions of detour devices and programs that might *endanger the existence of the specialized data industry*”; the assumption being that using works without permission “damages the specialized data industry and *might endanger the industry’s infrastructure*” (emphasis added).³¹⁵ The UCPL identifies certain circumvention-related acts that are to be regarded as unfair – hence unlawful – competition.³¹⁶ Although several commentators maintain that the primary purpose of UCPL’s anti-circumvention provisions is to protect access controls,³¹⁷ as we shall see below, the Act undoubtedly also protects copy controls. Thus, there is a slight overlap between the anti-circumvention protections of the JCL and the UCPL.³¹⁸

Copyright Law of Japan

According to the statutory definition,³¹⁹ in order to be protected under the Copyright Act, a TPM must (i) be a measure to prevent or deter (by electromagnetic means) such acts as constitute infringements on copyright; (ii) be used at the will of the copyright holder; and (iii) adopt a system of recording or transmitting such signals as having specific effects on machines together with works.³²⁰ The first requirement essentially limits the protection to TPMs regulating acts covered by copyright. As one commentator points out, this, in practice, includes copy controls and possible future measures to regulate the making available of works (to the public).³²¹ On the other hand, access controls, such as e.g. measures that restrict viewing or listening of a work, fall outside the protection of CLJ.³²² Whether the Act protects dual-purpose measures is unclear.

The definition requires measures to “prevent or deter” copyright-restricted acts.³²³ The term “prevent”, in this relation, means to *stop* such acts that constitute an infringement on copyright. For instance, a Serial Copy Management System (SCMS), which stops audio recording, falls within this group of measures.³²⁴ The term “deter”, in this relation, refers to deterring such acts that constitute an infringement on copyright by causing considerable obstruction to the results of such acts, although the act itself is not stopped.³²⁵ For example, the false synch pulse system, which causes a recorded picture to be disarranged and hence unbearable to watch, falls within this group of measures. Outside the definition are measures that merely warn the user not

³¹³ M. Ishida, *Outline and Practices of Japanese Unfair Competition Prevention Law*, Tokyo, Japan Patent Office, 2003, available at <http://www.apic.jiii.or.jp/p_f/text/text/2-10.pdf>, p. 8.

³¹⁴ *Ibid*, at p. 1.

³¹⁵ *Ibid*, at p. 22.

³¹⁶ The competition-perspective of the Act also naturally limits the scope to its anti-circumvention provisions to acts that are commercially motivated.

³¹⁷ See e.g. De Werra 2001, p. 230; Katoh 2002, p. 338.

³¹⁸ See e.g. J. Besek, “Anti-Circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts”, *Columbia Journal of Law & the Arts*, 2004/27, pp. 385-519, at p. 432; De Werra 2001, p. 232 (footnote 159).

³¹⁹ CLJ Article 2(xx).

³²⁰ Koshida 1999, pp. 4-5.

³²¹ *Ibid*, at 5.

³²² Koshida 1999, p. 5 ; de Werra 2001, p. 233; Noguchi 2006, p. 190.

³²³ CLJ Article 2(xx).

³²⁴ Koshida 1999, p. 5.

³²⁵ *Ibid*; cf. CLJ Article 2 (xx).

to make an illegal reproduction.³²⁶

Event though the anti-circumvention provisions of the CLJ were already drafted to intercept both current (at the time of enactment) and future technologies in the first place,³²⁷ according to one commentator, the Japanese Copyright Council is currently discussing expansion of the CLJ definition of “technological protection measures”, in order to include also access controls.³²⁸ One Discussion Report has already been produced in this regard (July 2005),³²⁹ in which reference is made to the increasing technical merger of copy- and access controls as the main background for the discussion.³³⁰ The following quote from the report illustrates the dilemma:

“[T]here was an opinion that access control devices should be regulated under Copyright law, because there could be a case where access control served as deterrence of [illegal] reproduction. For example, by decrypting and loading onto the PC the content of a DVD disc using ripping software, people can invalidate copy control technologies on DVD. However, on the other hand, there was an opinion that regulating technologies that control “mere viewing or listening,” which is not part of copyright, brings about the substantial effect of giving copyright holders a new right to control users’ viewing and listening”.³³¹

The Discussion Report, which marked the end of a six-month discussion within the Copyright Council, concluded that it was too early to conclude in the favour of an expansion. Further discussion was needed “regarding the purpose of copyright law, trend of international discussions [and] the boundary of where technologies, law and contracts should give overlapping protection”, and therefore, it decided to await a final conclusion expected in 2007.³³²

Article 120bis(i) of the Act generally bans acts of trafficking in circumvention devices (incl. computer programs). The provision reads as follows:

“any person who transfers to the public the ownership of, or lends to the public, manufactures, imports or possesses for transfer of ownership or lending to the public, or offers for the use by the public, a device having a principal function for the circumvention of technological protection measures (such a device includes such a set of parts of a device as can be easily assembled) or copies of a program having a principal function for circumvention of technological protection measures, or transmits publicly or makes transmittable such program.”³³³

Accordingly, the test applying to circumvention devices is whether they have a *principal function* for the circumvention of technological protection measures. According to one commentator, this requirement means that, in order to fall under the prohibition, a device may only have a limited practically significant function other than the circumvention of technological measures. General-

³²⁶ *Ibid.*

³²⁷ Koshida 1999, p. 5.

³²⁸ See Noguchi 2006, p. 196, et seq.

³²⁹ Discussion Report on Digital Working Team: Legislation Subcommittee of the Copyright Council, dated July 29th, 2005) available at <http://www.mext.go.jp/b_menu/shingi/bunka/gijiroku/013/05072901/002.htm> (Japanese text; a full English translation of the report does not appear to exist) [hereinafter Discussion Report].

³³⁰ Noguchi 2006, p. 196.

³³¹ Discussion Report, *Supra* note 146, 4. Translation by Noguchi 2006, p. 197.

³³² *Ibid.*

³³³ Article 120bis(i).

purpose devices, such as PCs, fall outside this definition. Also so-called “non-reacting machines” – equipment that does not respond to the signals that constitute the technical protection – are unaffected.³³⁴ Acts of manufacturing or importing, or possession of circumvention devices or programs for one’s own personal use are not targeted by the prohibition.³³⁵

Additionally, article 120bis(i) of the CLJ prohibits circumventing TPMs “as a business [...] in response to a request from the public”.³³⁶ This provision targets for example, the act of obtaining movie software from a customer, circumventing technological measures, and then returning it.³³⁷ The reason for this prohibition is that such conduct – which seems to constitute what might be called a circumvention *service* – is considered to have the same detrimental effect as transfer of ownership of a circumvention device to the public.

A violation of the CLJ anti-circumvention provisions gives rise to criminal liability.³³⁸ Contrary to acts of (actual) copyright infringement, civil remedies are not available. The rationale behind this limitation of available remedies is that, “whereas in Copyright Law, the right to petition for an injunction is thought to be applicable in cases where there is a clear danger of the infringement of a specified copyright, in the case of the transfer of ownership of a circumvention device to the public, etc. it is not clear generally at the time of its transfer of ownership to the public, etc. what copyright the device or the program is being used to infringe”.³³⁹

Unfair Competition Prevention Legislation

The Unfair Competition Prevention Legislation was first enacted in Japan in 1934. The current UCPL was enacted in 1994, following a comprehensive revision of the 1934 Act. It has since been partially amended a number of times.³⁴⁰ As mentioned above, the general objective of the UCPL is to protect private interests in the form of entrepreneurial business interests, and the public interest in fair competition.³⁴¹ The Act does not include a general clause targeting unfair competition as a whole; rather, it defines certain acts of unfair – hence unlawful – competition one by one.³⁴² In 1999, the list of targeted acts (enacted in article 2) was extended by the inclusion of certain acts related to the circumvention of commercially employed copy-³⁴³ and access control technologies.³⁴⁴ The purpose of this amendment was to protect the interests of the rapidly growing digital content industry.³⁴⁵

Since the general purpose of the UCPL is to ensure fair competition in the market, its application is not limited to copyrighted works; technology that protect content not subject to

³³⁴ Koshida 1999, pp. 8-9.

³³⁵ *Id.*, at 9.

³³⁶ Article 120bis(ii).

³³⁷ Koshida 1999, p. 9.

³³⁸ CLJ Article 120(2).

³³⁹ Koshida 1999, p. 10.

³⁴⁰ Ishida 2003. The Paper gives a comprehensive introduction to the UCPL by describing its background and history, and its basic principles and provisions.

³⁴¹ *Id.*, at 8 (where also a translation UCPL Article 1 is included: The purpose of this law is, by providing for measures for the prevention of, and compensation for damages from unfair competition, etc. in order to ensure fair competition among entrepreneurs and the full implementation of international agreements related thereto, and thereby to contribute to the wholesome development of the national economy”).

³⁴² *Id.*, at 5.

³⁴³ Article 2(1)(x).

³⁴⁴ Article 2(1)(xi).

³⁴⁵ Ishida 2003, p. 4.

copyright protection is also covered, e.g. public domain works.³⁴⁶ On the same grounds, the definition of protected TPMs is not limited to technology controlling the *acts* covered by copyright.³⁴⁷ The protected technology is often – although not always³⁴⁸ – translated as “*technical restriction means*”, defined in Article 2 (5) of the Act as: “a means for restricting *playing* of vision or audio or *executing* of programs, or *recording* thereof, by electromagnetic method [...]” (emphasis added). Interestingly, the definition is media-specific and confined to measures protecting images, sounds and (computer) programs. It is also technology-specific, since it requires that the measures work by electromagnetic method.

The UCPL does not prohibit circumvention.³⁴⁹

The anti trafficking provisions are divided into two subparagraphs. Article 2(1)(x) provides that it is an act of unfair competition to:

“convey, deliver, exhibit for the purpose of conveying, delivering, exporting or importing equipment (including devices that assemble such equipment) that only have the function of preventing the effect of a technical restriction means and making it possible to view and listen to images and sounds, execute programs, or record images, sounds or programs that are restricted by the technical restriction means that are used in business [...]”³⁵⁰

Article 2(1)(xi) further provides that it is an act of unfair competition to:

“convey, deliver, exhibit for the purpose of conveying, delivering, exporting or importing equipment (including devices that assemble such equipment) that only have the function of preventing the effect of a technical restriction means and making it possible to view and listen to images and sounds, execute programs, or record images, sounds or programs that are restricted by the technical restriction means that are used in business in order to disallow the viewing and listening of images and sounds, the execution of programs, the recording of images, sounds or programs by parties other than specified parties, [...]”³⁵¹

Some commentators state (or imply) that article 2(1)(x) relates to *copy* control technology; whereas article 2(1)(xi) relates to *access* control technology.³⁵² However, it is probably more accurate to say that item (x) protects technical restriction measures regulating access and use *by specified individuals* (e.g. technological measures used within the frames of an established contractual relationship or towards the purchaser of a specific product); whereas item (xi) protects technical restriction measures *excluding unauthorized persons from access* to (and subsequent usage of) protected material (e.g. technological measures that form the basis of a conditional access service).³⁵³ Thus, both provisions in principle protect both access and copy controls, only in different contexts. Certainly, the assertion that item (xi) also protects copy controls is true only to the extent that one accepts that blocking *initial* access is a way of controlling unauthorized reproduction. However, this is an assumption the UCPL seems to adopt. As shown above, the criterion “technical restriction means” – used in both items (x) and (xi) – refer to both access-

³⁴⁶ See Noguchi 2006, p. 203.

³⁴⁷ *Id.*, at 202.

³⁴⁸ Katoh, for instance, uses the term “technological protection measures”, see: Katoh 2002.

³⁴⁹ Besek 2004, p. 435.

³⁵⁰ Translation taken from: De Werra 2001, p. 233.

³⁵¹ *Ibid.*, at p. 34.

³⁵² See e.g. Ishida 2003, p. 22; Besek 2004, p. 433.

³⁵³ In favour of this interpretation, see De Werra 2001, p. 231; Noguchi 2006, p. 202 (note 472); and Katoh 2002, p. 339.

and copy controls. Further, both subparagraphs explicitly coin their anti-trafficking prohibitions so as to target technology that enable people “to view [...] listen [...], execute [...] or record”.³⁵⁴

Due to the general applicability of unfair competition law, and given its statutory purpose of ensuring fair competition among entrepreneurs,³⁵⁵ the UCPL only targets acts that are *commercially motivated*. As the above quotations reveal, the test applying to circumvention devices is – under both subparagraphs – that they “*only* have the function of preventing the effect of a technical restriction means [...]” (emphasis added).³⁵⁶ This has further been interpreted as a requirement that the circumventing technology is “exclusively” functioning to the invalidation of technical restriction means “and having no other functions than invalidating in view of economic and commerce”.³⁵⁷ As one commentator points out, “[t]his limitation is even more restrictive than the WCT, which protects all kinds of effective technological measures”.³⁵⁸

The sanctions for violation of the UCPL are mainly civil remedies; criminal sanctions are applicable only in certain cases.³⁵⁹ The anti-circumvention provisions of Article 2(1)(x) and (xi) are not among the provisions that trigger criminal sanctions.³⁶⁰

3.3.4 Canada

Although it is one of the original signatories to the WIPO Internet Treaties,³⁶¹ Canada has not yet ratified them. In 2003, the Canadian Ministry of Heritage commissioned two studies to investigate whether or not to ratify the two Treaties. As the authors of the study explain, Canada is left with two options:

“First, Canada could choose not to confer additional legal protection to TPMs and simply allow them to flourish or fail in an unregulated environment until such time as there is more compelling evidence of a need to legislate. [...] Second, Canada could choose to provide some measure of “adequate legal protection.” It is suggested that, if Canada Ratifies the WIPO Internet Treaties and legal intervention is to take place, legislative provisions should be designed to preserve to the greatest extent possible copyright’s delicate balance between private rights and the public interest”.³⁶²

In accordance with the second alternative, the Canadian Government in June 2005 introduced *Bill C-60: An Act to Amend the Copyright Act* (“Bill C-60”),³⁶³ proposing, among others, the adoption of anti-circumvention provisions based on the WIPO Treaties.³⁶⁴ However, after

³⁵⁴ As for the first three alternatives, access controls appear to be the relevant technology, whereas for the last, copy controls.

³⁵⁵ Cf. Article 1.

³⁵⁶ Ishida 2003, pp. 23-24.

³⁵⁷ *I.d.*, at 23.

³⁵⁸ R. L.-D. Wang, ‘DMCA Anti-Circumvention Provisions in a Different Light’, *AIPLA Q.J.* 2006/34, pp. 217-250, at p. 234.

³⁵⁹ Ishida 2003, p. 30 (cf. UCPL Article 13).

³⁶⁰ *Ibid.*, at p. 33 (cf. UCPL Articles 14, 15) See also: Noguchi 2006, p. 208.

³⁶¹ Canada signed the two treaties on 22 December 1997, see:
<http://wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY&end_year=ANY&search_what=C&treaty_id=16&treaty_id=20>.

³⁶² I.R. Kerr, A. Maurushat, & S.T. Tacit, ‘Technological Protection Measures: Tilting at Copyright’s Windmill’, *Ottawa L. Rev.* 2002/34, pp.7- , at pp. 46-47.

³⁶³ See: http://www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-60/C-60_1/C-60-3E.html.

³⁶⁴ For a comprehensive account for the (rather extensive) lobbying, discussions and consultation process leading up to Bill C-60, see H.A. Sapp, “North American Anti-Circumvention: Implementation of the WIPO Internet

having passed first hearing in the Canadian Parliament,³⁶⁵ Bill C-60 faced a dead end, as the new conservative Government elected in November 2005 declared that it did not intend to push Bill C-60 through. Rather it would return to the drawing board in order to draft a new and revised Bill. This Bill has not yet been presented, and at the time of writing, the Canadian *Copyright Act*³⁶⁶ does not have anti-circumvention provisions. Nevertheless, it is believed that the new Government will draft an anti-circumvention regime quite similar to the one contained in Bill C-60. Therefore, we find it appropriate to include here a presentation of the Bill C-60 proposal on this issue.

Bill C-60 defines TPMs as being “any technology, device or component that, in the ordinary course of its operation, restricts the doing [...] of any act that is mentioned in section 3, 15 or 18 [the statutory definitions of the copyright holder’s sole rights] or that could constitute an infringement of any applicable moral rights”.³⁶⁷ Apparently, the intention is to confine the scope of the prohibitions to measures that prevent copyright infringement. However, the protection seems to extend beyond TPMs that prevent copyright infringement to TPMs that restrict acts not covered by copyright (dual-purpose measures).³⁶⁸

The Bill contains three main prohibitions.³⁶⁹ The first of these cover circumvention of TPMs *for the purpose of copyright infringement*,³⁷⁰ the second, offering or providing of circumvention services that the provider *knows or ought to know will result in an infringement*,³⁷¹ It is a noteworthy feature that both the said prohibitions are confined to, respectively, circumvention and services, that result in copyright infringement. Thus, circumvention and circumvention-services for the purposes of fair dealing or any other legitimate use under Canadian copyright law, is permitted.³⁷² An important characteristic, however, is that the Act equals private-use copying of musical works – which *per se* is permitted under article 80 of the Copyright Act – to an infringing purpose.³⁷³ Another noteworthy feature is that the trafficking provision only covers services; there is no provision against circumvention devices.³⁷⁴ The third prohibition targets trafficking in works from which TPMs have been removed.³⁷⁵

The anti-circumvention provisions of Bill C-60 are, technically speaking, implemented as an expansion of the civil remedies section of the Canadian Copyright Act. This means that only

Treaties in the United States, Mexico and Canada”, *Computer L. Review & Tech. J.* 2005/10, pp. 1-39, 29 et seq. (2005).

³⁶⁵ See <http://www.parl.gc.ca/common/Bills_House_Government.asp?Language=E&Parl=38&Ses=1#C-60>.

³⁶⁶ Copyright Act, R.S. 1985, c. C-42, <<http://www.canlii.org/ca/sta/c-42/>>.

³⁶⁷ Bill C-60, S. 1(2).

³⁶⁸ Cf. J. Bailey, “Deflating the Michelin Man: Protecting User’s Rights in the Canadian Copyright Reform Process”, in M. Geist (ed.), *In the Public Interest: The Future of Canadian Copyright Law*, Toronto, Irwin Law Books, 2005, 125, 157: “[S]ince TPMs often control both access to and use of digital materials, individuals would be exposed to civil liability not only for infringing uses of copyright material, *but for simply accessing copyright material by circumventing a TPM that controls access to digital content*” (emphasis added). <http://www.irwinlaw.com/books.aspx?bookid=120>

³⁶⁹ In addition, the Act also introduces some special anti-circumvention rules related to distance learning, which will not be treated here.

³⁷⁰ S. 34.02(1)

³⁷¹ S. 34.02(2)

³⁷² M. Geist, “Anti-circumvention Legislation and Competition Policy: Defining a Canadian Way?”, in M. Geist (ed.), *In the Public Interest: The Future of Canadian Copyright Law*, Toronto, Irwin Law Books, 2005, p. 211, 242; Bailey 2005, p. 160; and J.-F. de Beer, “Constitutional Jurisdiction over Paracopyright Laws”, in M. Geist (ed.), *In the Public Interest: The Future of Canadian Copyright Law*, Toronto, Irwin Law Books, 2005, 89, 105.

³⁷³ S. 34.02(1).

³⁷⁴ Geist 2005, 245.

³⁷⁵ S. 34.02(3)

civil remedies are available.³⁷⁶

3.3.5 Switzerland

The current Swiss Copyright Act (the “Copyright Act”) was enacted in 1992.³⁷⁷ At the time of writing, the Copyright Act does not yet contain anti-circumvention provisions. In 2000, the Swiss legislator initiated a consultation process aimed at implementing of the two 1996 WIPO Internet Treaties (which Switzerland is obliged by the EFTA Treaty to ratify³⁷⁸). After almost six years of consultations, the Federal Council (Bundesrat) released, in March 2006, a final proposal in this regard (the “Bill”) accompanied by an Explanatory Report.³⁷⁹

In accordance with the WIPO Internet Treaties, the proposed Swiss anti-circumvention provisions only protect TPMs applied to works (or other subject-matter) protected by copyright (or relevant neighbouring rights).³⁸⁰ Thus, TPMs applied to works in the public domain are not protected. A further requirement is inherent in the definition of effective TPMs (*Wirksame technische Massnahmen*) in Article 39a(2): TPMs are only regarded as effective – hence protected – to the extent they are meant and fit for (*Dazu bestimmt und geeignet*) preventing or restricting unlawful (*Unerlaubte*) uses of such works (or other subject matter). The definition of unlawful uses in this relation is noteworthy:

“By unlawful use is, in accordance with the requirements of WCT Article 11 and WPPT Article 18, meant such uses that the Act preserves for the rightholder. This implies, in specific, that the protection of technological measures can have no overriding effect upon copyright exceptions”.³⁸¹

Thus, only TPMs preventing or restricting acts that have been *statutorily* reserved for the right holder shall enjoy protection against circumvention. It does apparently not suffice that an act has been reserved for the right holder on a *contractual* basis. This confirms one of the stated overall goals of the Swiss implementation of the WIPO Internet Treaties:

“By its implementation in national law, it should therefore be ensured that statutorily permitted work-exploitation, which in part is associated with an obligation to remunerate, is not displaced into illegality by the anti-circumvention protection”.³⁸²

The proposed legislation will prohibit both circumvention³⁸³ and trafficking in circumvention

³⁷⁶ These are the same civil remedies as are currently available for copyright infringement.

³⁷⁷ Bundesgesetz über das Urheberrecht und verwandte Schutzrechte (URG) vom 9. Oktober 1992.

³⁷⁸ B. Lindner, “Demolishing Copyright: The Implementation of the WIPO Internet Treaties in Switzerland”, *E. I. P. R.* 2005/27, pp. 481-488, 481.

³⁷⁹ Both contained in the document: Botschaft zum Bundesbeschluss über die Genehmigung von zwei Abkommen der Weltorganisation für geistiges Eigentum und zur Änderung des Urheberrechtsgesetzes, Der Bundesrat, 10. März 2006.

³⁸⁰ Article 39a(1) cf. Botschaft, 3424.

³⁸¹ Botschaft, 3424, unofficial translation. (Mit unerlaubten Verwendungen sind in Übereinstimmung mit den Vorgaben von Artikel 11 WCT und Artikel 18 WPPT solche gemeint, die das Gesetz den Rechteinhaberinnen und Rechteinhabern vorbehält. Das bedeutet insbesondere, dass der Schutz von technischen Massnahmen gegenüber den Schutzschränken keine überschüssende Wirkung haben kann.“

³⁸² Botschaft, 3399, unofficial translation. (Bei seiner Umsetzung ins nationale Recht wird deshalb dafür Sorge getragen, dass gesetzlich erlaubte Werkverwendungen, die zum Teil mit einer Vergütungspflicht verknüpft sind, durch den Umgehungsschutz nicht in die Illegalität verdrängt werden).

³⁸³ Article 39a(1).

devices and services³⁸⁴. Targeted trafficking activities are the manufacturing, importing, offering, selling or in other way distributing, letting for rent, lending, advertising and possessing for commercial gain, circumvention devices, and the provision of circumvention services. The test applying to circumvention devices and services is, according to Article 39a(3), whether they (i) have only a limited commercial purpose or use (*Begrenzen wirtschaftlichen Zweck oder Nützen*) other than to circumvent effective TPMs; and (ii) either are the object of promotion, advertising, or marketing for the purpose of circumvention of effective technological measures; or (iii) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of effective TPMs.

The proposed legislation will impose civil remedies and criminal sanctions³⁸⁵ against any violation of the anti-circumvention rules.

3.3.6 *Comparative remarks*

In accordance with the WIPO Treaties, the laws of the United States, Australia and Japan provide ‘adequate legal protection and effective legal remedies against the circumvention of effective technological measures’, just as would the proposed legislation of Canada and Switzerland.³⁸⁶ When analyzing the scope and definitions in detail, three significant differences appear, however: first, with respect to the acts prohibited by the law, e.g. whether the law targets acts of circumvention and/or preparatory acts; second, with respect to the correlation between the legal protection of TPMs and copyright protection; and third, with respect to the type of TPMs protected under the law, e.g. whether they serve to control the use of a work through access and/or copy control mechanisms.

A first observable distinction in the manner in which Contracting Parties have implemented their obligation to provide “adequate legal protection against the circumvention of effective technological measures” relates to the type of circumvention activity they prohibit. All implementing laws examined here prohibit the dealing in circumvention tools, which are deemed to constitute preparatory acts to the actual circumvention of a TPM. However, not all Contracting Parties have chosen to prohibit acts of circumvention as such.³⁸⁷ As the survey shows, the DMCA and the Information Society Directive represent one end of the spectrum, with a prohibition on acts of circumvention and a prohibition on circumventing devices and services. The (still) current Australian act represents the other end, by not targeting circumvention at all. The Japanese Act presents an interesting alternative since it prohibits the trafficking in circumventing devices, as well as acts of “circumvention as a business in response to a request from the public”, which is in fact nothing else than a prohibition on circumvention services. Another solution worth mentioning is found in the Canadian Bill, which if enacted in its current form, would not prohibit the dealing in circumvention devices but only in circumvention services, while prohibiting the act of circumvention as well.

A second distinction concerns the presence or absence of an express and clear connection in the law between the circumvention activity and an act of copyright infringement. Again, the DMCA and the Information Society Directive constitute one end of the spectrum, in that neither piece of legislation requires that the circumventing activity lead to a copyright infringement in order to be sanctionable. At the other end of the spectrum, two alternative approaches can be observed. Some laws have modelled their link to copyright infringement through a requirement *that certain acts are restricted* by the measure. In this group we find the Canadian Bill (stating that TPMs must restrict the accomplishment of an act comprised by the exclusive rights of the

³⁸⁴ Article 39a(2).

³⁸⁵ Article 39a cf. Articles 62 and 69a.

³⁸⁶ One distinct exception is the Japanese UCPL.

³⁸⁷ On the distinction; see e.g. Gasser 2006, p. 72.

copyright holder) and the Swiss Bill (requiring TPMs to prevent or restrict unlawful uses). Other laws, on the other hand, simply require *that a certain result – copyright infringement – is prevented or deterred*, such as the Australian Act and the Copyright Law of Japan. The proposed Australian TPM Bill forms a new category for several reasons: First, it defines TPMs both by direct reference to the technological functionality (“access control technological protection measure”) while, at the same, requiring a direct link to copyright infringement. Second, the link to copyright infringement includes both a reference to acts comprised in copyright and, at the same time, a link to copyright infringement.

A third distinction appears with respect to the options followed by the national legislators concerning the type of TPMs that are protected by the anti-circumvention provisions. More specifically, the Contracting Parties were free to decide whether to protect TPMs that control the use of a work either through *access controls* or *copy controls*, or both.³⁸⁸ Three approaches can be distinguished among existing anti-circumvention regimes: First, there are laws that do not substantively differentiate between the two types of measures. Second, there are the laws that clearly differentiate, in the sense that both types of measures are protected, but to different extents. Third, some regimes extend legal protection only to one of the two types of measures. Among the laws examined above, the DMCA and the proposed Australian TPM Bill clearly fall within the second category (ban on circumvention confined to access controls). In the Japanese context, commentators have interpreted the JCL as excluding access controls from its protection, something that places the Act in the last category. It should be noted, of course, that JCL is complemented by UCPL, which clearly protects access controls. For the rest, the statutory texts do not specify whether they protect access or copy control mechanisms, so that they fall under the first category.

3.4 Assessment of the legal protection of TPMs

For the European Commission, the main goal of the provisions pertaining to the legal protection of TPMs was to serve as a support to the successful large-scale introduction of electronic copyright management and protection systems by the private sector. Once developed, these systems would be dependent upon the implementation of measures that provide for legal protection in relation to acts such as the circumvention, violation or manipulation of these systems.³⁸⁹ On the basis of the findings of the previous sections, we are now in a position to draw some conclusions. Our assessment of the impact of the legal protection of TPMs on the deployment of online business models follows the five benchmark criteria exposed in the introduction of this study, namely: the consistency of the European provision with international norms; the degree of actual harmonisation across the Member States; the level of legal certainty yielded by the implementation of the Directive; the sustainability of the norms over time; and the balanced character of the legal framework established by the Information Society Directive. Considering the global character of the use of TPMs and their legal protection, we shall also draw some conclusions regarding the consistency of the European regimes with corresponding rules of Europe’s main trading partners. This summary allows us to formulate a number of suggestions for improvement of the legal framework with a view to establishing a fair balance of interests between rights owners and users of protected material.

Conformity with international norms The broad formulation of articles 11 of the WCT and 18 of the WPPT according to which Contracting Parties must provide ‘adequate legal protection and effective legal remedies against the circumvention of effective technological measures’ has given

³⁸⁸ Gasser 2006, pp. 68-69.

³⁸⁹ Follow-Up to the Green Paper 1996, p. 16.

national lawmakers a range of options. Whatever the option followed, to constitute an adequate protection under the WCT and the WPPT, the implementing provision must in any case meet the three following criteria: 1) the technological protection measure must be effective to deserve legal protection; 2) it must be applied by authors in the context of the exercise of their rights; and 3) it must restrict, with respect to a work or other protected subject matter, acts that are not authorised by law or by the rights owner. Although the protection afforded under article 6 of the Information Society Directive probably meets the first criterion, e.g. by requiring that the technological protection measure be effective to deserve legal protection, the protection granted under the Directive seems to depart from the criteria set by the WIPO Internet Treaties in two important respects:

First, contrary to the WIPO Treaties, the text of articles 6(1) to 6(3) nowhere expressly specifies that the TPM must be applied by authors in the context of the exercise of the rights owner's exclusive rights. Moreover, the Directive grants protection against the circumvention of TPMs that control the use of a work through access control mechanisms. Since "access" is not technically a copyright relevant act, this protection is akin to recognising a *de facto* "right of access" to the benefit of the rights owner. Whether this element of article 6(3) complies with the requirements the WCT and the WPPT and whether such broad protection is desirable are questions still open for debate. Apparently not all WIPO Contracting Parties share the view that access control technology deserves the same type of protection as copy control mechanisms, as the examples of Australia and Japan illustrate.

Second, both international instruments establish a clear connection between the legal protection of TPMs and copyright law. Indeed, according to the WCT and the WPPT, to deserve protection, a TPM must restrict the effectuation, with respect to a work, of acts that are not authorised by law or by the rights owner. By contrast, in the words of the Directive, the protection is granted only with regard to TPMs that are "designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright (...)". Therefore, we must conclude that the Directive fails to correlate the legal protection of TPMs with acts of circumvention that result in copyright infringement. Conversely, in the absence of such a connection, the protection against the circumvention of TPMS conferred under the Information Society Directive would seem to also extend to acts that are authorised by law, which goes beyond the requirements of the WIPO Treaties.

Consistency with the laws of main trading partners The comparative law study conducted in the previous section reveals that the protection against circumvention activities granted under the Information Society Directive goes further than any other law examined here. As Table 1 below illustrates, even the protection granted under the DMCA, which is to some degree comparable to the Directive in that it does not require a connection between the act of circumvention and copyright infringement, does not extend as far as its European counterpart, for it does not prohibit acts of circumvention of copy control mechanisms. All other enacted or proposed laws considered in the section above establish a direct link between the circumvention activity and an infringement of copyright. Some countries, like Australia and Japan, even restrict the legal protection of TPM only to preparatory acts of circumvention, without prohibiting acts of circumvention. The solution adopted under the Information Society Directive differs from the solution put forward in countries like Switzerland, where only TPMs preventing or restricting acts that have been *statutorily* reserved for the right holder shall enjoy protection against circumvention. It does apparently not suffice that an act has been reserved for the right holder on a *contractual* basis. This confirms one of the stated overall goals of the Swiss implementation of the WIPO Internet Treaties.

Country	Technology protected	Express link to copyright infringement	Act of Circumvention	Circumvention Tools
United States	Access Control	No	Prohibited (§ 1201 (a)(1))	Prohibited (§ 1201 (a)(2))
	Copy Control	No	Not prohibited	Prohibited (§ 1201 (b))
Australia	Access Control	Yes	Not prohibited	Prohibited (art. 10(1); art. 116A)
	Copy Control	Yes	Not prohibited	Prohibited (art. 10(1); art. 116A)
Japan	Access Control	No	Not prohibited	Prohibited (art. 2(1)(xi) Unfair Competition Prevention Law)
	Copy Control	Yes	Not prohibited	Prohibited (art. 120 bis Copyright Law; Art. 2(1)(x) Unfair Competition Prevention Law)
Canada	Access Control	Yes	Prohibited (art. 34.02(1) Bill C-60)	Only services targeted (art. 34.02(2) Bill C-60)
	Copy Control	Yes	Prohibited (art. 34.02 Bill C-60)	Only services targeted (art. 34.02(2) Bill C-60)
Switzerland	Access Control	Yes	Prohibited (art. 39a(1) Proposed Amendment Act)	Prohibited (art. 39a (2) Proposed Amendment Act)
	Copy Control	Yes	Prohibited (art. 39a(1) Proposed Amendment Act)	Prohibited (art. 39a (2) Proposed Amendment Act)
Europe	Access Control	No	Prohibited (art. 6(1) EUCD)	Prohibited (art. 6(2) EUCD)
	Copy Control	No	Prohibited (art. 6(1) EUCD)	Prohibited (art. 6(2) EUCD)

Table 1 Comparative table of legal protection of TPM in different countries.

Actual harmonisation In view of the vagueness of the provisions of article 6, Member States were confronted with the difficult task of interpreting the intention of the European legislator and of putting in place an entirely new form of protection against the circumvention of TPMs. Without proper guidelines, it is not surprising to observe major variations in the way the Member States have implemented articles 6(1) to 6(3) of the Directive. For a complete overview of the implementation by the Member States, we refer the reader to Part II of this study. As a result of this lack of harmonisation, however, it is clear that the scope of protection afforded to TPMs varies considerably from one country to the next. Some Member States require a certain proximity or nexus to copyright infringement for both the act of circumvention and the preparatory acts. Others require a connection only with respect to acts of circumvention and not with respect to preparatory acts, while another group of Member States have not established any correlation at all between the protection of TPMs and the prevention of copyright infringement. Moreover, the sanctions and remedies attached to the act of circumvention and to the dealing in devices and services differ between the Member States ranging from purely civil remedies to criminal sanctions or to a mix of both.

Legal certainty The current wording of articles 6(1) to 6(3) is the result of a political compromise between the three institutions which, like many political compromises, has resulted in convoluted and obscure language. Not only does article 6 introduce an entirely new form of protection to the benefit of rights owners, but the terms used in article 6 were, until the adoption of the Directive, unfamiliar in the context of European copyright law. For example, the definition of “effective technological protection measure” is not a model of clarity. What is clear is that the reference to “any technology, device or component” is meant to cover any software and hardware implementation of security technology. This technology must, in the normal course of its operation, be designed to prevent or restrict acts not authorised by the rights holder. The definition of article 6(3) is not very helpful to decipher the meaning of the requirement of “effectiveness”. In all likelihood, TPMs that do achieve the protection objective and exercise at least some control over the use of the work are protected, even if they eventually get circumvented.

The vague wording of articles 6(1) and 6(2) of the Directive leaves a number of questions unanswered. What is an “adequate legal protection” under both provisions? Who may invoke it: the rights owner, the content provider, or both? When does a device or software have only a limited commercially significant purpose or use other than to circumvent, according to article 6(2)? How must the commercial significance be evaluated? In the absence of clear indications in the Directive and of satisfactory solutions in the implementing legislation, it is up to the courts to provide some level of legal certainty on these issues.

Sustainability The question arises whether the regime established under the Information Society Directive is compatible with the two other existing legal regimes that prohibit the business of trafficking in illicit devices: those of the Computer Programs Directive and the Conditional Access Directive. Would a regime that only prohibits commercial dealings in circumvention devices and services, rather than acts of circumvention, be more sustainable? There is broad consensus in the industry that a prohibition aimed at the preparatory activities of intermediaries and facilitators is more efficient than a prohibition aimed at the circumventing activities of individual users. As shown in Table 2 below, this position is widely confirmed by a survey of the world case law on the topic of circumvention, according to which the vast majority of actions – whether successful or not – were instituted against providers of circumvention tools.

Since a prohibition on circumvention devices and services is not infallible, stakeholders – especially rights holders and major content providers – consider that a prohibition on acts of circumvention remains necessary to prevent large-scale attempts to remove TPMs in order to illegally and commercially copy and distribute digital content. Consequently, even if the scope of the legal protection of TPMs is connected to the scope of the copyright protection, as is the case in the Canadian and Swiss proposals, a prohibition on acts of circumvention still might remain desirable for it would disallow the removal of TPMs in order to illegally and commercially copy and distribute digital content while allowing acts covered by limitations on copyright.

Case/Nationality	Type of defendant(s)	Legal basis for action	Outcome
CSS related cases:			
<i>Universal City Studios v. Reimerdes</i> ³⁹⁰ / US	Providers of circumvention software (operators of the 2600 website linking to DeCSS software)	DMCA § 1201	Successful

³⁹⁰ 111 F.Supp.2d 294 (2d Cir. 2001).

Case/Nationality	Type of defendant(s)	Legal basis for action	Outcome
<i>321 Studios v. Metro-Goldwyn-Mayer Studios</i> ³⁹¹ / US	Provider of circumvention software (321 Studios sought a declaratory judgment that its CSS circumventing software did <i>not</i> violate § 1201)	DMCA § 1201	Decision against provider of Circumvention software (321)
PS mod chip cases:			
<i>Sony v Stevens</i> ³⁹² / Australia	Provider of circumvention tools (private person involved in the distribution of mod chips)	Australian Copyright Act s 116A	Not successful
<i>Sony v Balt</i> ³⁹³ / UK	Providers of circumvention tools (private persons involved in the design, manufacture sale and installation of mod chips)	UK Copyright, Designs and Patents Act s 296, 296ZA, 296ZD and 296ZF (amended <i>and</i> pre-amended Act)	Successful
<i>Sony v Salvatore</i> ³⁹⁴ / Italy	Provider of circumvention tools (company involved in the distribution of mod chips)	Italian copyright Act article 171-ter	Not successful (seizure of PS2 console and mod chips from the company deemed as <i>unlawful</i>)
<i>Guardia Civil v Innovagames</i> ³⁹⁵ / Spain	Provider of circumvention tools (company involved in the distribution of mod chips)	Spanish Penal Code Article 270	Not successful
<i>Sony Computer Entertainment America v. GameMasters</i> ³⁹⁶ / US	Provider of circumvention tools (company involved in the distribution of mod chips)	DMCA § 1201	Successful
Other:			
<i>IFPI v HeiseOnline</i> ³⁹⁷ / Germany	Provider of circumvention software (online magazine describing and linking to circumvention software)	German Copyright Act § 95a	Successful
<i>Alles Brenner Software</i> ³⁹⁸ / Germany	Non-commercial offer by an individual of a computer program on an internet platform permitting the burning of CD's	German Copyright Act § 95a	Successful
<i>Davidson & Ass. v. Jung</i> ³⁹⁹ / US	Provider of circumvention software (ISP and private persons engaged in the provision of circumvention software)	DMCA § 1201	Successful

³⁹¹ 307 F.Supp.2d 1085

³⁹² [2002] FCA 906; [2003] FCAFC 157; [2005] HCA 58.

³⁹³ [2004] EWHC 1738 (C).

³⁹⁴ See: <<http://www.ipjustice.org/123103playstationdecision.html>>.

³⁹⁵ See: http://www.theregister.co.uk/2004/04/27/spanish_xbox_modding_ruling/;
<http://www.innovagames.com/victoria-completa.htm>

³⁹⁶ 87 F.Supp.2d 976 (N.D. Cal. 1999).

³⁹⁷ LG München I, 7 March 2005, 21 O 3220/05 – *Heise Online*. The decision was upheld by the Munich Superior Court on 28 July 2005, ZUM 2005/12, pp. 896-901.

³⁹⁸ LG Köln, Urteil v. 23.11.2005 - Az: 28 S 6/05 (2006) Jur-PC Web-Dok. 49/2006, Nos. 1-63, available at: <http://www.jurpc.de/rechtspr/20060049.htm>

³⁹⁹ 422 F.3d 630 (8th Cir. 2005); [2005] 422 F.3d at 630.

Case/Nationality	Type of defendant(s)	Legal basis for action	Outcome
<i>RealNetworks, Inc. v. Streambox, Inc.</i> ⁴⁰⁰ / US	Provider of circumvention tools (company distributing VCRs with circumventing abilities)	DMCA § 1201	Successful
<i>IMS Inquiry Management Systems v. Berkshire Information Systems</i> ⁴⁰¹ / US	Circumventor (company that obtained user name and password issued to third party and used those to access and copy protected web pages)	DMCA § 1201	Not successful
<i>Chamberlain Group v. Skylink Technologies</i> ⁴⁰² / US	Provider of circumvention tools (provider of garage door opener)	DMCA § 1201	Not successful
<i>Lexmark International v. Static Control Components</i> ⁴⁰³ / US	Provider of circumvention tools (provider of replacement toner cartridges)	DMCA § 1201	Not successful
<i>United States v. Elcom Ltd.</i> ⁴⁰⁴ / US	Provider of circumvention software (provider of software capable of circumventing DRM used in connection with Adobes e-book reader)	DMCA § 1201	Not successful

Table 2 Comparative table of world case law relating to TPMs

Balance Article 6 of the Directive fails to establish a correlation between the legal protection of TPMs and acts of circumvention that result in copyright infringement. Consequently, in the absence of such a connection, the protection against the circumvention of TPMs conferred under the Information Society Directive would seem to also extend to acts that are authorised by law, which goes well beyond the requirements and purpose of the WIPO Treaties. Indeed, the anti-circumvention rules of the Information Society Directive do not differentiate between reasons for applying or circumventing TPMs. No act of circumvention is allowed, irrespective of the purpose to do so, as long as the TPM is applied in respect of works or other subject-matter that are not authorised by the rights holder of any copyright or any right related to copyright as provided for by law or the *sui generis* database right.

Not only does this policy fail to recognise that certain acts of circumvention may be done for entirely legitimate purposes, but also that DRM can be deployed for reasons beyond the rationales underlying copyright protection, e.g. to protect market share⁴⁰⁵ or to create and protect de facto standards that shield against competition by locking consumers into vendors' device-content-ecosystems.⁴⁰⁶ This technology lock-in leads to decreased usability of legally purchased

⁴⁰⁰ 2000 U.S. Dist. LEXIS 1889 (W.D. Wash. 2000).

⁴⁰¹ 307 F.Supp.2d 521.

⁴⁰² 381 F.3d 1178.

⁴⁰³ 387 F.3d 522; [2004] USCA 03-5400.

⁴⁰⁴ 203 F.Supp.2d 1111.

⁴⁰⁵ See: *Chamberlain Group v. Skylink Technologies*, 381 F.3d 1178 (provider of garage door opener); *Lexmark International v. Static Control Components*, 387 F.3d 522; [2004] USCA 03-5400 (provider of replacement toner cartridges).

⁴⁰⁶ A. Orloski, "Norway knockles down for a long iTunes fight", *The Register*, 3 August 2006, available at: http://www.theregister.co.uk/2006/08/03/norway_apple_itunes/; and J. Singsstad, "iTunes' questionable terms and conditions", *Forbrukerradet* (2006), available at: <http://forbrukerportalen.no/Artikler/2006/1138119849.71>

content. If legislation does not differentiate between the various purposes of applying TPMs as discussed above, it actually protects content providers' and technology developers' business models and the walled gardens they create around them. Anti-circumvention rules should not be used to protect commercial interests that are not related to copyright.⁴⁰⁷

Another source of potential imbalance comes as we shall see in the next chapter, from the fact that through the application of TPMs, rights owners may prevent the exercise of certain limitations on copyright and related rights. Moreover, as we shall see in chapter 5 below, whenever TPMs are applied to works that are made available on-demand under agreed contractual terms, rights owners have the power to exclude all limitations on copyright and related rights.

Recommendations

To remedy the prevailing legal uncertainty and the lack of harmonisation with respect to the legal protection of TPMs, and to align the European provisions with the international obligations under the WIPO Treaties, the European legislator could consider bringing the following four clarifications to the legal framework:

First, following the requirements of the WCT and the WPPT, the prohibition on acts of circumvention pursuant to article 6(1) of the Directive should only find application in circumstances where the act of circumvention results in copyright infringement. Such a precision would have the added advantage of reducing the risk of abusing TPMs for purposes other than the protection of copyrighted works.

Second, the relationship between articles 6(1) and 6(2) of the Information Society Directive should be clarified. The prohibition on commercial dealings in devices and services should only apply if the result of such commercial dealings directly leads to acts of circumvention prohibited under article 6(1). In other words, the dealings targeted by the prohibition of article 6(2) should be sanctioned only insofar as they constitute preparatory acts to acts of circumvention that give rise to copyright infringement. In such circumstances, the supply of circumventing devices or services that are used to commit an act of copyright infringement could be construed as a special case of contributory liability or as act of "inducement".

Third, and as a corollary to the preceding two recommendations, it should be made clear that the protection provided for under articles 6(1) and 6(2) constitutes an ancillary (*flankierende*) form of protection rather than an exclusive right of the rights owner.

Finally, since the rights owner is not always the one who applies the TPM on the work, it is important that the legal or physical person who applies the TPM on a work with the consent of the rights owner, i.e. usually the content provider or distributor, be legally entitled to invoke protection against circumvention.

⁴⁰⁷ L. Cradduck and A. McCullagh, "Designing Copyright TPM: A Mutant Digital Copyright", *International Journal of Law and Information Technology* 2005/13, pp. 155-187, at p. 182; Gasser 2006, p. 41.

4 Relation between TPMs and limitations

Referring once again to the obligation imposed by the WIPO Treaties on Contracting Parties to provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures that restrict acts which are not authorized by the authors concerned or permitted by law”, it is clear that the delegates to the Diplomatic Conference wanted to achieve a balance between the application of TPMs by rights holders and the exercise of limitations on copyright by users. As Ginsburg puts it, the “challenge for national laws, then, is to determine how to regulate the creation and dissemination of circumvention devices without effectively cutting off the fair uses that at least some devices, in the right hands, would permit”.⁴⁰⁸ This has proven to be a monumental challenge indeed.

This chapter begins with a section presenting a brief overview of the main policy goals pursued by the legal framework as established by the Information Society Directive. Section 4.2 follows with a short discussion on the use of TPMs from a users’ perspective. Next, section 4.3 analyses the solution put forward in article 6(4) of the Information Society Directive concerning the relationship between the use of TPMs and the exercise of limitations on copyright, and highlights the most problematic areas. In view of the complexity of the matter, we consider it useful to compare the system put in place under the Information Society Directive with those of other countries. Section 4.4 therefore describes solutions adopted in certain countries outside of the European Union, namely the United States, Australia, Japan, Canada and Switzerland. The analysis reveals that the European solution with regard to the intersection between the legal protection of TPMs and the exercise of limitations on copyright and related rights is rather unique in that it prescribes affirmative action by the rights owners or in its absence, by the Member States, to ensure the exercise of limitations despite the use of TPMs.

Section 4.5 considers the question of whether, as part of the solution to the challenge, the establishment of a monitoring body would contribute to improving the sustainability and balanced character of the norms. These discussions pave the way for section 4.6, in which we summarise our main findings and propose some modifications to the legal framework with a view to improving the balance between protecting TPM’s and allowing the exercise of limitations on copyright. Our overall assessment is made on the basis of the country reports in Part II of this study, the legal commentaries, the relevant decisions of the courts and the outcome of the interviews that Berlecon Research conducted with stakeholders. The five benchmark criteria described in introduction, namely the consistency with international norms, the actual harmonisation, the legal certainty, and the sustainable and balanced character of the legal rules, will once again serve as guiding principles throughout the chapter.

4.1 Goals of the Directive

As mentioned in section 3.1 above, the provisions in the Information Society Directive on the legal protection of TPMs have turned out to be the most controversial of the entire Directive, especially as they pertain to its interaction with the limitations on copyright. Indeed, not all acts of circumvention amount to a violation of copyright or related rights. Some people may circumvent a TPM in order to gain access or copy a work in the public domain, while others may circumvent in order to exercise a statutory limitation on copyright. The difficulty in elaborating an anti-circumvention rule that takes account of this reality essentially lies in the fact that a prohibition that sweeps too broadly may have several negative effects on the market. It can

⁴⁰⁸ J.C. Ginsburg, “Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the US Experience”, *Columbia Journal of Law & the Arts* 2005/29, pp. 11-37, at p. 20.

hinder the manufacture and dissemination of devices or services that have legitimate uses other than to circumvent access or copy controls on works; it may frustrate otherwise legitimate activities that the devices permit; and more importantly, it may prevent the development of useful new technologies. On the other hand, an anti-circumvention rule that would allow the distribution of any device as long as it is capable of being put to use for non-infringing purposes would render the prohibition virtually meaningless.⁴⁰⁹

The task for the European Commission in setting up a workable system that would reconcile the legal protection of TPMs with the exercise of limitations on copyright proved particularly complex, for the European lawmakers could hardly rely on the example set by the WIPO Internet Treaties or any tangible practical experience in the matter. Indeed, Contracting Parties had not much to go on to devise their own norms concerning the co-existence of TPMs and limitations on copyright.⁴¹⁰ When the provisions of the WIPO Treaties were adopted, the market for the distribution of digital content protected by technological measures was still in its very infancy. Conscious of the lack of guidance provided by the WIPO Treaties, Ricketson and Ginsburg feared that “in the absence of Treaty guidance on the preservation of non-infringing uses, national implementing laws will design so fine a mesh that too few non-infringing applications will succeed in passing through.”⁴¹¹ Another problem was that the technology used to control the use of copyrighted works through access or copy control mechanisms was long thought to be too primitive to allow a differentiation between an act of circumvention carried out for lawful purposes and an act of circumvention carried for illicit reasons.⁴¹² In this context it is not surprising to note that other Contracting Parties have not expressly regulated the intersection between the application of TPMs and the exercise of limitations on copyright and that the European Union’s solution to the problem, as embodied in article 6(4) of the Information Society Directive, is unique.

Since the beginning of the legislative process leading to the adoption of the Information Society Directive, it was the intention of the European legislator to accommodate the needs of the beneficiaries of limitations on copyright. In the Explanatory Memorandum to the Proposal, the Commission had insisted that:

“Finally, the provision prohibits activities aimed at an infringement of a copyright, a related right or a sui generis right in databases granted by Community and national law: this would imply that not any circumvention of technical means of protection should be covered, but only those which constitute an infringement of a right, i.e. which are not authorized by law or by the author.”⁴¹³

Nevertheless, the original Proposal for a Directive contained no specific provision dealing with the users’ right to exercise the statutory limitations with respect to works protected by a TPM. A specific paragraph dealing with the intersection between the application of TPMs and the exercise of limitations on copyright was incorporated in the Directive at a very late stage of the adoption process of the Directive. In one of many amendments proposed by the European Parliament in 1999, it had even been suggested to include a provision according to which the legal protection of technological measures prevailed over the exceptions listed in article 5. In the Draft statement

⁴⁰⁹ Ricketson/Ginsburg 2005, p. 977.

⁴¹⁰ Wand 2001, p. 55 et seq.

⁴¹¹ Ricketson/Ginsburg 2005, p. 978.

⁴¹² Koelman 2003, p. 15; but see: S. Bechtold, “Reconciling DRM Technology With Copyright Limitations”, paper presented at the IVIR-BUMA Conference, Amsterdam, 1 July 2003, <http://www.ivirbuma-conference.org/docs/bechtoldtechnology.pdf>.

⁴¹³ Explanatory Memorandum to the Proposal for a Directive on Copyright in the Information Society, p. 41.

of the Council's reasons on the Common position, one can read the following:

“The Commission had addressed this issue under article 6(3) of its amended proposal, by providing that only technological measures preventing or inhibiting the infringement of copyright were protected under Article 6. This meant that technological measures designed to prevent or inhibit acts allowed by law (e.g. by virtue of an exception) were not protectable under Article 6. In other words, under the Commission's amended proposal, the exceptions provided for in Article 5 prevailed over the legal protection of technological measures provided for in Article 6”.⁴¹⁴

The approach followed by the Council was diametrically opposed to the Commission's. As a result of the amendments brought by the Council, the protection against the circumvention of technological measures was substantially broadened to all TPMs designed to prevent or restrict acts not authorised by the right holder, regardless of whether the person performing the circumvention is a beneficiary of one of the limitations provided for in article 5. In this context, a solution had to be put in place to take account of the legitimate interests of beneficiaries of limitations. The solution put forward at the time became the current article 6(4) of the Directive, completed by Recital 51 of the Information Society Directive, which declares that

“The legal protection of technological measures applies without prejudice to public policy, as reflected in Article 5, or public security. Member States should promote voluntary measures taken by rightholders, including the conclusion and implementation of agreements between rightholders and other parties concerned, to accommodate achieving the objectives of certain exceptions or limitations provided for in national law in accordance with this Directive. In the absence of such voluntary measures or agreements within a reasonable period of time, Member States should take appropriate measures to ensure that rightholders provide beneficiaries of such exceptions or limitations with appropriate means of benefiting from them, by modifying an implemented technological measure or by other means. However, in order to prevent abuse of such measures taken by rightholders, including within the framework of agreements, or taken by a Member State, any technological measures applied in implementation of such measures should enjoy legal protection.”

The relationship between the legal protection of technological measures and the limitations provided in article 5 of the Directive were among the most political and difficult topics of the Directive.⁴¹⁵ A periodical review mechanism was therefore built into the Directive in order to monitor, among other issues, the level of protection conferred on technological protection measures and the effect of the use of effective technological measures on acts which are permitted by law.

The current study is part of the first review process carried out within the framework of article 12, and as expressly required by article 12, it considers the impact of the use of TPMs on acts which are permitted by law, i.e. acts covered by limitations on copyright. As mentioned earlier, article 6(4) of the Directive is one of the rare provisions in the world which attempts to provide a proactive solution to the question of the intersection between TPMs and copyright limitations. Despite its good intentions, article 6(4) is far from being a model of clarity and, as we shall demonstrate in the following sections, its complex formulation has not led to the

⁴¹⁴ Common position adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, 26 July 2000, 9512/00 ADD 1, p. 10.

⁴¹⁵ Koelman 2003, p. 93.

implementation of concrete legislative solutions in most Member States. Before turning to the detailed analysis of the provisions of article 6(4), let us first examine how the application of TPMs is perceived in practice and what problems and uncertainties remain with respect to article 6(4) of the Directive.

4.2 Relationship under the Information Society Directive

Article 6(4) of the Information Society Directive purports to resolve the problem of the intersection between the legal protection of TPMs and the exercise of limitations on copyright and related rights. It provides that rights holders should take voluntary measures, including agreements between them and other parties concerned, to ensure that certain users have the means of benefiting from exceptions provided for in national law. In the absence of voluntary measures from rights holders, Member States must take appropriate measures in this sense. Although article 6(4) of the Directive is very lengthy, it is worth reproducing it in full here, before we turn to the detailed analysis of its content:

“Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

The technological measures applied voluntarily by rightholders, including those applied in implementation of voluntary agreements, and technological measures applied in implementation of the measures taken by Member States, shall enjoy the legal protection provided for in paragraph 1.

The provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

When this Article is applied in the context of Directives 92/100/EEC and 96/9/EC, this paragraph shall apply *mutatis mutandis*.”

This provision is extremely complex, vague and prone to interpretation. As the country reports in Part II of this study show, lawmakers in the 25 Member States have once again used their imagination to interpret the provision and come up with their own solutions, which they hope meets the requirements of article 6(4) of the Directive. In the following pages, we will examine different aspects of article 6(4) in order to identify the main ambiguities and uncertainties. Among the issues considered are the scope of application of the obligation, the meaning of the terms ‘voluntary measure by a rights holder’ and ‘appropriate measure by a Member State’, the list of limitations covered by the provision, the special status of the private copying exception and the contractual overridability of the provision. To this end, we will follow the methodology

described in introduction and apply the five benchmark criteria of the consistency with international norms, the actual harmonisation, the legal certainty, and the sustainable and balanced character of the provision. These criteria will allow us, in section 4.5, to make an objective assessment of the impact of TPMs on users. In the absence of relevant case law to date in the Member States regarding this provision, our analysis is based on a review of the legal literature as well as on the outcome of the interviews that Berlecon Research conducted with stakeholders.

4.2.1 *Scope of application of the obligation*

Article 6(4) of the Directive opens with the words “Notwithstanding the legal protection provided for in paragraph 1”. This formulation clearly indicates that the obligation to provide the means to exercise a limitation applies only to the circumventing act protected under article 6(1) of the Directive, and not to the supply of circumventing devices or services proscribed under article 6(2). But the provision is more complex than it appears at first glance, for even if article 6(4) creates an obligation to provide the means to exercise a limitation, this obligation is imposed on rights owners and does not give users any authority to perform acts of circumvention themselves. In other words, this provision “does not introduce exceptions to the liability of the circumvention of technological measures in a traditional sense, but rather introduces a unique legislative mechanism which foresees an ultimate responsibility on the rightholders to accommodate certain exceptions to copyright or related rights”.⁴¹⁶

As Part II of this study summaries, the implementation of article 6(4) of the Directive at the national level has led to a vast array of different solutions with respect to the persons entitled to claim the exercise of the limitation on the basis of this provision. In some Member States, only individual beneficiaries may claim the application of the limitation, while in other countries, interest groups and other third parties also have the right to do so. In yet other Member States, administrative bodies may be entitled to force rights holders to make the necessary means available to beneficiaries of limitations. Denmark and Norway do grant users, under strict conditions, a right of “self-help” to circumvent TPMs in order to make a lawful use of a work. In Germany, a general self-help right for public authorities has expressly been introduced, according to which technological protection measures can be circumvented for purposes of public administration and the judiciary. The right holder applying technological protection measures is additionally obliged to make circumvention tools available for that purpose should such self-help not be possible.⁴¹⁷

Moreover, it is important to stress that the Directive does not require rights owners to grant access to their work in order for a user to benefit from a limitation contained in the list of article 6(4) first paragraph. This paragraph of article 6(4) aims at facilitating the exercise of a limitation, once a person has lawful access to a work. As Dusollier explains, this implies that the provision does not imply an obligation to facilitate the circumvention of access control mechanisms, but only obligates rights holders to facilitate the circumvention of copy control mechanisms. In other words, the rights owner must accommodate a user only in respect of TPMs used to restrict acts that fall under the rights owner’s prerogatives, e.g. acts of reproduction or making available. TPMs used to restrict access remain unaffected. Strangely, this requirement does not appear in the second paragraph of article 6(4) of the Directive, concerning the private copying exception. According to Dusollier, nothing indicates whether this is a simple omission or a fundamental difference in treatment between the two types of limitations.⁴¹⁸

⁴¹⁶ Braun 2003, p. 499.

⁴¹⁷ Bechtold, in Dreier/Hugenholtz 2006, p. 393.

⁴¹⁸ Dusollier 2005, p. 175.

4.2.2 *Voluntary measure by a rights owner*

Article 6(4) of the Information Society Directive essentially puts the solution to the problem of the intersection between the legal protection of TPMs and the exercise of copyright limitations in the hands of the rights holders. Rights owners are obliged to take voluntary measures, including agreements between themselves and other parties concerned, to ensure that the beneficiary of certain limitations provided for in national law have the means of benefiting from that limitation, to the extent necessary to benefit from that limitation and where that beneficiary has legal access to the protected work or subject-matter concerned. Since the Directive nowhere describes what types of voluntary measures are required, it is primarily up to the rights owners to decide how they want to fulfil their legal obligation.⁴¹⁹

Solutions vary widely, depending on the types of copyright-protected works being used, and the extent of DRM usage in the particular sector. As Koelman describes, voluntary measures can take on many forms, including the supply of a non-protected version of the work, or the supply of an encryption key to allow the user to circumvent the TPM. The encryption key might also be deposited with a third party, so that upon request the beneficiary of a limitation can obtain it in order to make a lawful use of a TPM protected work.⁴²⁰ Another possible solution is to design the TPM so that certain lawful uses are possible. Loffman reports for example that the publishing group Taylor and Francis gives users up to 45 minutes to browse a publication before making a purchase and allows users to print or download a range from one page to one chapter up to a limit of 5 per cent of the book – the same extent allowed by UK photocopying licences from the Copyright Licensing Agency for printed books – on payment of a small fee.⁴²¹

From the text of article 6(4), however, the negotiation of agreements between rights owners and parties concerned would appear to be the European legislature's preferred method to achieve its objective. As Dusollier points out, the way to contractual negotiations is only realistic when users are easily identifiable, like libraries and archives, broadcasting organisations, social institutions, educational institutions, groups of disabled persons and public entities. However, this is not necessarily the case for all users who may invoke the right to benefit from a limitation pursuant to article 6(4).

This voluntary path is actually being pursued in various Member States. For example, the Motion Pictures Association has entered into negotiations with the British Film Institute (BFI) regarding the right to make archival copies of films.⁴²² In January 2005, the German National Library has reached an agreement with the German Federation of the Phonographic Industry and the German Booksellers and Publishers Association on the circumvention of technological protection measures (TPM) such as access and copy controls on CDs, CD-ROMs, and e-books. According to the press release, the German National Library has obtained a "license to copy" technologically protected digital content for its "own archiving, for scientific purposes of users, for collections for schools or educational purposes, for instruction and research as well as of works that are out of print." To avoid abuses, the library "will check user's interest" for a copy of

⁴¹⁹ Id., p. 168.

⁴²⁰ Koelman 2003, p. 92.

⁴²¹ K. Loffman, "Copyright Exceptions and Technological Protection Measures in Electronic Publications: a challenge for legislators", paper presented at the World Library and Information Congress, 69th IFLA General Conference and Council, Berlin, 1-9 August 2003, p. 5.

⁴²² Motion Pictures Associations, MPA Response to the UK All Party Parliamentary Internet Group (APIG) Inquiry into Digital Rights Management (DRM), Brussels, 13 January 2006, available at: http://www.apig.org.uk/current-activities/apig-inquiry-into-digital-rights-management/apig-drm-written-evidence/MPA_APIG_DRM_Sub_Final_13012006.pdf

the technologically protected content. Further, the copies, which are subject to a fee, “will as far as possible be personalized by a digital watermark.”⁴²³

Interviews with library representatives reveal that until recently, libraries were able to offer digital articles as unprotected downloads that could be obtained by anyone who registered with the institution. The library representatives fear, however, that the deployment of DRM will become more restrictive in the near future, because major scientific publishers will want to increase the control over their products and possibly charge for individual access. Representatives of public and scientific libraries also indicate that receiving a key to decrypt protected content is not an option. For example, for one library subscribing to 2,000 electronic journals and periodicals, removing DRM from every single article would be too complicated in practice and impossible to manage with the available organisational resources. This would be aggravated by the multitude of different DRM systems on the market, which would not allow for a single approach to circumvention. Moreover, the lack of clarity with regard to the limitations on copyright and related rights lead to a multitude of different individual initiatives from the sides of rights holders, libraries, and publishers. This contradicts the value proposition of digital libraries, i.e. to make knowledge broadly and easily available over the Internet. The British Library notes that the great majority of agreements relating to electronic licences also undermined exceptions provided for in UK and international copyright law.⁴²⁴

Providing a dedicated distribution channel to beneficiaries of copyright exemptions appears for the users interviewed to be a viable solution for the industry. In this case, beneficiaries would be allowed to log on to a site provided for by the distribution platform. Files obtained from the channel would not be protected by any DRM systems. This is exemplified by the solution – which can be considered as a best practice – of one content platform that offers a dedicated channel for educational and public institutions such as universities and libraries. The DRM regime is also attuned to the users’ particular requirements. For instance, DRM can be set in a way that enables libraries to lend content to their patrons.

In other sectors of the copyright industry, where users do not belong to easily identifiable groups and where the negotiation of acceptable agreements is more difficult, rights holders appear to ignore the obligation. In some cases, rights owners will point at the responsibilities of online distributors. Indeed, it is not uncommon to observe that in specific sectors, like the music industry, TPMs are generally not applied by the rights holders themselves but rather by an intermediary, like the content or service provider. Whereas the legal obligation to provide beneficiaries of limitations with the means to exercise such limitation is addressed to the rights holder, it is not surprising to note that most content or service providers do not feel concerned by this provision and neglect to provide any means for beneficiaries to exercise their rights. Part of the reason for their reluctance might be that there have not yet been significant numbers of requests from the side of users. After all, most services have only been on the market for a short period of time.

4.2.3 Appropriate measures by Member States

Article 6(4) furthermore provides that “in the absence of voluntary measures taken by rightholders, (...) Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law”. From the text of the provision, it appears that voluntary arrangements concluded by rights holders must be given precedence over any measure to be adopted by a Member State. For the rest, the formulation of article 6(4) leaves a lot of room for interpretation by the Member States. Indeed, as the country report in Part II of this study show, Member States have followed

⁴²³ See: <http://blogs.law.harvard.edu/ugasser/2005/01/26/german-national-library-license-to-circumvent-drm/>

⁴²⁴ Gowers Review, p. 73.

numerous paths towards the implementation of the requirement to adopt “appropriate measures”, ranging from no implementation at all to a right of self-help for the user. As discussed in more detail in section 4.4 below, quite a number of Member States have entrusted a mediation or arbitration authority to solve conflicts between rights owners and users.

Several areas of uncertainty have arisen following its implementation in the national legislation. The first uncertainty comes from the fact that the Directive nowhere defines what constitutes an “appropriate measure” by a Member State: must such an “appropriate measure” take the form of a statutory provision or can the State leave the parties to resolve the issue before the courts or through alternative dispute resolution mechanisms? In view of the lack of guidelines in the Directive, the Member States have implemented this obligation in different ways, including by establishing a dispute resolution or mediation mechanism, or by creating an executive or administrative authority in order to prevent the abuse of such measures taken by rights owners.⁴²⁵ A second uncertainty relates to the nature of the obligations that Member States will impose on the rights owners. A third element of uncertainty is, of course, the delay during which a Member State must wait before taking action. According to Recital 51, such delay must be “reasonable”. As a commentator points out, “it is also unclear under which conditions the mere authority to impose obligations changes to a duty to impose obligations. It is questionable, for example, whether this duty only emerges once an abusive behaviour by a rightholder has become apparent.”⁴²⁶

4.2.4 *Limitations covered by the provision*

The Information Society Directive provides that, in the absence of voluntary measures taken by right holders, including agreements between right holders and other parties concerned, Member States must take appropriate measures to ensure that right holders make available the means of benefiting from a certain number of limitations, to the extent necessary to benefit from these limitations and where that beneficiary has legal access to the protected work or subject-matter concerned. Not all limitations appearing in the list of article 5 of the Directive are covered by this measure, but only a selection of the limitations included in articles 5(2) and 5(3) are subjected to the obligation of the rights holder to provide users with the means to exercise them. These limitations are:

- Acts of reproduction by means of reprographic equipment (art. 5(2)a));
- Acts of reproduction by publicly accessible libraries, educational establishments or museums, or by archives (art. 5(2)c));
- Ephemeral recordings of works made by broadcasting organisations (art. 5(2)d));
- Reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons (art. 5(2)e));
- Use for the sole purpose of illustration for teaching or scientific research (art. 5(3)a));
- Uses for the benefit of people with a disability (art. 5(3)b)); and
- Use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings (art. 5(3)e));

This list gives rise to several comments. First, compared with the total number of limitations mentioned in articles 5(2) and 5(3) of the Directive, the list seems strikingly short and the

⁴²⁵ See: Submission to WIPO on the Treaty for the Protection Of Broadcasting Organizations by the European Community and its Member States and the acceding States of Bulgaria and Romania, Geneva, WIPO, September 11 to 13, 2006, SCCR 15/5, p. 4 available at: http://www.wipo.int/edocs/mdocs/sccr/en/sccr_15/sccr_15_5.doc

⁴²⁶ Bechtold in Dreier/Hugenholtz 2006, p. 393.

selection of provision random.⁴²⁷ Surprisingly, even the mandatory limitation of article 5(1) of the Directive on transient and incidental acts of reproduction is not mentioned. With respect to the limitations not mentioned in article 6(4), rights holders have complete discretion to override these limitations by using TPMs.⁴²⁸ By omitting a number of other key limitations in this provision, the European legislator has failed to take account of the possible impact that the prohibition on the circumvention of technological measures applied to copyrighted works may have on activities such as criticism, comment, news reporting, parody, scholarship, or research.⁴²⁹ The absence of the right to quote from this list sparked the following comment from Ricketson:

“... if a work is only available in a digital protected format, with no provision for the making of quotations other than on the terms specified by the right-holder, the effect of this will be to deny the exception under Article 10(1) [Berne Convention] altogether. This will obviously have far-reaching consequences into the future as more and more works become available in digital protected formats only. The result would be that the only exception specifically mandated under the Berne Convention would be effectively neutralized in the digital environment”.⁴³⁰

Moreover, rights holders and Member States alike are bound to provide the means to exercise these – otherwise optional – limitations on copyright and related rights only insofar as these have indeed been transposed in the national order. The list of limitations that are subject to the obligation therefore risks being even shorter in reality, since for example, the limitation on reproductions of broadcasts made by social institutions pursuing non-commercial purposes has not been implemented in a number of countries. For a detailed analysis of the national implementation of this provision, we refer the reader to Part II of this study.

The reasons behind the legislator’s choice of limitations for which the means of exercise must be provided to the user remain a mystery to this day. Because this provision was negotiated in the last hours before adoption of the final text of the Directive, there is no public record available to shed light on the legislator’s intent. As a result, the list of limitations included in article 6(4) appears highly arbitrary.⁴³¹ For instance, it would be hard to explain how the limitations permitting acts of reproduction by means of reprographic equipment and reproductions of broadcasts made by social institutions pursuing non-commercial purposes have made it onto the list, given their presumably minor role in the digital environment, while many far more important limitations have not. Any modification to this provision should ensure that the limitations for which the rights holder or the Member States must provide the means of exercise are determined along objective criteria.

Be that as it may, even in the case of limitations appearing in the list of article 6(4) and implemented in national legislation, the exercise of this facility is not always easy in practice. For example, The Royal National Institute for the Blind (RNIB) of the UK reported to the Gowers Review Committee that Adobe eBooks usually have the ‘accessibility’ settings disabled, thereby preventing their members to make copies in accordance with the limitations introduced by the

⁴²⁷ Lucas/Sirinelli 2006, p. 322.

⁴²⁸ Götting in Schricker 2006, p. 1852.

⁴²⁹ Note that the private copying exception is the object of a separate regulation which is examined in the following section.

⁴³⁰ S. Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, presented at the WIPO SCCR meeting Geneva, June 23 to 27, 2003* (WIPO SCCR/9/7), p. 84, http://www.wipo.int/documents/en/meetings/2003/sccr/pdf/sccr_9_7.pdf

⁴³¹ Dusollier 2005, p. 166.

Copyright (Visually Impaired Persons) Act 2002.⁴³² In such circumstances, the RNIB must lodge a complaint before the competent authority in order to obtain the means to exercise the limitations.⁴³³

4.2.5 *Private copying exemption*

Article 6(4) second paragraph provides that Member States “may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.”

This provision is complemented by Recital 52:

“Voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, as well as measures taken by Member States, do not prevent rightholders from using technological measures which are consistent with the exceptions or limitations on private copying in national law in accordance with Article 5(2)(b), taking account of the condition of fair compensation under that provision and the possible differentiation between various conditions of use in accordance with Article 5(5), such as controlling the number of reproductions. In order to prevent abuse of such measures, any technological measures applied in their implementation should enjoy legal protection.”

Member States are under no obligation to take action in respect to the private copying exception. Moreover, if the rights holder designs his TPM in such a way that private copies are possible, then Member States are not allowed to intervene on the basis of article 6(4). And, as the text of Recital 52 stipulates, right holders may in any case use TPMs to control the number of reproductions in accordance with art. 5(2)(b) and art. 5(5).⁴³⁴ TPMs that are used to control the number of reproductions receive equal protection according to article 6(4) paragraph 3.

As the country reports in Part II of this study show, not all Member States have taken advantage of this provision. In the Member States that have implemented it, the number of copies that can be made for private use varies significantly. This decreases transparency for on-demand content providers and their customers alike. In those Member States where the private copying exception is not enforceable against TPMs, one can expect the debate to continue.⁴³⁵

A particularity of the German Copyright Act is worth mentioning here. Article 95a of the Act obliges content providers to disclose the scope and characteristics of the DRM protection they use for their content. The aim of this measure is to put the German consumer in a better position to make an informed decision about whether or not he wants to buy the protected content.⁴³⁶ The German provision fills a definite need among consumers, as a series of cases in France have shown.⁴³⁷ Indeed, the sale of tangible digital supports equipped with anti-copy devices, which prevent consumers from making any copy for time or place shifting purposes,

⁴³² Gowers Review 2006, para. 4.104.

⁴³³ See section 4.4.2 *infra*.

⁴³⁴ Lucas/Sirinelli 2006, p. 323.

⁴³⁵ Note that the issue of the intersection between the private copying exception, the level of compensation and the application or non-application of TPMs, remains outside the scope of this study.

⁴³⁶ S. Bechtold, “Digital Rights Management in the United States and Europe”, *American Journal of Comparative Law* 2004/52, pp. 323-382, p. 380.

⁴³⁷ See: Court d’Appel de Versailles (1ère ch., 1ère section), EMI Music France v. CLCV, 30 September 2004, RG n° 03/04771.

may give rise to serious consumer protection issues. In several cases brought before the French courts, the French consumer protection association UFC Que Choisir argued successfully that the sale of a digital support equipped with anti-copy devices without indication that the support may not be suited to play on certain equipment was misleading to the consumer.⁴³⁸

4.2.6 *Contractual overridability*

According to the fourth paragraph of article 6(4) of the Directive, “the provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them”. The last sentence of Recital 53 specifies that “non-interactive forms of online use should remain subject to those provisions”. What constitutes a non-interactive transmission is unclear. According to one commentator, “only live webcasting, web radio and similar transmissions where the user cannot choose the time of the transmission qualify for non-interactive transmissions”.⁴³⁹ The exclusion actually extends to any work offered “on-demand”, covering any work transmitted over the Internet, as long as the user is able to choose and initialize that transmission. In view of the fact that most works offered on-demand through DRM systems rely on the conclusion of contracts and the application of TPMs, the scope of this provision is potentially very broad.

Another source of uncertainty relates to the exact meaning to be given to the expression ‘agreed contractual terms’ in this provision. The word ‘agreed’ seems to suggest that the parties must have manifested their common consent to be bound by terms that they have jointly drawn up. Accordingly, the exception to the main rule of article 6(4) of the Directive could be interpreted as applying only in respect of the supply of online services for which the contracting parties have negotiated the terms of use. By contrast, the exception laid down in article 6(4), fourth paragraph, of the Information Society Directive would not apply in the case of services offered according to the terms of a non-negotiated standard form licence, such as iTunes, where the licensee had no opportunity to influence the content of the terms. Such an interpretation of the exception in article 6(4), fourth paragraph, of the Directive would be in line with the presumed intention of the European legislator, since it would preserve the respective parties’ freedom of contract while protecting the licensee from an unbridled use of standard form contracts. As we shall in chapter 5, however, most terms of use of copyright protected material are presented in the form of non-negotiated licences.

In light of the above, the reasons behind the legislator’s decision to relieve rights holders from the obligation to provide users with the means to exercise a limitation with respect to works that are made available pursuant to contractual terms of use are, for some commentators, just as obscure as the legislator’s choice of limitations included in the first paragraph. As one author explains, this provision is likely to lead to incongruous results, depending on whether the work that is made available through a DRM system is subject to the terms of a licence or not:

“Cette dérogation à l’affirmation du statut impératif des exceptions mène à des conséquences saugrenues. Telle ou telle exception serait impérative dans tel

⁴³⁸ TGI Nanterre, Association UFC Que Choisir v. Société Sony France, Société Sony United Kingdom Ltd, Juriscom.net, 15/12/2006, No RG 05/3574 ; TGI Paris, 10 janvier 2006, Christophe R et UFC Que Choisir v. Warner Music France et FNAC , Juriscom.net, 10/01/2006, No RG 03/8874 ; Cour d’Appel de Paris, Stéphane P. and Association UFC Que Choisir v. Universal Pictures Ind., 22/04/2005, No RG 04/14933 ; Tribunal de Grande Instance de Nanterre, 24 June 2003, Association CLCV/EMI Music France, available at: www.legalis.net/cgi-iddn/french/affichejnet.cgi?droite=internet_dtauteur.htm; Cour d’Appel de Versailles, 30 September 2004, S.A. EMI Music France v. Association CLCV, in <http://www.foruminternet.org/documents/jurisprudence/lire.phtml?id=809>.

⁴³⁹ Bechtold in Dreier/Hugenholtz 2006, p. 394.

environnement et non dans tel autre. Or, déclarer qu'une disposition légale est impérative, c'est reconnaître la nécessité de protéger les intérêts de contractants plus faibles. Ces intérêts, et le besoin de leur accorder une protection spécifique, restent identiques quel que soit le type de contrat conclu".⁴⁴⁰

As we shall see in greater detail in chapter 5 below, the relationship between limitations on copyright and related rights and contracts in the online environment is far from clear, most often to the detriment of the end-users' interests.

4.3 Relationship in laws of countries outside Europe

Articles 11 of the WCT and 18 of the WPPT serve as the basis for national law anywhere in the world regarding the legal protection of technological protection measures. As mentioned earlier, the broad wording of these provisions, according to which Contracting Parties must provide 'adequate legal protection and effective legal remedies against the circumvention of effective technological measures (...) that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law', offer several options to lawmakers when dealing with the intersection between the use of TPMs and the exercise of limitations on copyright. The Contracting Parties have followed different paths in order to meet this requirement, depending of course on the type of legal protection they afford to the use of technological protection measures. This section describes solutions adopted in certain countries outside of the European Union, namely the United States, Australia, Japan, Canada and Switzerland.

4.3.1 USA

One of the concessions made to users under the DMCA is the fact that the Act does not prohibit circumvention of rights controls. Apart from this accommodation, the DMCA includes a list of statutory exemptions allowing the circumvention of access control mechanisms. The exemptions are generally very narrowly worded and subject to specific and very detailed criteria.⁴⁴¹ They all relate to the prohibition of circumventing access control mechanisms. Some of them also relate to the prohibition of trafficking in access control circumvention devices (cf. § 1201(a)(2)), or to the prohibition of trafficking in rights control circumvention devices (cf. § 1201(b)), or both. The exemptions cover: (i) Non-profit libraries, archives and educational institutions so that they can decide whether to acquire a work; (ii) law enforcement, intelligence and other government activities; (iii) reverse engineering of computer programs for the purpose of achieving interoperability with other programs; (iv) encryption research; (v) protection of minors; (vi) circumvention to counterwork the collection by the TPM of personally identifying information; and (vii) security testing.⁴⁴²

The DMCA further provides for an administrative rulemaking procedure,⁴⁴³ by which the additional exemptions from the prohibition on circumvention can be created. The rulemaking relates only to the prohibition on circumventing access controls in § 1201(a)(1)(A), it does not affect potential liability under the anti device/service provisions in § 1201(a)(2) and § 1201(b)(1). Nor can the rulemaking or any created exception give relief from liability for copyright infringement. The power to create exemptions under the proceedings is delegated to the Librarian of Congress. Proceedings follow a triennial cycle⁴⁴⁴ and must determine whether users

⁴⁴⁰ Dusollier 2005, p. 652.

⁴⁴¹ Besek 2004, p. 397.

⁴⁴² § 1201(d) to (j) – also relates to § 1201(a)(2).

⁴⁴³ See § 1201(a)(1)(B)-(E).

⁴⁴⁴ The *first* rulemaking was, according to the mandate of § 1201(a)(1)(C), delayed with two years from the

of any particular class of copyrighted works are, or in the next three years are likely to be, adversely affected by the said prohibition in their ability to make non-infringing uses of copyrighted works.⁴⁴⁵ The question of the exact scope of “a particular class of copyrighted works”, in the sense of § 1201, is an issue that has been hotly debated and to which we will return below. The exemptions are not permanent, but must be re-considered every three years in order to reflect possible changes in the market situation for copyrighted materials. If exceptions are not re-established, they expire.⁴⁴⁶

The Librarian of Congress’ decisions must be based on the recommendations of the Register of Copyrights, who, in turn, must consult with the Assistant Secretary for Communications and Information of the Department of Commerce. Factors to be examined as part of the inquiry are (i) the availability for use of copyrighted works; (ii) the availability for use of works for non-profit archival, preservation, and educational purposes; (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research; (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and (v) such other factors as the Librarian considers appropriate.⁴⁴⁷

Three rulemaking proceedings have been held since the enactment of the DMCA, in 2000, 2003 and 2006, respectively. Any rulemaking exercise begins with a public consultation phase, including public hearings, based on specific exceptions requested by interested parties. Post-hearing written submissions are also possible. Following further consultation, the Register of Copyrights makes recommendations to the Librarian of Congress, who, in accordance with § 1201 makes the final ruling. The process takes approximately 12 months on each occasion.⁴⁴⁸ On 27 November 2006, the Librarian of Congress, on the recommendation of the Register of Copyrights, has announced the classes of works that, during the next three years, will be subject to the exemption from the prohibition against circumvention of technological measures that control access to copyrighted works. The new classes deal with the following:

- Audiovisual works included in the educational library of a college or university’s film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors.
- Computer programs and video games distributed in formats that have become obsolete and that require the original media or hardware as a condition of access, when circumvention is accomplished for the purpose of preservation or archival reproduction of published digital works by a library or archive. A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.

enactment of the DMCA. The purpose of the delay was “to allow the development of a sufficient record as to how the implementation of [DRM technologies] is affecting availability of works in the marketplace for lawful uses” (see H.R. Rep. No. 105-551, pt. 2 (1998), 38 [hereinafter House Commerce Report]). The first rulemaking was published 27 October 2000, the day before the prohibition against circumventing access controls took effect (see § 1201(a)(1)(C) cf. § 1201(a)(1)(A)). Thereafter, the rulemaking has been subject to its ordinary triennial cycle (§ 1201(a)(1)(c)).

⁴⁴⁵ § 1201(a)(1)(C).

⁴⁴⁶ T. Foged, “US v EU Anti Circumvention Legislation: Preserving The Public’s Privileges In The Digital Age”, *E.I.P.R.* 2002/24, pp. 525-542.

⁴⁴⁷ § 1201(a)(1)(C).

⁴⁴⁸ B.D. Herman and O.H. Gandy, ‘Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings’, *Cardozo Arts & Ent. L.J.* 2006/24, pp. 121-190; for more details see <<http://www.copyright.gov/1201/anticirc.html>>.

- Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete. A dongle shall be considered obsolete if it is no longer manufactured or if a replacement or repair is no longer reasonably available in the commercial marketplace.
- Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling either of the book's read-aloud function or of screen readers that render the text into a specialized format.
- Computer programs in the form of firmware that enable wireless telephone handsets to connect to a wireless telephone communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network.
- Sound recordings, and audiovisual works associated with those sound recordings, distributed in compact disc format and protected by technological protection measures that control access to lawfully purchased works and create or exploit security flaws or vulnerabilities that compromise the security of personal computers, when circumvention is accomplished solely for the purpose of good faith testing, investigating, or correcting such security flaws or vulnerabilities.

Despite the fact that the list of exempted classes increases from one rulemaking process to the next, recent academic commentaries⁴⁴⁹ seem to indicate a growing consensus that rulemaking proceedings of § 1201 is inadequate in achieving its intended purpose. It should then, of course, be added that some disagreement seems to exist regarding the actual purpose of the rulemaking process. Some claim that the purpose is to ensure that the public will have continued ability to engage in non-infringing uses of copyrighted works, such as fair use in the digital environment;⁴⁵⁰ others view the proceedings as a tool to cut away only the worst-case pay-per-use scenarios.⁴⁵¹ As to the inadequacy of the mechanism, one recent study concludes that the rulemaking “does not appear to be an earnest attempt to provide meaningful relief to adversely affected noninfringing users”.⁴⁵² Similarly, another publication maintains that “there are too many faults in both the structure and execution of the rulemaking provision to meaningfully counteract the adverse effects of the anti-circumvention provisions of the DMCA”.⁴⁵³ The critique raised is both system-related and aimed at specific criteria applicable to the rulemaking (and the restrictive manner in which the Librarian of Congress has interpreted those criteria).

At the systematic level, the argument has been put forward that § 1201 creates a system that is unable to provide legitimate users with the proper venue to adequately address the issue of the right to make fair uses of works in the digital context.⁴⁵⁴ Other commentators consider that the pragmatic difficulties involved in submitting a successful proposal for an exemption are so burdensome that they frustrate the purpose of the Statute and discourage potential submissions. Concerning the confines of the rulemaking mechanism, three main points have been raised. First, critique was expressed in relation to the limited mandate of the rulemaking procedure, particularly

⁴⁴⁹ See e.g. Herman/Gandy 2006, p. 124; W.N. Hartzog, “Falling on Deaf Ears: Is the “Fail-Safe” Triennial Exemption Provision in the Digital Millennium Copyright Act Effective in Protecting Fair Use”, *J. Intell. Prop. L.* 2005/12, pp. 309-350.

⁴⁵⁰ See e.g. Hartzog 2005, p. 323.

⁴⁵¹ See e.g. Herman/Gandy 2006, pp. 124, 129-30, referring the arguments presented by different stakeholders in the cause of the first two proceedings.

⁴⁵² *Ibid.*, at p. 124.

⁴⁵³ Hartzog 2005, p. 314.

⁴⁵⁴ Herman/Gandy 2006, p. 188.

regarding the fact that the rulemaking cannot create exceptions to the anti-trafficking provisions of § 1201(a)(2) or § 1201(b). The main argument in this respect is that, since average users do not possess the skills needed to circumvent increasingly sophisticated DRM technologies, the impossibility of gaining relief from anti-trafficking liability – and the resulting lack of availability of circumvention tools in the market – leaves the user unable to enjoy any “right to circumvent” that the rulemaking might produce. In effect, this renders the rulemaking insignificant.⁴⁵⁵

Second, an exemption can only be created for “a particular class of works”. Accordingly, the Librarian of Congress does not have the authority to create any exemptions defined by reference e.g. to the intended *use* or *users* of the works. A large number of proposals were dismissed during the first two proceedings for failing to properly define a class of works according to the quoted standards.⁴⁵⁶ For instance, exemptions were required by making reference to “material that cannot be archived or preserved” or to “works embodied in copies which have been lawfully acquired by users who subsequently seek to make non-infringing uses thereof”. The Librarian of Congress’ restrictive interpretation of the Act on this point has been severely criticised. As one commentator points out: “this refusal to consider the use or user of a work in determining the scope of the class is perhaps the largest flaw in the exemption provision and contrary to established notions of fair use.”⁴⁵⁷ A third limitation to the rulemaking process concerns the burden of proving the need for an exemption. The statutory text does not place this burden explicitly on any of the parties. However, during the first rulemaking proceeding, it was made clear that it is on the proponent of an exemption.⁴⁵⁸ All in all, the criticism raised against the DMCA rulemaking system, seems to find its origin in the specific statutory limitations of the powers delegated to the Librarian of Congress, and the manner in which those criteria have been interpreted by the actors involved in the rulemaking.

4.3.2 *Australia*

Pursuant to the current Australian anti-circumvention law, circumvention is not prohibited. Users may therefore lawfully circumvent a TPM for any purpose (including the pursuit of user rights). The Act additionally provides that, in relation to certain permitted purposes, the manufacture, dealing and supply of circumvention devices or services may also be lawful.⁴⁵⁹ The permitted purposes relate to certain specified copyright exceptions,⁴⁶⁰ including the reproduction of computer programs in order to make interoperable products, correction of errors or security tests, as well as certain uses by libraries, archives, educational institutions and institutions assisting persons with a print or intellectual disability. It is noteworthy that fair dealing⁴⁶¹ is not among the permitted purposes.

The exemption provided pursuant to article 116A(3) of the Act, which deals with the supply of circumvention devices or services, only applies where a qualified person⁴⁶² is pursuing a permitted purpose. In order to benefit from the exemption, the qualified person must provide the supplier with a signed declaration stating the person’s name and address, the basis on which he is a qualified person, the name and address of the supplier, a statement that the device or

⁴⁵⁵ Hartzog 2005, pp. 344 et seq.

⁴⁵⁶ Herman/Gandy 2006, pp. 175

⁴⁵⁷ Hartzog 2005, p. 328.

⁴⁵⁸ Letter from Marybeth Peters, Register of Copyrights, to James H. Billington, Librarian of Congress (Oct. 27, 2003), available at <<http://www.copyright.gov/1201/docs/registers-recommendation.pdf>>, p. 10.

⁴⁵⁹ Australian Copyright Act, § 116A(3) and 116A(4)

⁴⁶⁰ See Australian Copyright Act, § 116A(7).

⁴⁶¹ See Australian Copyright Act, § 40 – 43.

⁴⁶² Defined Australian Copyright Act, § 116A(8).

service is to be used for a permitted purpose and identification of that purpose by reference to a specific section of the Act. The declaration must also include a statement that the work or other subject-matter, in relation to which the device or service is required, is not readily available in a form not protected by a TPM.⁴⁶³ Article 116A(4) of the Act, which deals with the manufacture and importation of circumvention devices, requires that the manufacture or importation be done (a) for use only for a permitted purpose, or (b) for the purpose of enabling a person to supply the device, or to supply a circumvention service, for use only for a permitted purpose. Article 116A(4)(a) – not (b) – of the Act additionally requires that the work or other subject-matter is not readily available in a form not protected by a TPM. Furthermore, the Act contains an exception for acts lawfully done for purposes of law enforcement or national security purposes by the Commonwealth, a state or territory, or an authority in one of the foregoing.⁴⁶⁴

Subsequent reviews and the AUSFTA

Conscious that new technologies were changing rapidly and wishing to ensure that an appropriate balance of interests between rights owners and users be maintained, the Copyright (Digital Agenda) Act provided for its review within 3 years of commencement. The first review started in April 2003 and led to a report in January 2004.⁴⁶⁵ The report, known under the name of the Committee's president Phillips Fox, presented a number of recommendations for amendments of the Copyright Act in order to facilitate the achievement of the objectives of the Digital Agenda reform. With regard to the definition of protected TPMs, the report suggested that a TPM receive protection if it was designed to function, by its own processes or mechanisms, to prevent or inhibit the infringement of copyright and did more than merely deter or discourage a person from infringing copyright.⁴⁶⁶ It was further proposed that the list of permitted purposes in article 116A should be expanded so as to include any use or exception permitted under the Copyright Act – including fair dealing and access to a legitimately acquired non-pirated product. Following such an expansion of the definition of permitted acts, the report suggested that article 116A could be amended to prohibit the use of circumvention devices (or service) – i.e. the act of circumvention – other than for a permitted purpose. Finally, the report proposed that the integrity of the permitted purposes in article 116A should be retained by preventing a copyright owner from making it a condition of access to or use of a copyright work or other subject matter that a user will not use a circumvention device or service for the purpose of making a fair dealing of that work or other subject matter. A previous report from the Copyright Law Review Committee (CLRC)⁴⁶⁷ had similarly concluded that, in the digital environment, agreements are regularly being used to exclude or modify copyright exceptions, and that this leads to an overall displacement of the copyright balance. Accordingly, the report made two recommendations: first, that the Copyright Act be amended to provide that a contractual overriding of (certain) copyright exceptions would have no effect; and second, that the integrity of the permitted purposes in

⁴⁶³ Australian Copyright Act, § 116(4A) clarifies that a work or other subject-matter is taken not to be readily available if it is not available in a form that lets a person do an act in relation to it that is not a copyright infringement as a result of one of the permitted purpose exceptions.

⁴⁶⁴ Australian Copyright Act, § 116A(2).

⁴⁶⁵ Digital Agenda Review, Circumvention Devices and Services, Technological Protection Measures and Rights Management Information, Issues Paper (2003) available at: <[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/personal/E14F779DFBC655D9CA256E7F00206B2F/\\$FILE/FOX+Final+reportpassword.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/personal/E14F779DFBC655D9CA256E7F00206B2F/$FILE/FOX+Final+reportpassword.pdf)>, 2 [hereinafter the Phillip Fox report].

⁴⁶⁶ This recommendation has subsequently been adopted by the High Court in *Stevens v Kabushiki Kaisha Sony Computer Entertainment*, [2005] HCA 58.

⁴⁶⁷ Copyright Law Review Committee, *Report on Copyright and Contract*, Canberra, 2002, See: <<http://www.ag.gov.au/agd/WWW/clrhome.nsf/AllDocs/092E76FE8AF2501CCA256C44001FFC28?OpenDocument>>

article 116A of the Act be preserved along the lines of the recommendation made in the Fox report.

As mentioned in section 3.3.2 above, the AUSFTA will undeniably require substantial amendments to the Australian TPM protection scheme. The need to modify the regime not only appears from the simple reading of the provisions of the Free Trade Agreement, but has also been confirmed by the introduction of the Technological Protections Measures Bill. Furthermore, the Australian Government announced that the Phillips Fox proposals on TPMs have effectively been superseded by the AUSFTA obligations. Previous reviews and reform proposals have therefore been discarded.⁴⁶⁸

The AUSFTA requires the establishment of a certain TPM protection scheme. Its requirements in this regard may be divided into two categories: those that directly relate to the shaping of the anti-circumvention rules, and those that outline the features of a procedure for creating new exemptions (similar to the DMCA rulemaking proceedings). The Technological Protection Measures Bill introduces rules of both types, and the details of the Bill will be analysed below. Before turning to the provisions of the Bill, however, it is important to discuss some of the recommendations presented on this matter by the Standing Parliamentary Committee on Legal and Constitutional Affairs.⁴⁶⁹ The exemption mechanism, outlined in AUSFTA Article 17.4(7)(d)(viii), authorises the creation of exceptions for:

“non-infringing uses of a work, performance, or phonogram in a particular class of works, performances, or phonograms, when an actual or likely adverse impact on those non-infringing uses is credibly demonstrated in a legislative or administrative review or proceeding; provided that any such review or proceeding is conducted at least once every four years from the date of conclusion of such review or proceeding.”

After discussing several alternatives, the Standing Committee Report concludes that future reviews should be of an administrative nature and be carried out by the Attorney-General's Department. Created exemptions should be implemented through subordinate rather than primary legislation, in order to provide flexibility and avoid time delays. The Copyright Act should define the general policy parameters, the approach and the factors to be considered. Reviews should be carried out in accordance with a two-tracked review scheme, which includes both periodical general reviews of existing and proposed exceptions within the timeframes set by Article 17.4(7)(d), and subsequent *ad hoc* reviews. The general reviews should evaluate exemptions created in the course of previous reviews, but – unlike the US scheme – prior exemptions will not automatically expire unless they are successfully re-argued in the subsequent hearing. Existing exemptions will therefore not be time-limited by nature: they will be maintained unless a subsequent review leads to the conclusion that they should be cancelled. *Ad hoc* reviews should be available at any time (except during a period just before or after a general review) to consider applications from individuals and organisations for the establishment of new exemptions or the removal of existing exemptions. The general reviews, covering all existing and proposed exemptions, together with a review of the process, should be conducted every four years, and roughly follow the rulemaking procedure laid down in the DMCA.

The Technological Protection Measures Bill introduces a new exception scheme, aimed at protecting the user rights embedded in copyright law. Some exemptions are already included in the Bill itself; others will be included in the Copyright Regulations; whereas a third group of exemptions may be created through regulations in accordance with a rulemaking procedure that

⁴⁶⁸ Government responses to Phillips Fox recommendations and related matters, May 2006. Available at: <<http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/RWP7B3B6A5CD28F19B5CA25704C001A5627>>.

⁴⁶⁹ Review of technological protection measures exceptions, House of Representatives, Standing Committee on Legal and Constitutional Affairs (February 2006) [hereinafter the Standing Committee Report].

will be described below. With regards to the statutory exceptions, the Bill provides that no action can be brought against a person who circumvents (i) in the belief that he has permission to circumvent;⁴⁷⁰ or (ii) for the purpose of doing certain specified acts.⁴⁷¹ Acts that can form the basis of a lawful circumvention relate to ensuring interoperability between computer programs, encryption research, computer security testing, online privacy, law enforcement and national security and libraries. Similarly, the Bill provides that no action can be brought against a person who manufactures a circumvention device or a circumvention service, if the device is used to circumvent a technological protection measure to enable a person to do certain specified acts.⁴⁷² The acts that in this way can form the basis of a lawful manufacturing of circumvention devices and services relate to ensuring interoperability between computer programs, encryption research, computer security testing, law enforcement and national security.

Upon presenting the Bill, the Government declared that certain additional exceptions proposed in the Standing Committee Report would be included in the Copyright Regulations. The instrument of regulations was chosen because it “provides greater flexibility and improves the responsiveness of the scheme to changes in technology”.⁴⁷³ Furthermore, with respect to the prohibition against circumvention of an access control mechanism, the Bill foresees a procedure whereby additional exemptions can be created. Like the US rulemaking proceedings, the proposed Australian mechanism will not allow the creation of exemptions to the anti-trafficking provisions. The Bill provides that no action will be admissible against a person who circumvents for the purpose of doing an act if “the doing of the act by the person is prescribed by the regulations”.⁴⁷⁴ Such regulations will be adopted by the Governor General upon recommendation from the Minister, following a consultation process during which submissions will be admissible from persons who are or are likely to be adversely affected in their doing of the act in question.⁴⁷⁵ Submissions by affected parties must be confined to “a particular class of works or other subject matter”.⁴⁷⁶ The regulations may prescribe “(a) a particular act or a class of acts; and (b) a particular person or class of persons.”⁴⁷⁷ According to the Bill, the Minister must make a decision with regards to any submission within four years from receiving it. This provision seems to allow the establishment of a double-tracked system such as the one suggested in the Standing Committee Report, i.e. including both general periodical reviews and consecutive *ad hoc* reviews. A first rulemaking was initiated in parallel to the introduction of the Bill. Currently, the Governor General is considering certain exemptions that were proposed in the Standing Committee Report, but that have not been included in the Bill itself.

4.3.3 Japan

Since the CLJ establishes a direct connection between the scope of the copyright protection and the protection of technological measures, only technological mechanisms that prevent copyright infringement benefit from the protection of the law. The making and distribution of circumventing devices give rise to a punishable act. Similarly, the circumvention as a business in response to a request from the public of a TPM designed to prevent copyright infringement is a

⁴⁷⁰ Section 116AK(2).

⁴⁷¹ Section 116AK(3)-(8).

⁴⁷² Respectively Section 116AL(2)-(5) (devices) and Section 116AM(2)-(5) (services).

⁴⁷³ Media release “Exposure Draft – Copyright Amendment (Technological Protection Measures) Bill 2006”, available at <<http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/RWP04FC63D41045DEA5CA2571DF0021BCA3>> [hereinafter the TPM Bill Media Release].

⁴⁷⁴ Subsection 116 AK(9).

⁴⁷⁵ Subsection 116 AK(12).

⁴⁷⁶ *Ibid*, at (c).

⁴⁷⁷ Subsection 116 AK(10).

punishable act. Circumvention services are equally prohibited.⁴⁷⁸ This means that, as long as it is done for non-commercial purposes, circumvention generally is lawful under the CLJ.⁴⁷⁹ This confinement of the anti-circumvention protection not only benefits private users, but also seems to relieve non-profit organisations, such as libraries or schools, from liability. Moreover, devices falling outside the TPM definition of the CLJ, such as e.g. measures blocking initial access, can lawfully be offered to the public, as long as the conduct is not commercially motivated (and hence constitute an act of competition). Thus, public dissemination of such tools by non-profit organisations (such as e.g. libraries or public consumer authorities etc.) seems to be permitted.

With respect to the private copying exemption, the situation is different. The CLJ does not sanction the act of circumvention itself, but article 30(1)(ii) provides the following:

“(1) It shall be permissible for a user to reproduce by himself a work forming the subject matter of copyright (hereinafter in this Subsection referred to as a "work") for the purpose of his personal use, family use or other similar uses within a limited circle (hereinafter referred to as "private use"), except in the case:

(ii) where such reproduction is made by a person who knows that such reproduction becomes possible by the circumvention of technological protection measures or it ceases to cause obstruction, by such circumvention, to the results of acts deterred by such measures ("circumvention" means to enable to do acts prevented by technological protection measures or to stop causing obstruction to the results of acts deterred by such measures, by removal or alteration of signals used for such measures; the same shall apply in Article 120*bis*, items (i) and (ii)) ("removal" or "alteration" does not include such removal or alteration as is conditional upon technology involved in the conversion of recording or transmission systems)”⁴⁸⁰.

Essentially, this provision means that the act of circumvention itself is not prohibited, but the making of a private copy from a work, the technological protection of which has been circumvented, constitutes an infringement of copyright. The same rule applies when the person who makes the copy did not personally circumvent the TPM, but had reason to know that the TPM was removed in order to allow the making of such a copy.⁴⁸¹ In other words, circumvention of usage control results in a loss of the private copying privilege set forth in article 30, and may result in liability for copyright infringement that is enabled by such circumvention.

The UCPL, on the other hand, targets all acts that are commercially motivated. With respect to exemptions on acts of circumvention, the UCPL allows circumvention for purposes of testing or research regarding technological protection measures.⁴⁸² The official commentary to the act states that the aim of the exemption is to ensure free and competitive activities targeted towards developing more sophisticated TPMs. The Japanese legislator did, however, consider creating another exemption in the UCPL, aimed at preserving the statutory copyright exceptions. However the idea was abandoned based on the reasoning that: (a) circumvention devices have the potential of creating considerable economic loss to content owners if misused, and (b) legitimate and acceptable uses will not be targeted by the UCPL because such uses will not cause commercial damages large enough to be regulated under the Act.⁴⁸³

⁴⁷⁸ Koelman 2003, p. 126.

⁴⁷⁹ Noguchi 2006, p. 204; Cunard/Hill/Barlas 2004, p. 94.

⁴⁸⁰ Copyright Law of Japan, art. 30(1)(ii) available at: http://www.cric.or.jp/cric_e/clj/clj.html

⁴⁸¹ Koelman 2003, p. 126.

⁴⁸² UCPL Article 11(1)(7).

⁴⁸³ Noguchi 2006, p. 204.

The scarcity of exemptions to be found within the Japanese anti-circumvention regime does, however, not necessarily mean that user rights are not a priority. As one commentator points out:

“If Japan adheres to its moderate approach in scope, it would not call for more exemptions. In essence, Japan confines its anti-circumvention protection to prevent copyright infringement only. As long as Japan does not consider fair use to be copyright infringement, and thus excludes it from the ambit of anti-circumvention, there is no need for further exemptions or limitations as required by other WCT signatories”.⁴⁸⁴

4.3.4 *Canada*

Generally speaking, Canadian copyright law is concerned with seeking a balance between promoting the public interest in the encouragement and dissemination of works, and the public interest in obtaining a just reward for the creator or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated.⁴⁸⁵ The Supreme Court has also stressed the importance of the fair dealing exemption in accommodating the balance of interests inherent in the Copyright Act.⁴⁸⁶ This reality is reflected in the proposed legislation. If Bill C-60 is tabled again in the same form, and if it is adopted, circumvention of TPMs would be prohibited only to the extent it is carried out for an infringing purpose. In other words, circumvention for a non-infringing purpose – including the enjoyment of user rights – is permitted.

Furthermore, Bill C-60 provides for no prohibition against circumvention devices. This ought to result in a general availability in the market of circumvention tools, enabling the public to benefit from the said right to circumvent. However, the lack of a statutory definition of “service” – the provision of which is prohibited by the Act – creates some uncertainty. As Bailey points out, it will be difficult in practice to draw the line between circumvention services, which are encompassed by the prohibition, and circumvention devices (goods) that are not.⁴⁸⁷ This uncertainty may well have a chilling effect on the availability of such devices. In principle, Bill C-60 also permits the provision of a circumvention service, as long as the circumvention does not result in an infringing use. However, due to the obvious difficulties in predicting an end-user’s true intentions, it is unlikely that such circumvention services will flourish.

4.3.5 *Switzerland*

Confirming the legislator’s intention to align anti-circumvention protection with material copyright law, Article 39a(4) provides that the prohibition on acts of circumvention does not apply in cases where the circumvention takes place for legitimate purposes:

“The prohibition of circumvention can not be enforced towards a person who has carried out the circumvention solely for the purpose of a statutorily permitted exploitation”.⁴⁸⁸

According to the explanatory report, this exception implies that, even though circumvention in

⁴⁸⁴ Wang 2006, p. 244.

⁴⁸⁵ CCH Canadian Ltd v Law Society of Upper Canada [2004] 1 S.C.R. 339.

⁴⁸⁶ B. Sookman, “Technological Protection Measures (TPMS) and Copyright Protection: The Case for TPMS” *Computer and Telecommunications Law Review* 2005/11, pp. 143-159.

⁴⁸⁷ Bailey 2004, p. 161.

⁴⁸⁸ Article 39a(4), unofficial translation. (Das Umgehungsverbot kann gegenüber denjenigen Personen nicht geltend gemacht werden, welche die Umgehung ausschliesslich zum Zweck einer gesetzlich erlaubten Verwendung vornehmen).

principle is prohibited, a violation shall not have any civil or criminal consequences where carried out for the sole purpose of conducting a use permitted under the Act.⁴⁸⁹ Only the prohibition on circumvention is restricted in this way, not the prohibition on trafficking.⁴⁹⁰ According to the explanatory report, a use shall be deemed as statutorily permitted, if it is covered by a copyright exception or relates to a work that (i) according to Article 15 of the Act is exempted from copyright protection; or (ii) with regards to which the term of protection has expired. It should also be noted that Article 39a(4) does not interfere with the statutory protection of access controls in electronic commerce found in Article 150bis of the Swiss Criminal Code (StGB).⁴⁹¹

In addition, the Swiss legislator acknowledges that the lack of a prohibition against circumvention does not in itself fully protect users against over-protective TPMs:

“Certainly, the protection of technological measures in Article 39a of the Copyright Act is shaped to not have any overriding effect upon the material copyright law, in specific the copyright exceptions. Nevertheless, technical measures might, *independently of their legal protection*, prevent work-exploitation that is permitted through copyright exceptions (emphasis added).⁴⁹²

In light of this, article 39b empowers the Federal Council to appoint an observatory body⁴⁹³ entrusted to maintain certain specific responsibilities relating to the protection of user rights:⁴⁹⁴ First, the observatory body shall monitor the general impact of the use of TPMs on copyright exceptions, and report its findings to political authorities.⁴⁹⁵ Second, it shall serve, in practice, as an intermediary between user and consumer groups on the one hand, and the users of TPMs on the other. If needed, the observatory body shall act as a mediator between these groups in order to promote voluntary solutions.⁴⁹⁶ Third, the observatory body may⁴⁹⁷ be given certain powers to impose obligations upon right holders to take measures in order to adjust their TPMs so as to avoid interference with public interests reflected in copyright exceptions.⁴⁹⁸

The Explanatory Report explains that, while serving as a connecting entity between users and consumers of works, and users of TPMs, the observatory body will come in direct contact with the practical problems arising from the use of such devices. According to Article 39b(1)(b), the observatory body shall assist in solving such conflicts by promoting/requiring⁴⁹⁹ voluntary

⁴⁸⁹ Botschaft, 3425.

⁴⁹⁰ The exception is directed at „Personen ... welche die Umgehung ... vornehmen.“.

⁴⁹¹ Botschaft, 3425.

⁴⁹² *Ibid*, unofficial translation (Der Schutz technischer Massnahmen ist zwar in Artikel 39a E-URG so ausgestaltet worden, dass er gegenüber dem materiellen Urheberrecht bzw. den damit verbundenen Schranken keine überschüssende Wirkung hat. Technische Massnahmen können aber *unabhängig von ihrem rechtlichen Schutz* Verwendungen verhindern, die gemäss den Schranken des Urheberrechts erlaubt sind).

⁴⁹³ Referred to in Art 39b as “Beobachtungsstelle” and “Fachstelle”.

⁴⁹⁴ Article 39b was re-written during the final phase of the drafting process. Before the revision, the provision prescribed a different model, by which anti circumvention protection was made conditional on the compliance with two obligations: First, right holders were *required to label* copies to which TPMs were applied. Second, they were *obliged to enable* users, with some limitations, to benefit from copyright exceptions. For a detailed analysis of the prior version of Article 39b; see Lindner 2005.

⁴⁹⁵ Article 39b(1)(a).

⁴⁹⁶ Article 39b(1)(b).

⁴⁹⁷ It seems to be subject to the discretion of the Federal Council to determine whether such powers should be assigned to the body.

⁴⁹⁸ Article 39b(2).

⁴⁹⁹ “Förder[n]”.

solutions between concerned parties. The observatory body shall inform the political authorities about whether its mediating efforts have been successful, or whether further measures in accordance with Article 39b(2) are called for. It remains unclear, however, whether such reports are to be made on a case-by-case basis or in more general terms. The Explanatory Report further suggests that the observatory body, and the execution of its tasks and assignments, can be coordinated with those of one of the two already existing supervisory bodies in the field of Swiss copyright law. These are *Das Eidgenössische Institut für Geistiges Eigentum* (supervisory body of the Swiss collecting societies) and *Die Eidgenössische Schiedskommission für die Verwertung von Urheberrechten und verwandten Schutzrechten* (the body responsible for monitoring and approving tariffs on behalf of the collecting societies).⁵⁰⁰

4.3.6 Comparative remarks

Summing up, the five countries examined above have adopted quite different ways to ensure that the use of TPMs not frustrate the exercise of limitations on copyright and related rights and that the public interest be taken into consideration. By far the most intricate and burdensome regime is the one established under the DMCA. The Act contains a list of statutory exemptions allowing the circumvention of access control mechanisms, which are generally very narrowly worded and subject to specific and very detailed criteria of application.⁵⁰¹ These exemptions all relate to the prohibition of circumventing access controls. Some of these also relate to the prohibition of trafficking in access control circumvention devices (cf. § 1201(a)(2)) or to the prohibition of trafficking in rights control circumvention devices (cf. § 1201(b)), or both. The DMCA further provides for an administrative rulemaking procedure by the Librarian of Congress,⁵⁰² by which additional exemptions from the prohibition on circumvention can be created. The US rule-making system has been strongly criticised for being only limited to the identification of “classes of works” based upon the attributes of the works themselves, rather than the intended use or users of the works. Moreover, this procedure has no effect on the potential liability under the anti device/service provisions in § 1201(a)(2) and § 1201(b)(1).

In Australia, acts of circumvention are not prohibited under the current Copyright Act, whereby exemptions are unnecessary. In addition, the manufacture, dealing and supply of circumvention devices or services may also be declared lawful in relation to certain permitted purposes.⁵⁰³ However, the Australian Act will soon be modified pursuant to this country’s obligations under the AUSFTA. In Japan, since the CLJ establishes a direct connection between the scope of the copyright protection and the protection of technological measures, only technological measures that prevent copyright infringement benefit from the protection of the law. There is therefore no need for the recognition of specific exemptions under Japanese copyright law. Similarly, if Canadian Bill C-60 is adopted, the circumvention of TPMs would be prohibited only to the extent that it is carried out for an infringing purpose. In other words, circumvention for a non-infringing purpose – including the enjoyment of user rights – would be permitted. Furthermore, since Bill C-60 does not circumvention devices, circumvention tools should be available on the market, enabling the public to benefit from the said right to circumvent. Finally, article 39a(4) of the Swiss Proposal provides that the prohibition on acts of circumvention does not apply in cases where the circumvention takes place for legitimate purposes, thereby making the adoption of exemptions superfluous.

⁵⁰⁰ Botschaft, 3426 et seq.

⁵⁰¹ Besek 2004, p. 397.

⁵⁰² See § 1201(a)(1)(B)-(E).

⁵⁰³ Australian Copyright Act, § 116A(3) and 116A(4)

Country	Exemptions on circumvention	Exemptions on anti-trafficking	Rulemaking procedure	Frequency
United States	Fixed exemptions on access control mechanisms – No exemption for fair uses.	None	Periodical review of exemptions for classes of works on copy control mechanisms	Rulemaking procedure recurs every 3 years; Exemptions on access control mechanisms final.
Australia	No exemption necessary (yet) – may change following implementation of AUSFTA	Exemptions for certain acts of trafficking in devices/services	To be created along the lines of the DMCA system	General review every 4 years <i>Ad hoc</i> review any time
Japan	Not necessary if circumvention done for non-commercial purposes <i>However</i> , circumvention of usage control results in a loss of the private copying privilege (art. 30(1)ii))	None		
Canada	Not necessary	Not necessary		
Switzerland	Not necessary	None	Mediation body	

Table 3 Comparative overview of exemptions to anti-circumvention or anti-trafficking laws.

4.4 Monitoring the use of TPMs

Conscious of the potential negative impact of the application of TPMs on users' interests and competition, several countries throughout the world have established observatory bodies as part of their anti-circumvention regimes. These bodies have been entrusted with the mission to monitor or respond to the possible negative consequences of the anti-circumvention legislation or the use of TPMs. The rationale behind the formation of these observatories lies on the acknowledgement that the legal protection of TPMs is a relatively new phenomenon, created from the drawing board without any mentionable practical experience upon which to rely.⁵⁰⁴ In the following pages, we briefly discuss the reasons behind the establishment of an observatory body, with particular attention to the possible functions of such a body. Next, we deal with existing bodies in the countries of the European Union, which leads us in the third section, which examines how a pan-European observatory body might best preserve a balance of interests in matters relating to the application of TPMs.

4.4.1 Workings of an observatory body

The main argument in favour of the establishment of an observatory body is that it contributes in mitigating the uncertainty surrounding the consequences for users of the introduction of a legal protection for TPMs. This state of uncertainty calls for the ability to react to the observation that the system needs adjustment.⁵⁰⁵ What is the added value of an observatory body above and beyond existing adaptation mechanisms, such as legislative review by the Parliament and/or case-by-case adjustments performed by the judiciary?

Before answering this question, we must define the legal nature of such an observatory body. The question is how to characterize existing examples of observatories. The mechanisms established in some EU Member States have been described as "regulatory or mediation body",

⁵⁰⁴ See e.g. Gasser 2006, pp. 104.

⁵⁰⁵ *Ibid*, at 105, describing the monitoring mechanism as an "ability to learn and improve".

as opposed to “the lawmaker” and “the courts”;⁵⁰⁶ as “mediation mechanisms, sometimes coupled with an arbitration mechanism”;⁵⁰⁷ or as “mediation, administrative complaint procedure, and direct access to courts”.⁵⁰⁸ Similarly, the US rulemaking system is generally described as an “administrative mechanism”⁵⁰⁹, while in the Australian context, the AUSFTA requires a “legislative or administrative review or proceeding”.⁵¹⁰ Note that in the last case, the Australian Parliamentary Committee, after the first review, advised against the legislative option for future reviews.⁵¹¹ The monitoring and review mechanisms of a suggested model anti-circumvention regime has also been portrayed by reference to a process that “might include legislative, administrative or academic review”.⁵¹² For the purpose of this section, an observatory body created to deal with matters relating to the application of TPMs should therefore be seen as an administrative body.⁵¹³

Such an organisation may be conferred either rulemaking powers (i.e. subordinate legislation), or dispute resolution powers (i.e. mediation and/or adjudication), or both.⁵¹⁴ In the latter case, they intervene as specialised tribunals to determine disputes arising in their own areas of expertise.⁵¹⁵ In contrast to ordinary courts, administrative tribunals are known to be cheaper, more accessible, free from procedural technicality, expeditious, and experts in their particular field. Moreover, administrative tribunals can often act on their own initiative – *ex officio* – while courts are seized by the actual conflicts brought before them. Also administrative bodies are often in a better position to observe the evolution of the market on an ongoing basis, in order to propose, in their rulemaking capacity, legal modifications to the primary legislator. Consequently, administrative bodies have the additional advantage of allowing *ex ante* intervention as opposed to the *ex post* intervention of the courts.⁵¹⁶

On the other hand, assuming that the regular courts, due to their inherent limitations, are not fit to fulfil the role of a TPM observatory, one can ask why the task should not simply be assigned to the primary legislator, following a legislative review. Convincing counter-arguments to a legislative approach have been put forward. First, compared to the legislative powers of the Parliament, the rulemaking through subordinate legislation is known to be more flexible (“adaptation can take place without the need for amending legislation”) and rapid (“it can provide a quick response where there is need for urgent legislative action”).⁵¹⁷ The Australian Parliamentary Committee that advised against making future AUSFTA legislative reviews, also referred to the lack of efficiency as one reason; the other one being the lack of expert knowledge

⁵⁰⁶ See: S. Dusollier, “The Role of the Lawmaker and the Judge in the Conflict Between Copyright Exceptions, Freedom of Expression and Technological Measures”, paper presented at the 2006 ALAI Study Days, Barcelona, June 17-19 2006.

⁵⁰⁷ Braun 2003, p. 502.

⁵⁰⁸ See Gasser 2006, p. 78.

⁵⁰⁹ See Besek 2004, pp. 416 et seq.

⁵¹⁰ Article 17.4(7)(e)(viii).

⁵¹¹ Review of technological protection measures exceptions, House of Representatives, Standing Committee on Legal and Constitutional Affairs (February 2006), Item 5.24.

⁵¹² Gasser 2006, p. 47.

⁵¹³ Among the empirical evidence, the only exceptions from an administrative (first) approach is Ireland (providing for a direct recourse to the courts), and the AUSFTA (suggests administrative and legislative review as alternative options).

⁵¹⁴ See e.g. N. Parpworth, *Constitutional and Administrative Law*, 3rd ed., Oxford, Oxford University Press, 2005, 9.51.

⁵¹⁵ *Ibid*, at 15.3.

⁵¹⁶ Dusollier 2006.

⁵¹⁷ Parpworth 2005, para. 9.50.

in such a forum.⁵¹⁸ The obvious advantage of rulemaking is that it applies generally, and not only to the parties in a given conflict. This means that a flaw in the system would only have to be rectified once, and not again and again until all individual incidents have been adjudicated (as would be the case with a dispute resolution body). On the other hand, the proceedings of a rulemaking body will generally be more complex and time consuming, than those of a tribunal.⁵¹⁹ Thus, from the perspective of the individual user seeking redress, a dispute resolution body has a clear advantage in terms of efficiency. Another risk associated with a rulemaking body is, as illustrated by the US-scheme, that the enabling Act contains a delegation so qualified, that the failsafe mechanism misses its practical impact and importance. Both schemes seem to have distinct advantages compared to the other.

In light of the above, the solution is perhaps to combine the two functions, e.g. to assign a TPM observatory body the functions and powers necessary to create general exemptions and to resolve individual disputes at the same time. The synergies of such a combination, in terms of experience and expert knowledge gained in the two roles, are obvious.

4.4.2 *Observatory bodies within the EU*

Several jurisdictions within the territory of the European Union have already put in place one form of observatory body or another to monitor the evolution of the technology and the market with respect to the use of TPMs. These monitoring authorities generally represent the national solution to the implementation of the obligation imposed on the Member States under article 6(4) of the Information Society Directive to take appropriate measures, in the absence of voluntary measures by the rights holders, to ensure that the beneficiaries of certain limitations are able to benefit from them (see section 4.2.3 above). Among the different observatory or mediation authorities created in the Member States, let us compare those of Denmark, France, Greece, Italy, Lithuania, Norway and the United Kingdom. For purposes of comparison, the main characteristics of these bodies are summarised, together with those of the United States, Australia and Switzerland, in Table 4 below.

Under the Danish Act⁵²⁰, if voluntary measures fail, parties may address the Copyright License Tribunal. This administrative⁵²¹ expert organ – previously occupied primarily with adjudicating in conflicts regarding compulsory licenses⁵²² – may, in response to such a request, order that the rights holder make available the means needed for a beneficiary to benefit from a protected copyright exemption.⁵²³ Such obligations are, in other words, imposed upon rights holders by the Copyright License Tribunal on a case-by-case basis.⁵²⁴ According to the explanatory memorandum, the Tribunal may determine the conditions of use, and instruct rights

⁵¹⁸ Review of technological protection measures exceptions, House of Representatives, Standing Committee on Legal and Constitutional Affairs (February 2006), Item 5.24.

⁵¹⁹ See, as an illustration, the preparatory procedures of the US and Australian bodies described above. According to information available on the website of the US Copyright Office, the US revision process has taken approximately 12 months each time, see: <<http://www.copyright.gov/1201/anticirc.html>>.

⁵²⁰ Consolidated Act on Copyright 2003, Act No. 164 of March, 12 2003 available at: <<http://www.kum.dk/sw4550.asp>>, § 75 d (1) cf. (2).

⁵²¹ U. Gasser and M. Girsberger, “Transposing the Copyright Directive: Legal Protection of Technological Measures in the EU, A Genie Stuck in a Bottle”, Cambridge (Mass), Berkman Publication Series No. 2004-10), available at <<http://cyber.law.harvard.edu/media/files/eucf.pdf>>, 20.

⁵²² T. Foged, “Overview (Denmark)” on the Euro-Copyrights website, available at <<http://www.euro-copyrights.org/index/4/11>> [hereinafter Overview (Denmark)]; Braun 2003, p. 501

⁵²³ Consolidated Act on Copyright 2003, Act No. 164 of March, 12 2003 available at <<http://www.kum.dk/sw4550.asp>>, § 75 d (1) cf. (2) [hereinafter the Copyright Act].

⁵²⁴ Foundation for Information Policy Research, Implementing the European Union Copyright Directive, available at <<http://www.fipr.org/copyright/guide/eucd-guide.pdf>>, 38 [hereinafter EUCD Guide].

holders to hand over to the beneficiary either an analogue copy, or a TPM-free digital copy, or the codes and keys etc. needed for decryption.⁵²⁵ If the rights holder does not comply with such an order within four weeks, the user may lawfully circumvent the over-protective measure. This – eventual – right to circumvent is a statutorily based sanction to the individual orders of the Tribunal. Both rights holders and users can bring a case before the Tribunal, and the up-front costs are shared equally by the parties. Decisions of the Tribunal are subject to judicial review. Whether a case can be brought directly before the courts, without prior adjudication by the Tribunal, is, however, uncertain.⁵²⁶

The French Act of 1st August 2006 provides for the creation of a specialised body called *Autorité de régulation des mesures techniques* (ARMT).⁵²⁷ The powers of the ARMT must still be determined by governmental decree. However, according to the information available, private individuals, consumer associations and other organisations would be entitled to bring a case before the Authority requesting the application of the limitations recognised in the Intellectual Property Code, including the private copy exception. Accordingly, the ARMT would have the power to arbitrate disputes and to define the minimal amount of authorised copies depending on the type of work or subject matter protected. With respect to the issue of interoperability between different technologies, the ARMT will have the power to enjoin the person or entity concerned to take appropriate measures to ensure the plaintiff's access to the information necessary for interoperability. According to article L. 331-8 of the Code, the ARMT received both adjudication powers and rulemaking powers. The safeguard of the exercise of the limitations included in the list will take either one of two forms: either the Authority will take action on its own initiative or it will react to a complaint by a beneficiary of a limitation who is prevented from exercising such limitation.⁵²⁸

The Greek Act places a statutory obligation upon rights holders to enable the enjoyment of protected copyright exemptions by giving to the beneficiaries “the measures to ensure the benefit of the exception[s] to the extent necessary and where that beneficiaries have legal access to the protected work or subject-matter concerned.”⁵²⁹ If rights holders do not take voluntary measures, both rights holders and beneficiaries may request the assistance of one or more mediators selected from a list of mediators drawn up by the Copyright Organization (an official body established by the Ministry of Culture⁵³⁰). The mediators make recommendations to the parties. If no party objects within one month from the notification of the recommendation, all parties are considered to have accepted the recommendation. Otherwise, the dispute is settled by the Court of Appeal of Athens trying at first and last instance.

The Italian Act provides that, in the absence of voluntary agreement between beneficiaries and right holders, each party can address the existing Standing Consultation Committee on Copyright – a pre-existing committee nominated directly by the Prime Minister every four years – with a request for a compulsory attempt to conciliation. This initiates a process by which the Committee attempts to mediate between the involved parties. If no agreement is reached, the

⁵²⁵ See: T. Foged, Overview (Denmark).

⁵²⁶ *Ibid.*

⁵²⁷ Act No. 2006-961 of 1st August 2006 on Copyright and Related Rights in the Information Society, art. L. 331-6.

⁵²⁸ S. Dusollier, “L'introuvable interface entre exceptions au droit d'auteur et mesures techniques de protection”, *Communication Commerce électronique* 2006/11, pp. 21-24.

⁵²⁹ Law 3057/2002 (Official Gazette A/ 239/10 October 2002) Article 81, Implementation of the Directive 2001/29 EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society and other provisions, available at <<http://www.culture.gr/8/84/e8401.html>> Article 66A par.5 [hereinafter Law 3057/2002].

⁵³⁰ Braun 2003, p. 501.

dispute is passed on to the regular courts for determination by a judge. Thus, apparently, the Committee does not itself have any decision-making powers under the established scheme.

The Lithuanian Act⁵³¹ imposes a statutory obligation upon rights holders to provide beneficiaries of relevant copyright limitations with “conditions or adequate means (i.e. decoding devices and other), enabling to use legitimately accessible objects [...] to the extent necessary for the users of the rights to benefit from the limitations”.⁵³² Rights holders that intend to offer voluntary measures in order to ensure that users can benefit from relevant copyright limitations, must furnish information to an institution authorised by the Government about (i) the measure(s) to be applied; and (ii) other issues related to the implementation of such measure(s), including information about ongoing negotiations between rights holders, users and other interested persons.⁵³³ If negotiations are ongoing, the institution shall have the right to appoint a representative to take part.⁵³⁴ If rights holders fail to take such measures as required by the Act, beneficiaries may apply to the Council for mediation. The mediator(s) shall present proposals and help the parties reach an agreement. The mediator(s) may also suggest solutions to the conflict. If so, the parties will have one month to object in writing; otherwise they shall be deemed as having accepted the solution. If the parties do not accept the proposal of the mediator(s), the dispute shall be settled by the Vilnius regional court.

Under the Norwegian Act,⁵³⁵ right holders are statutorily obliged to provide such access that is needed in order to enjoy user privileges under the relevant copyright exemptions.⁵³⁶ If a right holder fails to provide such access, the affected beneficiary may address a grievance before a new Complaint Board. The Board may, upon the beneficiary’s request, order the rights holder to provide such information or other assistance as needed. Additionally, if requested by the beneficiary, the Board may decide that the beneficiary shall have a right to circumvent unless the rights holder provides such access as ordered within the imposed time limit.⁵³⁷ The Board is to be established by the Ministry of Culture and Church Affairs. At the time of writing, the Board had not yet been established, and its exact functioning was therefore still not completely clarified. Orders by the Board will be subject to court review by the regular courts (starting in the court of first instance). Similar to the Danish scheme, it is uncertain whether the case can be brought directly before the courts, without prior adjudication by the Board.

The UK Act⁵³⁸ provides that where the application of TPMs prevents a person from carrying out a permitted act⁵³⁹ in relation to the protected work, that person may issue a notice

531 Copyright Act of the Republic of Lithuania, as amended by Law amending the law on copyright and related rights, 5 March 2003, No. IX-1355 available at:

<http://portal.unesco.org/culture/fr/file_download.php/1bebf3afce5c3ba0aef5aac71883ec78Law_of_March_5_2003.pdf#search=%22lithuania%20law%20amending%20the%20law%20on%20copyright%22>.

532 Lithuanian Copyright Act, Article 75 (1).

533 Lithuanian Copyright Act, Article 75 (2).

534 *Ibid.*

535 No. 2 of 12 May 1961 Relating to Copyright in Literary, Scientific and Artistic Works, etc. as amended by Act of 17 June 2005 (in force from 1 July 2005). Norway is not an EU member state, but obliged under the EEA Agreement to implement the EU CD. Nevertheless, when hereinafter referred to “Member States”, Norway is included.

536 Norwegian Copyright Act, § 53b first paragraph.

537 Norwegian Copyright Act, § 53b, second paragraph.

538 Copyrights, Designs and Patents Act 1988, as amended by the Copyrights and Related Rights Regulation 2003 available at <<http://www.legislation.hmsso.gov.uk/si/si2003/20032498.htm>>.

539 Section 29(1) paragraph 1 defines “permitted act” as an act “which may be done in relation to copyrighted works, notwithstanding the subsistence of copyright, by virtue of a provision of this Act listed in Part 1 of Schedule 5A”.

of complaint to the Secretary of State, who has been given an administrative⁵⁴⁰ power to act in this area, as and when required. Upon receipt of such complaint, the Secretary of State shall initiate an *investigation* to establish “whether any voluntary measure or agreement relevant to the copyright work the subject of the complaint subsists”.⁵⁴¹ If it is established that no subsisting voluntary measure or agreement subsists, the Secretary of State may order the rights holder to ensure that the complainant can benefit from the permitted act. Failure to comply with his direction will amount to a breach of statutory duty and is actionable by the complainant or a representative of a body of complainants.⁵⁴² With respect to the workings of the complaint procedure before the Secretary of State, the Gowers Review reports that the process is “slow and cumbersome”. The Review suggests making it easier for users to file notice of complaints procedures relating to TPMs by providing an accessible web interface on the Patent Office website.⁵⁴³

State and body	Mediation	Adjudication	Rulemaking	Monitoring and/or reporting
France/ARMT		Yes	Yes	
Greece/ Copyright Organization	Yes	Indirectly	No	
Denmark/ Copyright License Tribunal	Not Expressly Mandated	Yes	No	
Italy/Standing Consultation Committee on Copyright	Yes	No	No	
Lithuania /institution authorised by the Government	Yes	Indirectly	No	Right holders are obliged to report
Norway /Complaints Board	Yes	Yes	No	
UK / Secretary of State	Not Expressly Mandated	Yes	No	Initiates enquiries in individual cases
Switzerland/TPM Panel (“Fachstelle”)	Yes	Yes	No	Yes
US /Librarian of Congress	No	No	Yes	Yes
Australia (TPM Bill) /Attorney General’s Department (proposed)	No	No	Yes	Yes

⁵⁴⁰ P. Akester, Overview (UK) at the Euro-Copyrights website, available at <<http://www.euro-copyrights.org/index.php/8/13>> [hereinafter Overview (UK)].

⁵⁴¹ Section 296ZE(3)(a).

⁵⁴² Section 296ZE(6).

⁵⁴³ Gowers Review 2006, para. 4.106.

Table 4 Comparative table of powers of existing monitoring bodies

4.4.3 Towards a pan-European observatory body?

The quick survey of the previous section shows that a number of European Member States have chosen to implement the obligation of article 6(4) of the Information Society Directive by establishing various types of regimes having as their primary function to provide individual redress, in cases where beneficiaries were prevented by a TPMs to exercise a limitation on copyright or related rights. Apart from the fact that not all Member States have gone this way, the multiplicity of different monitoring bodies across the European Union clearly has a disharmonising effect, which is bound to create legal uncertainty for rights owners and users, especially in respect of cross-border content services, since the outcome of a single case brought before a national authority can vary from one Member State to another. Since they represent the national legislator's response to the obligation imposed by article 6(4) of the Directive, these bodies have generally not been given a rulemaking or monitoring power. Considering these drawbacks, and in view of the speed at which technological developments and market changes take place in the information society, it might be considered to institute a monitoring body at the European level.⁵⁴⁴ Although there would, in theory, be clear advantages to centralizing the monitoring and regulatory functions now performed by a plethora of national authorities, and putting these into the hands of a European body, there are important legal and political obstacles towards the achievement of this goal. As we shall very briefly explain below, the Community legal framework imposes certain constraints to the creation of European Agencies.

Community law makes a distinction between *executive* and *regulatory* agencies. The former concept refers to agencies responsible for purely managerial tasks i.e. assisting the Commission in implementing the Community's financial support programs. Issues related to the creation, legal status, location, tasks, structures, organs of governance and budget of the executive agencies are dealt with by the Council Regulation laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programs.⁵⁴⁵ The concept of regulatory agencies has been defined by the Commission as referring to agencies required to be actively involved in the executive function by enacting instruments, which help to regulate a specific sector,⁵⁴⁶ including through the preparation, adoption and implementation of a regulatory framework or of the legislative acts for implementing a regulatory framework.⁵⁴⁷ Only in limited cases, have European Agencies been given regulatory competence in the form of quasi-judicial powers. This is the case, for example, for the Office for Harmonization of the Internal Market⁵⁴⁸ and the Community Plant Variety Office,⁵⁴⁹ which can take binding decisions on the registration of applications for Community trademark or plant-variety rights and keep public registers of the relevant titles. By contrast, the vast majority of the existing European Agencies are information agencies and have been apportioned with tasks that do not constitute regulatory powers as such,

⁵⁴⁴ See A. Kreher, "Agencies in the European Community-a step towards administrative integration", *Journal of European Public Policy* 1997/4, pp. 225-246.

⁵⁴⁵ Council Regulation No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programs (OJ L 11 of 16.1.2003).

⁵⁴⁶ Communication from the Commission. The operating framework for the European Regulatory Agencies, COM(2002) 718 final, pp. 3-4.

⁵⁴⁷ See Report by the Working Group "Establishing a framework for decision-making regulatory agencies" (group 3a) in preparation of the White Paper on Governance, Work area 3, Improving the executive responsibilities (June 2001), at point 11.

⁵⁴⁸ Council Regulation (EC) 40/94 of 20 December 1993 on the Community trademark, OJ L 11 of 14.1.1993 p. 1.

⁵⁴⁹ Council Regulation (EC) 2100/94 of 27 July 1994 on Community plant variety rights (OJ L 227 of 1.1.1994 p.1) as amended by Council Regulation (EC) 2506/95 of 25 October 1995 (OJ 28.10.1995 L 258 p.3).

but consist in assisting the exercise of regulatory powers by the Commission or the Member States.

The generally limited scope of a European Agency's competences originates from the motives of the European Court of Justice in the landmark *Meroni* case.⁵⁵⁰ Although this case related to the ECSC Treaty, this judgment is broadly perceived as applying *mutatis mutandis* to all European Treaties and is largely endorsed by the subsequent practice of the European institutions regarding the delegation of powers to bodies not mentioned in the Treaties. According to the ECJ's ruling, a delegation of powers from the Commission to a European Agency can only be effected without a Treaty amendment provided that:

- The delegation relates to powers which the Commission itself possesses;
- The delegation involves clearly executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority. The latter will be held responsible for the manner in which the delegated competence is exercised;
- The delegate authority is subject to the same conditions to which the delegating authority would have been subject had it exercised them directly.

It follows that according to the existing legal framework and its restrictive interpretation, the delegation of what has here been defined as regulatory powers is circumscribed in two senses. Firstly, the delegation of the power to adopt general and abstract binding rules is in any case excluded. European Agencies can at most assist the Commission in exercising these functions throughout the provision of technical expertise and information. Secondly, the delegation of executive/quasi-judicial powers is also limited to the extent that it can involve only a margin of technical appraisal that is related to specific objectives not falling into a complex economic field and is unconnected with political implications.

Several European scholars have called for a more lenient approach towards the delegation of competences of regulatory nature to the European Agencies. Against this background, the legal arguments in favor of an update of the *Meroni* doctrine focus, in the first place, on the wrongfulness of the transposition of the judgment in the EC Treaty context. According to some commentators, there is a fundamental difference between the cases allegedly covered by *Meroni* and the cases where the delegated powers pertain to the Member States' competences, as it will be generally true for the large majority of implementing/executive powers.⁵⁵¹ Indeed, it could be argued that the *Meroni* judgment bears no relevance for the cases where executive/quasi-judicial powers are detracted from the Member States' competences and conferred to an EA and therefore it should not be considered as automatically applying to them. In the second place, the argument has been made that the delegation of powers to agencies is not at odds but rather in full compatibility with the institutional balance as the latter is better served by independent agencies which would improve the quality of the decision making.

More research would certainly be needed on the issue, in particular to determine the possible contours of the powers that could be attributed to a pan-European observatory body in the area of TPMs and copyright law. Another question that would need to be examined is whether the European body should co-exist with the existing national bodies, or replace them.

⁵⁵⁰ Case 9/56, *Meroni & Co., Industrie Metallurgiche S.p.A. v. High Authority*, [1057-58] ECR 133 and Case 10/56, *Meroni & Co., Industrie Metallurgiche S.p.A. V. High Authority*, [1957-58] ECR 157.

⁵⁵¹ See e.g. D. Geradin, "The development of European Regulatory Agencies: what the EU should learn from American experience", in *Columbia Journal of European Law*, 2004 (11) pp. 1-52, at p. 10 and X. Yataganas, "delegation of regulatory authority in the European Union. The relevance of the American model of independent agencies", Jean Monnet Working Paper 3/01, at pp. 27-40.

4.5 Assessment of the impact of TPMs on users

There is broad consensus that the use of TPMs should take account of the users' interest in exercising certain limitations on copyright and related rights. Accordingly, article 6(4) of the Information Society Directive prescribes affirmative action by the rights owners or in its absence, by the Member States, to ensure that users benefit from certain limitations with respect to works protected by TPMs. On the basis of the findings of the previous sections, we can now assess whether the European legislature has reached its objectives in respect of the intersection between the rights owner's interest in using TPMs and the user's interest in benefiting from the statutory limitations on copyright. Our assessment, once again, follows the benchmark criteria set out in the introduction.

Consistency with international norms and the laws of main trading partners At the 1996 Diplomatic Conference the Contracting Parties to the WIPO Internet Treaties agreed that acts of circumvention performed for the exercise of a limitation on copyright should not be prohibited.⁵⁵² The final texts of articles 11 of the WCT and 18 of the WPPT were presumably intended to reflect this intention, but they failed to instruct Contracting Parties on how to accommodate the exercise of limitations on copyright. Contracting Parties were therefore left with the task of finding proper a solution to the problem. Not surprisingly, implementing countries have taken approaches to limitations and exceptions that are significantly different in several respects, giving rise to consistency problems between the different national systems.

Actual harmonisation In the absence of any clear guideline in the Directive on how to accommodate the exercise of limitations on copyright, it is safe to say that no real harmonisation has been achieved regarding the implementation of article 6(4) in the European Union. As the country reports in Part II of this study show, the implementation of article 6(4) of the Directive at the national level has led to an array of different solutions and procedures. In some Member States, only individual beneficiaries may claim the application of the limitation, while in other countries, interest groups and other third parties also have the right to do so. In yet other Member States, administrative bodies may be entitled to force rights holders to make the necessary means available to beneficiaries of limitations. With respect to the option given to Member States regarding the benefit of the private copying exception, not all Member States have taken advantage of the possibility offered under this provision. In the Member States that have implemented this provision, the number of copies that can be made for private use varies significantly. This decreases transparency for on-demand download content providers and their customers alike.

Legal certainty Article 6(4) of the Information Society Directive is unnecessarily long, convoluted and obscure. The terms used in the provision are too vague and leave too much discretion to the Member States, as consequence of which a large degree of legal uncertainty prevails in this regard within the European Union. A first uncertainty comes from the fact that the Directive nowhere defines what constitutes an "appropriate measure" by a Member State. Must such an "appropriate measure" take the form of a statutory provision or can the State leave the parties to resolve the issue before the courts or through alternative dispute resolution mechanisms? In view of the lack of guidelines in the Directive, the Member States have implemented this obligation in different ways, including by establishing a dispute resolution or mediation mechanism, or by creating an executive or administrative authority in order to prevent the abuse of such measures taken by rights owners. A second element of uncertainty is how long a Member State must wait

⁵⁵² Dusollier 2005, p. 157.

before taking action. Third, what event should trigger the Member State's intervention? Is it the mere passage of time or must there be an instance of abuse on the part of the rights holder?

Balance One of the sources of potential imbalance in the context of article 6(4) lies in the seemingly haphazard list of limitations appearing in its first paragraph. It is indeed remarkable that even the mandatory limitation of article 5(1) of the Directive on transient and incidental acts of reproduction is not subjected to the obligation to provide beneficiaries of this exception the means to exercise it. Moreover, it is difficult to comprehend why essential limitations based on free speech and other human rights and freedoms, such as those permitting criticism, comment, news reporting, parody, scholarship, or research, are not mentioned in article 6(4) of the Directive. As a consequence, rights holders are left with the discretion to override these limitations by using TPMs, which may have a serious impact on the interests of users. The same holds true for the exclusion in article 6(4)(4), which rules out the application of this provision to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them. The distinctions in treatment between the different limitations and between works that are made available interactively or not, distinctions for which no convincing justification has been put forward, will inevitably affect the provision's balanced character to the detriment of the users.

Sustainability Apart from its opaque wording, article 6(4) of the Directive clearly lacks sustainability in that it is not formulated in technology-neutral terms. As its fourth paragraph suggests, the provision collapses as soon as content is delivered online and on demand "on agreed contractual terms".

Recommendations

Our assessment of article 6(4) leads to the following recommendations to the European legislator:

- The principle underlying article 6(4) of the Directive is worth maintaining. There is indeed not much point for a user being allowed to circumvent a TPM for a lawful purpose, if he does not have the means to do so. However, the European legislator should consider simplifying and clarifying the provision.
- A revised provision should not distinguish between the types of TPMs for which accommodation must be provided, nor between interactive or non-interactive modes of making a work available.
- A revised provision should identify limitations for the exercise of which accommodation must be provided on solid grounds and in an objective manner. The same criteria as those developed in section 2.4.2 above might apply here. Limitations that reflect the fundamental rights and freedoms enshrined in the European Convention on Human Rights, those that have a noticeable impact on the Internal Market or concern the rights of European consumers deserve accommodation, while other "minor reservations" do not.
- Ideally, the determination of the conditions of application and its practical implementation might be entrusted to a European monitoring or observatory body. Further research should be carried out in order to define the possible contours of such a European body, and to examine whether such a body should co-exist with, or rather replace, existing national bodies.
- In line with article 95d of the German Copyright Act, a revised article 6 should oblige content providers to disclose the scope and characteristics of the DRM protection they use, so as to properly inform consumers.

5 Online Contractual Practices and End-users

The deployment of DRM systems as envisaged by the Information Society Directive not only presupposes the application of technological protection measures to protected works and other subject matter, but it also entails the use of contractual agreements spelling out the acts that users are permitted to accomplish with respect to the licensed material. The digital network's interactive nature has created the perfect preconditions for the development of a contractual culture. Through the application of technical access and copy control mechanisms, rights owners are capable of effectively subjecting the use of any work made available in the digital environment to a set of particular conditions of use.⁵⁵³ While the Information Society Directive contains extensive provisions on the protection of TPMs and rights management information, it fails to deal with the use of contracts in the context of DRM systems or otherwise. At most, the Directive contains a few statements encouraging parties to conclude contracts for certain uses of protected material. Since neither the Directive nor the relevant international instruments on copyright and related rights, such as the WCT and the WPPT, prescribe any rules on the subject, the specific regulation of licensing contracts has been left to the Member States. Thus, the contractual framework generally remains voluntary and market-driven, knowing that the principle of freedom of contract constitutes a cornerstone of European contract law.

Nevertheless, the Information Society Directive does create a legal framework within the boundaries of which rights owners are able to license their rights to end-users. This framework essentially consists in rules analysed in the previous chapters of this study regarding the scope of protection of copyright and related rights, including limitations on rights, as well as TPMs, most of which are default rules that parties to an agreement are free to set aside. How does this framework influence the form and content of end-user licences used in the context of DRM systems? What types of acts do such licence agreements generally allow or prohibit? To what extent do these contractual arrangements take account of the interests of end-users? Are most contractual arrangements compatible with the general policy goals pursued by the Directive?

Section 5.1 discusses the primary goals of the Information Society Directive with respect to the development of contractual practices in the context of DRM systems. Section 5.2 gives an overview of the main contractual practices developed in Europe for the supply of online services, including an account of the main contractual provisions contained in such contracts. Section 5.3 examines the emerging licensing practices put forward by the open source software and the Creative Commons movements, both of which purport to offer an alternative to restrictive contractual agreement. Next, subsection 5.4.1 contains an analysis of the impact of contractual practices on end-users of protected material, which is followed by subsection 5.4.2 which proposes some options designed to restore the balance between the interests of rights owners and end-users in their contractual relations.

At the outset, it is important to note that this chapter focuses exclusively on the contractual relationship that arises between rights owners and end-users of protected material in the context of online services. It does not deal with contracts for the exploitation of economic rights signed between authors or performers on the one hand, and collective rights management societies or intermediaries, such as publishers, producers or distributors, on the other hand. Both types of exploitation contracts have already been the object of extensive study at the European level.⁵⁵⁴

⁵⁵³ P.B. Hugenholtz, 'Copyright, Contract and Code: What Will Remain of the Public Domain?', *Brooklyn Journal of International Law* 2000/26, pp. 77-90, p. 79; P. Goldstein, 'Copyright and its Substitutes', *Wisconsin Law Review* 1997, pp. 865-871, p. 867.

⁵⁵⁴ European Commission, *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee - The Management of Copyright and Related Rights in the Internal Market*, COM(2004) 261 final, Brussels, 16.04.2004; and Guibault/Hugenholtz 2002.

Questions of private international law also remain outside the scope of this study. The same applies to the practical difficulties concerning rights clearance that arise from the multiple ownership of rights on digital works, since this topic has been examined in depth in the IViR Study on the Recasting of Copyright and Related Rights in the Knowledge Economy.

5.1 Goals of the Directive

There exists very little *acquis communautaire* in the area of licensing contracts for the end-use of copyright protected material. The absence of specific rules on this topic may partly be explained by the fact that contract law is traditionally perceived as a matter falling under the competence of the individual Member States and that the mass-marketing of copyright protected works subject to the terms of a licence of use is a relatively recent phenomenon. The lawmakers of the European Union intervened for the first time in contractual relations between rights owners and end-users, with the adoption in 1991 of the Computer Programs Directive. Article 9(1) of the Directive expressly provides that ‘any contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5 (2) and (3) shall be null and void’.⁵⁵⁵ Aside from the growing practice of licensing computer programs to users, no significant contractual practice concerning the use of other copyrighted material had developed at that time to justify a clarification as to the imperative character of other limitations. In view of the growing practice of marketing mass-market databases subject to contractual terms of use, however, the European Community adopted a similar provision under the Database Directive. Article 15 states that ‘any contractual provision contrary to Articles 6 (1) and 8 shall be null and void’. Article 6(1) provides that ‘the performance by the lawful user of a database or of a copy thereof of any of the acts listed in Article 5 which is necessary for the purposes of access to the contents of the databases and normal use of the contents by the lawful user shall not require the authorisation of the author of the database’. Article 8 allows the lawful user of a database to extract and/or to re-utilise for any purposes whatsoever insubstantial parts of the contents of a database protected under the *sui generis* right.⁵⁵⁶

More and more works of all kinds are now being distributed to the mass-market under conditions set by contractual agreements, particularly in the on-line environment. One might have expected that, in light of this growing practice, the European Community would address the issue of the relationship between the rules of copyright law and contract law and clarify the weight to give limitations on copyright and related rights. The documents issued by the European Commission prior to the adoption of the Information Society Directive, however, barely devote any attention at all to the regulation of contracts, except perhaps with respect to the question of the applicable law in cross-border relationships and to collective rights management. In the Green Paper of 1995, the European Commission did foresee that through digital technology the transmission of works to the user would occur more and more frequently together with the necessary authorisations for the purposes of copyright and related rights. In such situations, the European Commission envisaged that each use would be dealt with individually.⁵⁵⁷ The Green Paper did not expand any further on the question of licensing contracts except to note that:

⁵⁵⁵ See also Recital 26 of the Directive: ‘Whereas protection of computer programs under copyright laws should be without prejudice to the application, in appropriate cases, of other forms of protection; whereas, however, any contractual provisions contrary to Article 6 or to the exemptions provided for in Article 5 (2) and (3) should be null and void’.

⁵⁵⁶ J. Gaster, *Der Rechtsschutz von Datenbanken : Kommentar zur Richtlinie 96/9/EG mit Erläuterungen zur Umsetzung in das deutsche und österreichische Recht*, Munich, Carl Heymanns Verlag, 1998, p. 186.

⁵⁵⁷ Green Paper 1995, p. 77.

“In terms of copyright and related rights the arrival of the all-digital age may facilitate rights management in some areas. The scope it offers for tracing and monitoring use in general, and private copying in particular, constitutes an opportunity which ought to be grasped at once. Rather than having to think in terms of a generalized right to remuneration, therefore, we may, if systems of this kind become a reality, be moving towards a more and more finely tuned and individualized form of rights management”⁵⁵⁸.

As the Green Paper and the Follow-Up to the Green Paper of 1996 rightfully point out, to be able to grant any type of licence of use with respect to protected works and other subject matter, rights holders must enjoy an exclusive right on their protected material rather than remuneration rights.⁵⁵⁹ For, in the last case, rights holders have no right to authorise or prohibit the use of their work or other subject matter: uses permitted under a remuneration right are allowed to take place without prior authorisation from the rights owner, but subject to the payment of remuneration. The grant of exclusive rights constitutes therefore a pre-requisite to the conclusion of licences of use. Accordingly, the Information Society Directive has harmonised the rights of reproduction, communication to the public and making available for all categories of rights owners in the form of exclusive rights. Pursuant to Recital 30 of the Directive, the rights referred to in the Directive may be transferred, assigned or subject to the granting of contractual licences, without prejudice to the relevant national legislation on copyright and related rights.

The Information Society Directive contains very few provisions referring to the conclusion of contractual licences as a means to determine the conditions of use of copyright protected works and other subject matter. The Directive makes no mention of the possibility to conclude licences of use with respect to the exclusive rights granted therein. With respect to the limitations on copyright, Recital 45 declares that “The exceptions and limitations referred to in Article 5(2), (3) and (4) should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law.” The text of this Recital gives rise to interpretation. Some commentators believe that, according to Recital 45, the limitations of articles 5(2) to 5(4) can be overridden by contractual agreements.⁵⁶⁰ Others consider that, pursuant to this Recital, the ability to perform legitimate uses that do not require the authorisation of rights holders is a factor that can be considered in the context of contractual agreements about the price. Whether the requirement that a contractual agreement must have the goal to secure the fair compensation of rights holders means that contractual agreements with the purpose to override legitimate uses are impermissible is, according to these authors, questionable.⁵⁶¹

In the specific case of the limitations adopted in favour of non-profit making establishments such as publicly accessible libraries and archives, Recital 40 specifies that such limitations should “not cover uses made in the context of on-line delivery of protected works or other subject matter. Therefore, the conclusion of specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve”. As the Explanatory Memorandum to the Proposal for a Directive specifies, this does not mean that libraries and equivalent institutions should not engage in on-line deliveries. However, it is the Commission’s opinion that “such uses can and should be managed on a contractual basis, whether individually or on the basis of collective agreements.” Their aim is to ensure adequate control and a fair economic return to the rights holders involved, while enabling users of protected material, such as non-profit libraries, to provide their information

⁵⁵⁸ Id., p. 75.

⁵⁵⁹ Green Paper 1995, p. 25; Follow-Up Green Paper 1996, p. 24.

⁵⁶⁰ Bechtold in Hugenholtz/Dreier 2006, p. 371.

⁵⁶¹ Walter 2001, p. 1064-1065.

services even more efficiently and at affordable cost. The Commission warns, however, that the use of protected material by public libraries should not be subject to undue financial or other restrictions.⁵⁶² In practice, representatives of public libraries and archives, and of publishers' associations have signed contractual agreements relating to the use of copyright protected material in several Member States, like Germany, the UK and the Scandinavian countries.

Recital 53 and article 6(4) of the Directive both deal with the use of technological measures to ensure a secure environment for the provision of interactive on-demand services. The first paragraph of article 6(4) also encourages the development of a contractual practice between rights holders and users when it states that "in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law (...)". In view of the wording of article 6(4), the European Commission seems to put the emphasis on the negotiation of agreements between rights owners and parties concerned as a means to achieve its objective of encouraging rights owners to provide the means to exercise certain specific limitations on copyright. As we have seen in section 4.2.2 above, the way to contractual negotiations is only realistic when users are easily identifiable, like libraries and archives, broadcasting organisations, social institutions, educational institutions, groups of disabled persons and public entities. However, this is not necessarily the case for all users who may invoke the right to benefit from a limitation pursuant to article 6(4), like private individuals who wish to make a private copy.

Article 6(4), fourth paragraph, of the Directive states that "the provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them". As discussed in subsection 4.2.6 above, the term "agreed contractual terms" in this provision could be interpreted as requiring the negotiation of a licence of use. However, this interpretation may not reflect reality for, standard form contracts, rather than negotiated contracts, actually govern the vast majority of transactions relating to information in the digital networked environment.

While article 6(4), fourth paragraph, of the Directive establishes a rule of precedence between the use of contractual arrangements and the application of technological protection measures, no rule has been established anywhere in the Directive concerning the priority between contractual arrangements and the exercise of limitations on rights. The absence of any such rule was considered briefly during the legislative process leading to the adoption of the Directive. In second reading of the Proposal for a Directive, amendment 156 was tabled for the introduction of a new article 5(6) to the effect that "No contractual measures may conflict with the exceptions or limitations incorporated into national law pursuant to Article 5".⁵⁶³ This amendment was rejected by the Commission, however, and therefore never made it into the Common Position. As a result, nothing in the Information Society Directive seems to preclude rights owners from setting aside by contract the limitations on copyright and related rights.

While the initial intention of the European legislator appears to have been to encourage economic players to move towards a more finely tuned and individualized form of rights management, it is doubtful whether the legal framework actually put in place by the Directive is capable of catering to the interests of all parties involved, especially those of users. After only a few years following the adoption of the Information Society Directive, the Commission made the following observation:

⁵⁶² European Commission, Proposal for a Directive on the harmonisation of copyright and neighbouring rights in the information society, 10 December 1997, Brussels, COM(97) 628 final, p. 39.

⁵⁶³ European Parliament, Committee on Legal Affairs and the Internal Market, 17 January 2001, PE 298.368/5-197.

“At the same time, in their present status of implementation, DRMs do not present a policy solution for ensuring the appropriate balance between the interests involved, be they the interests of the authors and other rightholders or those of legitimate users, consumers and other third parties involved (libraries, service providers, content creators...) as DRM systems are not in themselves an alternative to copyright policy in setting the parameters either in respect of copyright protection or the exceptions and limitations that are traditionally applied by the legislature”⁵⁶⁴

Let us examine, in the following section, how contractual practices have developed in the context of online services as a result of the implementation of the Information Society Directive. This will allow us to assess whether the European Commission’s scepticism is warranted in reality.

5.2 Overview of contractual practices

In the following pages, we provide a survey of some current online contractual practices with respect to protected works and other subject matter. To this end, we offer an overview of the licensing contracts used by a number of larger and smaller providers of paid online services. The content providers in question originate from different countries. They do not necessarily have their registered or head offices within the EU territory, but all of them do offer their services to EU citizens. In this respect, we must emphasise that the focus is placed on the Dutch, English, French, German, as well as Italian and Spanish language areas. Importantly, a distinction is made between three major markets: music, film and written works. The discussion below is structured in accordance with this distinction. Per market, we first review the relevant terms and conditions imposed by the different providers. Thereafter, some conclusions are drawn concerning the contractual practices’ conformity with the relevant exceptions and limitations of article 5 of the Information Society Directive. This study should be seen as a sample; it claims in no way to be fully representative of online contractual practices in the markets distinguished above.

5.2.1 Online exploitation of music

The Netherlands based *Free Record Shop* generally allows music ordered to be downloaded on one single PC, the download computer, and played on that PC without restrictions. Files may be burnt on CD for personal, non-commercial use up to ten times, and exported to appropriate portable players for an indefinite number of times. In those cases where record labels and licensors apply a stricter set of user conditions, the customer will be confronted with those conditions and requested to accept them the moment he enters into a specific transaction. Commercial exploitation, re-digitisation, uploading to the Internet, use in combination with third party content, and the making of derivative works are prohibited.

eMusic, one of the world’s largest digital music retailers, stipulates a number of ‘technical and use limitations’. These prohibit *eMusic* (Europe) users to supply any obtained file to any third party, but allow the making of copies for the customer’s personal use only. Utilisation of automated systems for selection or downloading of files is prohibited as well. On a more general note the licensing restrictions prohibit any behaviour in respect of ‘data, information or material’ related to the service that infringes any intellectual property, proprietary rights or confidentiality obligations of others. Under the heading ‘intellectual property rights’ it says that content received through the service is to be used and played for personal, non-commercial use only. The reproduction, retransmission, distribution, dissemination, sale, broadcast, performance, making

⁵⁶⁴ European Commission, *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee - The Management of Copyright and Related Rights in the Internal Market*, COM(2004) 261 final, Brussels, 16.04.2004, p. 10.

available to third parties, circulation to anyone, and exploitation of the content for commercial or non-commercial purposes requires the express prior written consent of eMusic.

In its general terms and conditions, *Tiscali Music Downloads* points out that any tracks ordered are made available to the customer for his or her private, non-commercial use only. Furthermore it commands its customers to refuse third parties access to the tracks ordered. The user may neither give out his password, nor make any copies in order “to give, sell, loan, broadcast, send or transmit to friends and family” (or anyone else for that matter). Interestingly, the following is added: “[t]he restrictions on copying that apply to cassettes and CDs, etc. also apply to the tracks accessed as part of these services. Copying at home is still illegal.” The use of automated systems for selection or downloading of music is prohibited as well. The user gains only the right to download or stream the tracks ordered and play them on his or her PC, copy them to CD or transfer them to a portable player where the digital rights allow so. Importantly, in addition to these general terms and conditions, rights information as to the permitted number of transfers to a portable device, burns to CD and plays on PC is given on the level of the individual tracks or albums downloaded. See the following example below:

Sugababes		
Red Dress (Radio Edit)		
	<input type="button" value="Play"/>	<input type="button" value="Buy"/>
<u>Transfer to Portable Device</u>	No	25
<u>Burn to CD</u>	No	10
<u>Plays on PC</u>	Not Applicable	Unlimited
Digital Release Date		
21/06/2006		

Figure 2 General Terms and Conditions of use of Tiscali Music Downloads

Utilization of *Starzyk's* music files is permitted only for private purposes, subject to the provisions of the French intellectual property code. Any total or partial reproduction of the site or its ‘elements’ contrary to their destination is prohibited, as well as the sale, exchange, or rent of files, and their transfer to a third party. The customer only enjoys a right of personal use of the music files, demarcated by the rights information supplied when these files are selected, “in a sphere that is strictly private and non-commercial”. Digital Rights Management measures are to be observed. The number of permitted burns or transfers to different media are not specified at the moment of ordering.

Sony Connect entitles its customers to permanently download a track onto the ‘registration PC’; to copy a track at least up to three times to removable digital media or built-in memory in a portable player – with the restriction that not more than three such players may be used; and to burn it at least up to three times on CD in each format⁵⁶⁵ allowed for by the provider. The number of copies or burns permitted depends on the leniency of Connect’s music suppliers, i.e. record companies and recording artists involved. Upon downloading a track, the customer is provided with the rights information pertinent to that specific track. Sony Connect, like other content providers, limits the permitted uses to the non-commercial, personal sphere. Customers

⁵⁶⁵ The user is authorized “to produce a CD in either ATRAC/OpenMG format or CD-DA (so-called "Red Book") format so that [he/she] can play tracks in ATRAC-compatible, CD-DA-compatible (i.e. "traditional") and dual-format-compatible CD player(s).”

may not “use Connect or Connect Music for any commercial purposes including, without limitation, sale, resale, hire, reproduction or promotional purposes that require synchronisation, public performance or print rights to be obtained; [...] distribute, broadcast, communicate to the public, loan, lend, give, transmit or transfer to any other person by any means, translate, modify, adapt or create derivative works from Connect Music; [...] deep link to or frame any Connect Music [...] contents.” Finally, it stipulates that security measures and technology are not to be prejudiced.

EMI Music, on its Dutch website, does not present any terms and conditions until the user pursues to check out an order. By clicking a confirmation button, which is necessary for completing a purchase, the customer agrees to a (modest) set of general terms and conditions. These are, for their relevant part, that downloaded music files may be used only for private and non-commercial purposes. In particular, the user is not allowed to distribute a downloaded music file or copies of it by CD or whatever other medium, or via e-mail or internet. The terms and conditions stipulate expressly that the making available of downloaded files (or copies thereof) through FTP sites, filesharing systems or related systems is prohibited as well. Curiously enough “the conditions mentioned above apply to non-commercial and gratuitous transactions”.

Terra Musica Premium, a Spanish service operated by Telefónica, does not incorporate a separate statement in its terms and conditions that the client may use any content downloaded for private and non-commercial purposes only. However, that message can be deduced from the provision that the customer may not reproduce, copy, distribute, publicly communicate, transform or modify the content without permission. Further the customer may not remove, manipulate or alter in any way the rights management information and related measures applied by Telefónica and its licensors. Elsewhere on the website is indicated that these measures enable the user to either download⁵⁶⁶ or burn any track or album ordered up to a maximum of three times.

Of the various content providers examined here, record company *Magnatune* appears to be the odd one out. First of all, Magnatune does not apply any DRM system. What is more, website visitors can listen to all tracks offered on the site in streaming for as many times as they want, integrally and free of charge. When the consumer wishes to download an album (tracks are not downloadable individually), he may do so in any format he prefers without having to subscribe or register. After that the customer is entitled to make three copies to give out to third parties. There is no general user contract, but dependent upon the (non-private) purposes for which the customer may intend to use the content ordered,⁵⁶⁷ the site offers standard licences which can be customized to a certain point.

MUSIC	Website ?	How are contracts concluded?	Registration/ subscription required?	Use of DRM/ TPM?	Applicable law?	Reservations regarding customer's place of residence?
1. <i>Free Record Shop</i> .	www.freerecordshop.nl	Browse-through	Yes	Yes	Dutch law (note that on freerecord-	Download computer and other equipment have to

⁵⁶⁶ “Hacer click en “Descargar” o “Grabar” para comprar los contenidos que luego te podrás descargar o grabar hasta un máximo de 3 veces.” If the client can really download up to three times a work that he ordered and paid for once, this is remarkable. No other content provider is as generous as to allow the user three downloads. On the other hand, the contract and the instructions on the website do not point out whether – let alone how many – transfers to different storage media (mp3-players!) are allowed.

⁵⁶⁷ Magnatune distinguishes the following uses: Film, Single units, Video, Slide show or Powerpoint, TV ad or radio ad (or radio production), Audio projects, Internet web site and Flash, Podcasts, Non-Commercial (schools and Creative Commons), TV show, Video game and software, Sampling, Music compilation, Public Space (restaurants, trade shows & retail spaces), Telephone music on hold, and Custom bid.

MUSIC	Website ?	How are contracts concluded?	Registration/ subscription required?	Use of DRM/ TPM?	Applicable law?	Reservations regarding customer's place of residence?
					shop.be, Belgian law is declared applicable)	be located in The Netherlands
2. <i>eMusic Europe</i>	www.emusic.com	Click-through	Yes	?? (no express mention is made)	English law	No (but dependent on his place of residence customer has to register either with eMusic Europe, or with eMusic UK, or eMusic US)
3. <i>Tiscali Music Downloads</i>	sib1.od2.com/commo n/Framework11.aspx?s hid=012B002E	Terms available on website; unclear whether customer must expressly accept them	Yes	Yes	Differing for Tiscali's national websites (e.g. English law for customers ordering from Dutch and UK websites; German law for customers from the German site)	Customers buying on German Tiscali website have to be inhabitants of Germany, the terms and conditions on Dutch and English websites do not make any such reservations
4. <i>Starziki</i>	www.starzik.com	Click-through	Yes	Yes	French law	Customer must reside in France
5. <i>Sony Connect</i>	www.connect-europe.com	Click-through	Yes	Yes	Depends on the website: transactions effectuated via the French website are subject to French law, those effectuated via the German website to German law etc.	Connect Europe offers its service solely to customers in Austria, Belgium, France, Germany, Ireland, Luxembourg, Monaco, The Netherlands, Switzerland and the UK
6. <i>EMI Music</i>	www.emimusic.nl/page/downloads	Click-through	No	Yes	??	??
7. <i>Terra Música Premium</i>	musicapremium.terra.es/index.cfm	Click-through	Yes	Yes	Spanish law	?? (General terms and conditions make no reservations)
8. <i>Magnatune</i>	magnatune.com	No contract for 'private' consumers	No	No	Californian State law, US	No

Table 5 Comparative table of contracts for the online exploitation of music

5.2.2 Online exploitation of film

Austrian content provider *aon.tv*, exploited by Telecom Austria, offers online access to *inter alia* film, music, and TV. It is not entirely clear – without registering and ordering one product or another – whether or not the consumer, who according to the general terms and conditions may use any content ordered in Austria only, can in fact store such content on his PC. The terms of use do state that the consumer is neither allowed to make a fixation, in whatever form, of the content on a physical carrier which remains within the exclusive control of the user; nor to use and exploit the content in physical or non-physical form in any other fashion. This statement

follows the condition that the customer may use aon.tv, and in particular the content provided, for private purposes only. Any other use requires Telecom Austria's foregoing written permission.

Very brief are the terms and conditions that French content provider *Canal Play* attaches to the use of its services. We have not been able to examine whether every individual transaction requires the user to agree with certain work-specific usage rules. The downloads are meant to be used in the private sphere only; any other utilization is strictly prohibited – in particular their sale, exchange, rent or transfer to a third party. For the rest the client has to commit himself not to frustrate any technological protection measures. Other providers are more elaborate.

CinemaNow is such a provider. In its general terms and conditions, it grants the user “a non-exclusive, non-transferable, limited right and license to [...] view and privately display the Site Content by way of one or more computers or other authorized devices connected to the Site via IP networks only, and in strict conformity with these Terms of Use.” Caching for the purpose of increasing the speed and efficiency of future access to the site is expressly permitted, just as downloading a film ‘on a download basis’. The contract then proceeds to state that no other copies or uses are permissible except where expressly permitted, after which an exemplary, non-exhaustive – yet extensive – list of unauthorized acts is presented.⁵⁶⁸ Interestingly the user also has to agree “to use the Materials and this Site only for purposes which are lawful in every nation and jurisdiction in the world and all subdivisions thereof.” *CinemaNow* offers streaming content, which dependent on the film can be viewed for a period of 24 or 48 hours, as well as content to download, which may be burnt one time on a disk (unless otherwise indicated). In addition it is stipulated that *CinemaNow* grants its licenses for the limited purpose of personal, non-commercial use. Business entities, in whatever form, are not licensed to use the site. Remarkably the terms and conditions for use of Disney products are set out in two ‘exhibits’ annexed to the contract. Convenient for the user is the site's top 10 questions and the answers that are provided, some of which are of relevance for the purpose of this study:

6. Can I burn videos to a DVD?

Only videos in the Burn-To-DVD section can be burned and played in a standard DVD player. Please see the Burn To DVD How it Works page for more details. For all other *CinemaNow* videos, Your DVD player will not be able to read the information properly since our videos use a special security protection. For info on other ways to watch on your TV, click here.

[...]

8. Why can I buy some movies and rent others?

We offer our videos to you according to the licenses given by filmmakers and content companies. We are working with them to expand our options so you have more of what you want! For movies you can buy, please click here.

9. Can I transfer movies to my video iPod, PSP or other portable player?

At this time, *CinemaNow* movies are not available for the iPod or PSP, however we are working with our content providers to expand the options you have. To see videos that are available for other quality portable players, please click here.

⁵⁶⁸ “By way of example, and not limitation, subject to the other terms of these Terms of Use, you may not sublicense, alter, adapt, transmit, publicly perform or display, distribute, customize, modify, add to, delete from, create derivative works based upon any portion of the Site Content, link or forward any web address to this Site, copy, counterfeit or paste the Site Content to any other web-site or web page. You may not publicly display any portion of the Site, or any films or other audiovisual or digital works available at this Site, without a written license signed by a party authorized to legally bind *CinemaNow* to such a contractual arrangement. Any other use or exploitation of this Site, including the Site Content or Site Code, is strictly prohibited. You agree and acknowledge that you shall not acquire any ownership rights by downloading the Materials from the Site. You agree that links to the Site are only permitted upon express permission from and arrangement with *CinemaNow*. You acknowledge and agree that modification of the Materials or use of the Materials for any other purpose is a violation of *CinemaNow*'s and possibly other third parties' copyright and proprietary rights.”

LOVEFiLM too has set up a sophisticated regime for the use of its services. Basically this content provider, which offers its services only to inhabitants of the UK, distinguishes between video-on-demand ('pay-per-download') and electronic sell through ('download-to-own') terms and conditions. The former model denotes that the user is entitled to download a work and view it for a limited period – provided that he agrees to the applicable contract terms and conditions prior to purchase, and pays the applicable content fee. The applicable terms and conditions may differ per movie ordered. As ordering movies from outside the UK is not possible, it is hard to say what these terms and conditions might amount to. The website does contain a list of questions and answers, but these do not really go into what the user may and may not do with the films he orders. The download-to-own model, secondly, entitles the user to download a film and view it for an unlimited period on specific devices – provided again that he agrees to the terms and conditions prior to purchase and pays the content fee. The user is then entitled to retain one file containing the content on his download PC; that file is not transferable to or usable on any other device. Apart from that, the user is entitled to retain one copy of the content that is transferable to one other, portable (Windows Play4Sure certified) device. Once the consumer has transferred the relevant file to a portable device, he may not transfer the file to any other device either from his PC or from the portable device. For the rest, just as with the pay-per-download model, the general terms and conditions do not contain any enumeration of reserved acts, nor a reservation as regards commercial use. It is thinkable however that such stipulations do occur in the specific user terms and conditions relating to any work ordered.

Germany based *One4movie* employs a set of general terms and conditions that apply as far as specific rules governing the use of a particular work do not provide otherwise. First it is stated that any content ordered – whether as a stream or as a download – is to be utilized only for private, non-commercial purposes and may neither be modified in any way, nor copied or otherwise made accessible to third parties. Upon payment of the purchase price the customer obtains the single and non-transferable right of personal use of the content ordered in accordance with the conditions accompanying the purchase in question. Superfluously it is stated another time that the user rights may not be transferred to third parties. Unless otherwise indicated, any content ordered with One4movie may only be accessed within the German territory.

Italian provider *Rosso Alice* offers services to adult Italian consumers. It requires customers to acknowledge that the service is solely intended for personal and non-commercial use. Any use that conflicts with statutory provisions or that is "inept" in any other way, is proscribed. Content ordered and storage media carrying such content may neither be transferred to third parties, nor reproduced or used outside the private sphere. Businesslike and commercial uses, and uses for advertising purposes are prohibited. The same goes for uses that assume ownership of rights with regard to synchronisation or publication in print, for public communication and broadcasting, and for all other uses that amount to re-distribution of the content ordered or the storage media carrying it. The customer can neither make the content his property, nor – and this is an exemplary, non-exhaustive enumeration – reproduce, disseminate, communicate, sell or rent the content. Furthermore the customer shall not modify the content, derive other products from it or (again) use it for any commercial or lucrative purposes. Should the user be authorized to perform any of the acts excluded above, then that shall only be so within the boundaries set by the law.

FILM	Website?	How are contracts concluded?	Registration/ subscription required?	Use of DRM /TPM?	Applicable law?	Reservation regarding customer's place of residence?
1. <i>aon.tv</i>	aontv.proxityv.speed	Browse-	Yes	Yes	Austrian	Utilization of the service is

FILM	Website?	How are contracts concluded?	Registration/ subscription required?	Use of DRM /TPM?	Applicable law?	Reservation regarding customer's place of residence?
	net.at/aontv	through possibly also click-through			law	to take place in Austria only
2. <i>Canal Play</i>	www.canalplay.com	Click-through	Yes	Yes	French law	Website offers its services only to consumers accessing the site with a PC on French territory
3. <i>Cinema Now</i>	www.cinemanow.com	Click-through	Yes	Yes	Californian State law, US	Customers from all over the world can in principle access and use Cinema Now's services (site merely states that "those who choose to access this Site from other locations do so at their own risk")
4. <i>LOVE FiLM</i>	www.lovefilm.com	?? (No access or subscription options from the Netherlands)	Yes	Yes	Laws of England and Wales	UK residents only
5. <i>One4all</i>	www.one4movie.de /	Click-through	Yes	Yes	German law	Content can only be ordered from within the German territory
6. <i>Rosso Alice</i>	www.alice.it/rossoalice/indexbb.html	Browse-through possibly also click-through	Yes	Yes	Italian law	Customer has to enter into any transaction from a PC in Italy (or San Marino or the Vatican)

Table 6 Comparative table of contracts for the online exploitation of films

5.2.3 Online exploitation of written works

Blackwell Publishing, which offers access to publications in several fields of science, applies a concise set of general terms and conditions. First it is pointed out that no material may be resold or published elsewhere without Blackwell's written consent, save as authorised by a licence or to the extent required by the applicable law. "Unreasonable use", which includes the systematic downloading of content without a written licence, results in access to the website being blocked. Furthermore it is stated that permitted usage does in no circumstance encompass any commercial exploitation of the content accessed. The specific terms of the click-through licence governs the copying of any individual articles. Electronic dissemination or mailing of articles requires the prior permission from Blackwell Publishing. By way of example, the terms and conditions laid down in the click-through licence governing the use of the article 'Silhouette v. Hartlauer – Fortress Europe?' by Martyn Hann read as follows:⁵⁶⁹

I agree that:

- 1.1 I will only use the online journal for my research, teaching and private study purposes;
- 1.2 I may print and/or download individual articles and other items from the online journal;
- 1.3 I may index (article author, article title and keyword) the online journal and where stored locally retain backup copies of both the online journal and the index;
- 1.4 I will not, except as expressly permitted above, use the online journal directly or indirectly

⁵⁶⁹ As published in World Intellectual Property 1998/5, p. 723-886.

for any substantial or systematic reproduction, re-distribution, re-selling, loan or sub-licensing, systematic supply or distribution in any form to anyone;

1.5 I will not modify, adapt, transform, translate or create any derivative work based on any material included in the online journal in a manner that would infringe the copyright or other proprietary rights therein.

1.6 I will use best endeavours to ensure that my username and password are not passed to any individual or third party. I will notify Blackwell Publishing of infringements that come to my notice and agree to co-operate with Blackwell Publishing as appropriate to stop further abuse should it occur.

1.7 I may not assign this agreement to any other natural or legal person.

German weekly *Der Spiegel* offers an online version of its newsmagazine, namely 'Spiegel Digital'. According to the user terms and conditions subscribers are allowed to use Spiegel Digital content for their own private purposes and store it in the working memory of their PCs. Downloading as well as temporary storage in a PC for private purposes is expressly declared permissible. Reproduction of content is permitted for the user's own private and informatory purposes. Above-mentioned authorizations apply only in as far as copyright notices and representations of trademarks and names are maintained in the copies made. Archiving is permitted if it serves exclusively to secure safekeeping of the content, and internal use; if the archive is inaccessible to third parties; if the archive does not serve to make reproductions for third parties; and if it does not lead to any 'additional' exploitation of the content. All other uses require Der Spiegel's prior written permission.

Digital bookstore *eBooks.com* offers its content, usually in different types of formats, in principle to customers worldwide. However "copyright reasons" may make that a work will not be available to customers in certain countries. The user ordering a given work is bound by the stipulations as regards copying laid down in the reader software accompanying the work, and is required to acknowledge that these stipulations "override (to the extent permitted by law) any right [he] might have to use the [work] under the copyright legislation in the country of use." The greater part of the general terms and conditions govern the use of the 'content' of the eBooks.com webpages.

As the works ordered are to be downloaded by the customer from a download page in the MobiPocket Reader, Adobe eBook Reader or Microsoft Reader format, it is unclear whether the word 'content' cited above pertains merely to the webpages (as works of authorship) themselves or also to the works that can be downloaded *from*, not opened *on*, these webpages. Be all that as it may, the stipulation that the customer, in accessing the eBooks.com web pages, may only download content for his own personal, non-commercial use can be interpreted indeed as to pertain to the e-books supplied by the company. It is somewhat less certain whether the same goes for the provision that the user is "not permitted to copy, broadcast, download, store (in any medium), transmit, show or play in public, adapt or change in any way the content of these web pages for any other purpose whatsoever without the prior written permission of Ebooks Corporation Limited." In any case, the customer is to promise to observe the (copyright) law, and also not to use an e-book ordered in any other way than on the terms – including the 'customer licence' and the 'terms of website use' – on which it is supplied to him. The user may not reproduce, transmit, make available, adapt, modify, frame, link or perform any other (copyright pertinent) act with an e-book ordered without prior written permission of eBooks.com – except where the terms and conditions of use or the (Australian) Copyright Act 1968 or similar copyright legislation allow so. Furthermore the customer is required to keep any e-book in the form in which it was supplied to him, and to promise not to circumvent any technological protection measures.

French e-book retailer *Harmattan* provides a limited set of general terms and conditions. Under the header "Y a-t-il des restrictions?", the webpage states that any book made available on the website may be printed, in whole or in part, and that it can be downloaded once on the

download PC, but that it may not be transferred to or used on any other device. To the question whether the user may “cut and paste” any part of the content, the website declares that any reproduction in whole or in part of the digital work is impossible, since such acts are forbidden under the Intellectual Property Code.

Euromoney Institutional Investor PLC binds subscribers to its online newsmagazine on intellectual property, *Managing IP*, to use the magazine’s content (i.e. the material on the site and news spread by e-mail) solely for their own use and benefit, and not for resale or other transfer or disposition to any other person or entity. Commercial use is restricted in that customers may not use, transfer, distribute or dispose of any content in any manner that might compete with the business of Euromoney. The company does allow, subject to the above, retrieval and display of content on a computer screen, printing of individual pages on paper (but not photocopying them) and storage of such pages in digital form on disc (but not on any server or other storage device connected to a network). In addition, the user may not reproduce, modify or exploit any of the content for commercial purposes.

Numilog, another France based e-book retailer, requires registration to the website, after which the user can order e-books. Until recently the company relied fully upon DRM technology to fine-tune the contractual relationship with the customer as regards a given work. The moment the client confirms his order, he declares that he agrees with the specific conditions applicable to the e-book he wishes to obtain. An example of this is given below:⁵⁷⁰

**Notez votre numéro de commande il vous sera demandé en cas de réclamation.
Vos liens de téléchargement vous seront envoyés à l'e-mail que vous avez indiqué après validation de votre paiement.**

COMMANDE N° 06731688231124 du 31/07/2006			
CLIENT: xxx			
Vous pouvez imprimer cette page afin de conserver les informations de votre commande			
Format	Droits	Titre, Auteur	Prix
PDF	Protégé Copier-Coller: 0 p. Impression: 147 p. Synthèse vocale: Oui	Théorie de la régulation. Tome 1, BOYER	5,56
		TOTAL DE VOTRE COMMANDE 5,56 € TTC (36,47F)	

⁵⁷⁰ Pertaining to R. Boyer, *Théorie de la régulation*, Tome 1, Les fondamentaux, La Découverte 2004.

ATTENTION : BIEN LIRE AVANT DE CONFIRMER LA COMMANDE - AUCUN REMBOURSEMENT NE SERA POSSIBLE SUR LA BASE DES ELEMENTS CI-DESSOUS

Cette commande comprend 1 ou plusieurs livres numériques au format PDF protégé contre la copie et la modification. Chacun de ces livres peut être lu exclusivement sur l'ordinateur qui servira au premier téléchargement avec le logiciel Adobe Reader 7 ou 6 - et sur des machines activées manuellement avec le même compte Adobe, dans la limite de 5 machines.

Les systèmes d'exploitation requis sont, au minimum, Windows 98 SE ou Mac OS X v.10.2.8. Les environnements Linux ne sont pas compatibles.

Vérifiez avant de commander que Adobe Reader 7 ou 6 peuvent être installés sur votre ordinateur.

Ces livres peuvent également être lus avec le logiciel Adobe Reader 3 pour Palm sur un appareil équipé de l'OS Palm version supérieure ou égale à 4.0.

Ces livres ne peuvent pas être prêtés à d'autres appareils. Les droits d'usage attachés à ces fichiers sont précisés dans le Tableau ci-dessus.

En cliquant sur Accepter vous reconnaissez avoir pris connaissance de ces informations

Figure 3 Example of Terms and Conditions of Numilog

With the adoption of the French implementation Act of August 2006, Numilog has adapted its commercial practice. As of this summer, user rights and obligations are governed contractually as well. Briefly the customer has to agree with the company's general terms and conditions, which impose upon the client a strictly personal, private and non-commercial use. Any reproduction, adaptation, or representation, and in particular resale, exchange, rent, or transfer to a third party of a work ordered is expressly forbidden.

Written Works	Website?	How are contracts concluded?	Registration, subscription required?	Use of DRM /TPM ?	Applicable law?	Reservation regarding customer's place of residence?
1. <i>Blackwell Publishing</i>	www.blackwell-synergy.com	Click-through	Yes	??	Laws of England and Wales	No
2. <i>Der Spiegel</i>	www.spiegel.de	Click-through	Yes	??	German law	No
3. <i>eBooks.com</i>	www.ebooks.com	Terms and conditions are on the website; it is unclear whether the user must expressly assent to them	Yes	Yes	Laws of Western Australia, Australia	Dependent on the work ordered
4. <i>Harmattan</i>	www.harmattan.fr	User contract is still 'en cours de réalisation'	Yes	??	??	No
5. <i>Managing IP</i>	www.managingip.com	Click-through	Yes	??	English law	No
6. <i>Numilog</i>	www.numilog.fr	Click-through	Yes	Yes	French law	No

Table 7 Comparative table of contracts for the online exploitation of written works

5.2.4 *Comparative remarks*

The above survey shows that, in the three sectors examined, most online content providers tend to make their services available under rather restrictive licensing terms, certainly in comparison to what national copyright law normally permits pursuant to the limitations on copyright and related rights. Recurring licensing clauses stipulate that content may be downloaded for private and non-commercial purposes only. This restriction is most often accompanied by a prohibition to reproduce, copy, distribute, publicly communicate, transform or modify the content without prior written permission from the rights owner. It is also interesting to note that most, but not all, online services examined in the previous sections apply some form of DRM system in support of the licensing terms. However, even in the case of online services that do not apply DRM, the licensor has deemed it necessary to include some restrictive contractual language.

Of the three sectors, the most liberal is perhaps the music sector. Music licences typically make accommodations to meet the needs of the average consumer, allowing him or her to burn the downloaded music on a CD for personal, non-commercial use up to a pre-determined amount of times, and to export the file to appropriate portable players for a definite or indefinite number of times. Nevertheless, the reproduction, retransmission, distribution, dissemination, sale, broadcast, performance, making available to third parties, circulation to anyone, and exploitation of the content for commercial or non-commercial purposes requires the express prior written consent of the provider. The terms of use put forward by providers in the film sector are often characterised by their vagueness as to the number and kinds of reproductions permitted. Most providers simply do not indicate the type, purpose and amount of reproductions permitted with respect to any digital download. Only CinemaNow and LOVEFiLM do indicate the number and kinds of reproductions their clients can make. Of the three categories of digital content providers analysed, the providers of digital ‘specimens’ of written works seem to be the least rigid in terms of allowing for private copying. Most terms and conditions of use in this sector allow for private copying – seemingly without curtailing such acts of reproduction through any technological protection measure – as long as it is performed for private purposes (Der Spiegel, Managing IP) and not in a ‘substantial or systematic manner’ (Blackwell Publishing).

5.3 **Alternative licensing practices**

The Open Content movement has emerged from the perception, by a segment of the population, that the current copyright regime constitutes a major obstacle for creative activity. This new licensing model purports to rectify the shortcomings of the copyright regime by allowing, through contracts, increased access to and use of copyright protected works. The original model, *Open Source Software* (or ‘Free Software’), allows software programmers and users to freely use software, access the source code, modify it, improve it, and distribute modified versions – all without prior authorisation from the rights owner and, in most instances, on a royalty-free basis. The open source movement has inspired a variety of similar distribution models in the realms of science and art, which are commonly referred to as ‘Open Access’ or ‘Open Content’. Outside the realms of software and science, the standardised *Creative Commons* licenses have become particularly popular.⁵⁷¹

The Open Content principles⁵⁷² are being widely endorsed both at the national and international levels. For example, the Ministers present at the January 2004 Meeting of the Organisation for Economic Co-operation and Development (OECD) Committee for Scientific and Technological Policy adopted a Declaration entrusting the OECD to work towards commonly agreed Principles and Guidelines on Access to Research Data from Public

⁵⁷¹ See <http://creativecommons.org>.

⁵⁷² Open Society Institute, *Open Access Publishing and Scholarly Societies – A Guide*, New York, OSI, 2005, p. 6.

Funding.⁵⁷³ Elsewhere in the world, Open Content principles are being broadly promoted, especially in developing countries.

Far from rejecting the rules of copyright law, Open Source Software and Creative Commons licences rely on the application of these rules to set their own 'open' terms of use of protected works. The key terms in open licences have been designed to take account of the fact that the traditional distinction between creators and users of works has essentially vanished. The digital networked environment has made it easier for users to become creators and vice-versa. To accommodate the incremental development of creative works, the licences grant users the freedom to use, reproduce, modify the work, and the freedom to distribute or re-distribute the work. Let us now briefly examine how and to what extent Open Source Software and Creative Commons licences rely on the rules of copyright to promote their ideology. Note that although the open source licensing regime may rest more on the provisions of the Computer Programs Directive than on those of the Information Society Directive, a short description of its main characteristics is called for here, since this regime has to a large extent inspired that of Creative Commons and similar approaches.

5.3.1 *Open Source Software*

Open source software is actually as old as the software industry, but its use is becoming more and more widespread among businesses, governments, and the public at large. Open source software licences are based on two fundamental principles: the possibility for users to use the software for any purpose and to modify and redistribute it without prior authorisation from the initial developer. Some open source software licences, like the General Public Licence (GPL), also impose a corollary obligation on the licensee: to make the source code available to other developers.⁵⁷⁴ The idea behind this form of licensing is that when programmers can read, redistribute, and modify the source code for a piece of software, the software evolves.⁵⁷⁵ Perhaps more than any other type of software, open source software is, as a result of its characteristic licensing scheme, the engine of collaborative creation. The very fact that the software may be freely used, modified and redistributed encourages subsequent developers to make their own contribution to an existing piece of software, by correcting errors, or by enhancing the software's capabilities and efficiency. Open source software may be developed in a closed setting, but it may also consist of a patchwork of different contributions originating successively from a number of unsupervised and unrelated developers, who are often scattered across different locations in the world. The modifications brought to the initial software can then either be distributed as a separate programme or be integrated into the original software.

Within a few years, the 'open' method of development and distribution of computer programs has imposed itself as a powerful social ideology. The philosophy behind open source licensing has also inspired the development of numerous other 'open' licences and 'open' projects, where the principles of open source are applied in the fields of music, media, encyclopaedia and science. The mechanism for achieving this goal is through a standardized licensing infrastructure. The use of open source software licences has given rise to new, viable, and attractive business models for the distribution of software products. In view of its commercial potential, established companies are investing important capital and labour resources in the development of open source operating systems and applications. Open source licences cover thousands of projects, including the heart of the Linux operating system, the Firefox Web

⁵⁷³ OECD, Science, Technology and Innovation for the 21st Century. Meeting of the OECD Committee for Scientific and Technological Policy at Ministerial Level, 29-30 January 2004 - Final Communiqué, available at: http://www.oecd.org/document/15/0,2340,en_2649_37417_25998799_1_1_1_37417,00.html

⁵⁷⁴ Free Software Foundation Europe, <<http://fsfeurope.org/documents/freesoftware.html>>.

⁵⁷⁵ Open Source Initiative, <<http://www.ossl.nl/opensource.org/>>.

browser, the Apache server software collection and soon, Sun Microsystems' Solaris version of Unix. Open source software owes its attractiveness to the very principles put forward by its proponents: software users and developers savour the political freedom granted under the licence to use and modify the software as they wish.⁵⁷⁶ The principles underlying the open content movement have been embraced by a large and varied public worldwide, ranging from governments, to businesses, individual users and institutions.

In Europe, software developers enjoy copyright protection on their programs since the adoption, in May 1991, of the Directive 91/250/EEC on the legal protection of computer programs. As a result, all computer programs, whether in object code or in source code,⁵⁷⁷ are subject to copyright protection, provided that they meet the habitual criterion of originality. OSS does not differ in this respect from any other proprietary software. Open source software does, however, depart from proprietary software in the manner in which it is created and distributed to the public. The modes of creation and distribution of OSS have emerged in reaction to those of proprietary software, where the use of copyright law was seen as an impediment to the further development of software. Far from rejecting the rules of copyright law, the open source movement relies on the application of these rules to set their own 'open' terms of use for protected software. The key terms in open source licences have been designed to take account of the fact that the traditional distinction between creators and users of software has essentially vanished within the open source community: users are creators and vice versa.⁵⁷⁸ To support such a distinct development and distribution model, the open source community uses a different set of licensing conditions than those used by conventional software developers. The main characteristic of an OSS licence is the freedom granted to the licensee to use, reproduce, modify, and distribute the software.

In view of the broad freedom granted to the licensee under most open source software licences, the disputes most likely to arise between parties will concern either the licensee's failure to distribute modified code under the terms of the GPL, thereby 'closing-up' the code, or his failure to make the source code available. Both types of omissions were actually at the heart of the decision of the District Court of Munich in the case *Netfilter v. Sitecom*,⁵⁷⁹ which represents the first judgement ever upholding the validity of the GPL. In its final ruling, the District Court of Munich concluded that the distribution of the software without complying with the conditions of the GPL constitutes an infringement of copyright give rise to a claim for injunctive relief pursuant to the German Copyright Act. On appeal of an injunctive order, the Court upheld articles 2, 3, 4 of the GPL as valid general conditions of sale that are in compliance with the provisions of the Copyright Act.⁵⁸⁰ More recently, the GPL was again upheld as valid and enforceable by the District of Frankfurt.⁵⁸¹

⁵⁷⁶ H.E. Pearson, 'Open Source — The Death of Proprietary Systems?', 3 *Computer Law & Security Report* (2000), pp. 151-156, p. 152.

⁵⁷⁷ Computer programs directive, recital 7, which reads as follows: 'Whereas, for the purpose of this Directive, the term "computer program" shall include programs in any form, including those which are incorporated into hardware; whereas this term also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage.'

⁵⁷⁸ L. Guibault and O. van Daalen, *Unravelling the Myth around Open Source Licences – An Analysis from a Dutch and European Law Perspective*, The Hague, T.M.C. Asser Press, 2006.

⁵⁷⁹ District Court of Munich I, 19 May 2004, (*Netfilter v. Sitecom*), *Computerrecht* 2004/10, pp. 774- 776, with annotation by T. Hoeren and A. Metzger.

⁵⁸⁰ Guibault/Van Daalen 2006, p. 159.

⁵⁸¹ LG Frankfurt a.M. Urteil vom 06.09.2006 2-6 O 224/06 Geltung der GPL *JurPC Web-Dok.* 126/2006.

5.3.2 *Creative Commons licences*

Among the numerous licensing models based on Open Content, the most successful application so far is undoubtedly the Creative Commons initiative, which was set up initially in the United States, but is now rapidly spreading across the globe. Creative Commons has developed a series of standardised licenses that allow authors of literary, musical or audiovisual works to permit wide dissemination and transformative uses of their works, without completely forfeiting copyright protection. While copyright law creates the default rule of *All Rights Reserved*, making permission necessary for each and every use of a work, Creative Commons seeks to facilitate an environment in which *Some Rights Reserved* or even *No Rights Reserved* become the norm. The Creative Commons licensing scheme is designed to meet the diverse preferences of authors and at the same time keep it simple and easy to employ for both authors and users of copyrighted material. The mechanism for achieving this goal is through a standardized and automated licensing mechanism. This licensing model has recently been extended to cover the realm of scientific publications, known as Science Commons.⁵⁸²

Creative Commons licenses are designed to be applied to a work and to be binding upon those who use the work. Creative Commons licenses are expressed in three different formats: the Commons Deed (human-readable code), the Legal Code (lawyer-readable code); and the metadata (machine-readable code). The Commons Deed, which is the first document visible to the user, is a summary of the key terms of the actual license, which basically states what users can and cannot do with the work. This Deed itself has no legal value, and its contents do not appear in the actual license. The Legal Code is the actual license, designed to be enforced in a court of law, which the user will read only if he takes deliberate action to access it. The metadata contains the key license elements that apply to a work in order to enable discovery through search engines. To facilitate the widest possible use of the Creative Commons licenses, the Legal Code has been translated and adapted to the legal system of an increasing number of national jurisdictions worldwide. At the time of writing this report, the Creative Commons licence had been ‘ported’ in 17 European jurisdictions.

The Creative Commons licences make no difference between digital and analogue works, nor do they make any difference between acts of reproduction and acts of making available to the public. The only obligatory licensing condition in every Creative Commons licence is the Attribution clause.



Attribution. authorises others to copy, distribute, display, and perform the copyrighted work — and derivative works based upon it — but only if they give credit in the way the author requests.

The core CC licensing suite also lets authors mix and match conditions from the list of options below. There are a total of six Creative Commons licenses to choose from the core licensing suite. The Commons Deed may reproduce a combination of either one of the following clauses:




Non-commercial. authorises others to copy, distribute, display, and perform the work — and derivative works based upon it — but for non-commercial purposes only.



No Derivative Works. authorises others to copy, distribute, display, and perform only

⁵⁸² S. Dusollier, “The Master’s Tools V. The Master’s House: Creative Commons v. Copyright”, *Columbia Journal of Law & the Arts* 2006/29, pp. 271-293, at p. 271.

verbatim copies of the work, not derivative works based upon it.

 **Share Alike.** allows others to distribute derivative works only under a licence identical to the license that governs the work.

Note: A licence cannot feature both the Share Alike and No Derivative Works options. The Share Alike requirement applies only to derivative works.

Creative Commons licences are designed to allow the rights owner to retain his copyright while announcing in clear and standardised terms to users how they may use the work. Each licence grants a worldwide, royalty-free, non-exclusive, perpetual licence to the user to reproduce, display, perform, communicate and to distribute copies of the work. Depending on the combination of licence terms selected, the user may have the right to create derivative works or to use the work for commercial purposes. All rights not expressly granted by the licensor are reserved, with the exception of limitations to copyright that are, in principle, not prejudiced by the licence. Indeed, article 2 of the Creative Commons licence according to which “Nothing in this license is intended to reduce, limit, or restrict any rights arising from fair use, first sale or other limitations on the exclusive rights of the copyright owner under copyright law or other applicable laws”. The Legal Code, e.g. the actual licence, also requires users to keep any copyright notice intact on all copies of the work; not to alter the terms of the licence nor to use technology to restrict other licensees' lawful uses of the work. If required by the rights owner, the ShareAlike licence demands that the further distribution of derivative works be made under the same licence terms.⁵⁸³

On March 9, 2006 the District Court of Amsterdam, judging in summary proceedings, upheld the validity of a Creative Commons license in case involving local media celebrity Adam Curry. Curry had published family photo's on www.flickr.com under a Creative Commons Attribution-NonCommercial-ShareAlike licence. Dutch gossip magazine Weekend had reproduced four photos in a story on Curry's children without seeking Curry's prior permission. The Court gave way to Curry's claim, thereby confirming that the conditions of a Creative Commons license automatically apply to the content licensed under it, and bind users of such content even without expressly agreeing to, or having knowledge of, the conditions of the license.⁵⁸⁴

5.4 Assessment of the impact of online contractual practices on end-users

As we have seen, the European legislator aimed with the adoption of article 6(4), paragraph four, of the Directive at encouraging economic players to move towards a more finely tuned and individualized form of rights management. By taking away the obligation put on rights owners to provide users with the means to benefit from certain limitations whenever works or other subject-matter are made available to the public on agreed contractual terms on an interactive basis, the European legislator hoped to stimulate the conclusion of contractual arrangements between rights owners and users for the use of protected material. As the survey conducted in sections 5.2 shows, online content providers have indeed developed the practice of licensing the use of protected material in the context of DRM systems. Not surprisingly, this practice tends to be much more restrictive than what copyright law would normally permit. This emerging practice certainly helps to explain the spectacular rise of the open source and open content movements.

⁵⁸³ S. Dusollier, “Sharing access to intellectual property through private ordering”, *Chicago-Kent Law Review* 2007/82 forthcoming.

⁵⁸⁴ District Court of Amsterdam, 9 March 2006, LJN: AV4204.

In this section, we examine the impact of the current online contractual practices on the interests of users, query whether contract ought to prevail over limitations or vice versa, and offer some policy options designed to ensure that the balance of interests established by the Information Society Directive can be preserved inside contractual relationships.⁵⁸⁵

5.4.1 Restrictive licensing practices and end-user interests

While the digital networked environment offers the perfect conditions for the growth of a contractual culture, the transaction costs associated with the negotiation of every clause of a digital contract remain prohibitive. Standard terms significantly lower the transaction costs associated with the mass distribution of works, in that they save firms and their customers the cost and trouble of negotiating the terms of each contract individually. In practice, however, most contracts in the digital networked environment take the form of ‘take-it-or-leave-it’ licences, where users only have the choice of accepting or refusing the terms of the licence presented to them on the Internet. Standard terms appear in various ways on the user's computer screen display. In some cases, the user obtains access to the protected work only once he has given assent, by clicking with the mouse in the appropriate dialogue box or otherwise, to the terms of the on-line screen licence. In other cases, the contract terms are simply made available via a hyperlink located somewhere on the site's home page. For example, the following notice may appear at the bottom of an Internet home page: ‘Please click here for legal restrictions and terms of use applicable to this site. Use of this site signifies your agreement to the terms of use’. Of course, like for any other standard form contract, assent may be express or implied from the party's conduct.⁵⁸⁶ Online standard form contracts are generally held valid in Europe, provided that the purchaser of the good or the service is given the opportunity to review the terms of the licence and to give assent before completing the purchase.⁵⁸⁷

In the online environment, the use of copyright protected works and other subject matter is usually governed by the terms of a licensing agreement, which define the permissible uses. In effect, the licence terms often act in conjunction with technological measures as a substitute to the system of exclusive rights and limitations established by traditional copyright law.⁵⁸⁸ Through the application of TPMs, right holders are technically capable of contractually prohibiting licensees from reproducing, communicating or making the work available to the public for the purposes covered by the respective exceptions and limitations:

“The various combinations of all these rights and conditions in an REL enable the content provider to express nearly any conceivable business model and usage contract in machine readable form. From a legal perspective, this is a very important feature of DRM systems as compliance with the contractual terms may not only be controlled by law, but also by technology: if the contract governing digital content allows a consumer to make only two

⁵⁸⁵ For scholarly commentary on this issue see: Guibault 2002; J. de Werra, “Moving Beyond the Conflict Between Freedom of Contract and Copyright Policies: In Search of a New Global Policy for On-Line Information Licensing Transactions: A Comparative Analysis Between U.S. Law and European Law”, 25 *Colum. J.L. & Arts* 239, 251 (2003); H. Schack, “Anti-Circumvention Measures and Restrictions in Licensing Contracts as Instruments for Preventing Competition and Fair Use”, *University of Illinois Journal of Law, Technology and Policy* 2002/2002, pp. 321-332.

⁵⁸⁶ B. Trompenaars, ‘Legal Support for Online Contracts’, in P.B. Hugenholtz (ed.), *Copyright and Electronic Commerce*, The Hague, Kluwer Law International 2000, pp. 267-307, p. 272.

⁵⁸⁷ The enforceability of click-wrap licenses is confirmed by Article 9 (1) of Directive 2000/31/EC of the European Parliament and of the Council of June 8, 2000, on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, Official Journal of the European Communities L 178 (Jul. 17, 2000), 1. See also: BGH, Urteil vom 14.06.2006 I ZR 75/03 Einbeziehung von AGB bei Bestellung im Internet JurPC Web-Dok. 104/2006, Abs. 1 – 27;

⁵⁸⁸ Schack 2002, p. 329.

copies of the content, any further copying will be prevented by the technological measures of the DRM system, which read the attached metadata in which the contractual terms are encoded. This demonstrates that, in a DRM system, the contractual protection is supported by a technological protection”.⁵⁸⁹

The survey conducted in section 5.2 shows that recurring licensing clauses stipulate that content may be downloaded for private and non-commercial purposes only. This restriction is most often technically circumscribed by the number of possible downloads, the number of times that each file may be copied to a standard CD, and the possibility to transfer the file to another device. Recital 52 of the Directive makes room for such arrangements regarding the private copying exception, when it states that “rights holders may take measures which are consistent with the exceptions or limitations on private copying in national law in accordance with Article 5(2)(b), taking account of the condition of fair compensation under that provision and the possible differentiation between various conditions of use in accordance with Article 5(5), such as controlling the number of reproductions”. However, the right to control the conditions under which a private copy may be done, including the number of reproductions permitted, in no way extends so far as stripping the exception from any practical significance. A contractual clause which would effectively deprive users from benefiting altogether from a limitation would probably be held invalid. The combination of the contractual language found in some licences with technical enforcement via TPMs may frustrate certain reasonable expectations of consumers most notably with respect to the amount of permitted downloads, the right to make a back-up of downloaded files, and the right to port the file to other devices.

Apple’s iTunes service is one illustration of a DRM system that enables rather restrictive licensing terms. The company Apple is under pressure from consumer associations to offer consumers a fair deal, one in which contract terms that prevent users from playing their legally purchased music on more than one type of player have been removed. In fact, the Norwegian Consumer Ombudsman, in co-operation with French, German, Swedish, Danish and Dutch consumer authorities, has recently concluded that the iTunes DRM Fairplay is unfair and must be licensed or changed to secure interoperability.⁵⁹⁰ By the same token, these associations demand that consumers be allowed to rip CDs burned from iTunes downloads to DRM-free audio files that can be played with a variety of consumer electronics devices. Some of iTunes’ contract terms have also come under fire, more specifically the clause reserving it the right to modify rules for using the service unilaterally, putting the risk of damage to music files or of damage caused by them on the customer, as well as the clause designating British law as the law applicable to the sale, irrespective of the country of residence of the consumer.⁵⁹¹

Besides restricting end-users to a private and non-commercial use of the protected material, licensing contracts typically contain a prohibition to reproduce, copy, distribute, publicly communicate, transform or modify the content without prior written permission from the rights owner. Although the wording used in most licences does not specifically prohibit such acts as the use of a work for educational purposes, or for purposes of quotations, news reporting, parody, private study or research, a general prohibition on any kind of reproduction or communication to the public could be interpreted as such. This wording seems to imply that protected works and other subject matter made available on these online services are accessed and used only by passive consumers, who limit themselves to reading, listening to or viewing the downloaded material. This assumption, however, does not hold true in practice. Mass-marketed protected

⁵⁸⁹ Bechtold 2004, p. 346.

⁵⁹⁰ J. Libbenga, “Dutch consumer chief puts Apple through the mill”, *The Register* 25th January 2007, http://www.theregister.co.uk/2007/01/25/dutch_out_of_tune_with_apple/

⁵⁹¹ Apple received demands to change iTunes contract terms, *AfterDawn*, 28 January 2006, <http://www.afterdawn.com/news/archive/8469.cfm>

material is not only accessed and used by consumers, but also by professional and semi-professional users, such as journalists, writers, composers, librarians, teachers etc. As the digital environment keeps developing, more and more protected material will be made available online to an ever wider public. End-users are not merely consumers, understood in the strict sense of the word, but encompasses a broad range of categories of users. Restrictive contract terms may therefore impede such legitimate uses as music review, media studies and film critique, to name just a few examples.⁵⁹² In order to be able to make any kind of legitimate use of a work or other subject matter, end-users should unequivocally be allowed to benefit from the limitations on rights recognised in copyright and related rights law.

In practice, the exercise of this type of control over the use of copyrighted works could bring about several undesirable consequences such as preventing competition or encroaching upon the users' fundamental rights. A number of commentators have indeed voiced the concern that the use of copyrighted works made available over the Internet will be systematically blocked through the application of technical measures.⁵⁹³ When a rights owner decides to make his work accessible to the public, he must do so in a manner that will not hinder competition. As an author points out, DRM can raise competition law issues because "copyright holders have, by the very nature of the rights they hold in their copyright works, a monopoly over what can and cannot be done with their work. Adding a DRM system to an electronic song, which dictates on what medium it can be used while preventing it from being converted to another format, looks set to cause problems".⁵⁹⁴ Accordingly, a contractual prohibition on quoting or making reproductions of a work for legitimate purposes such as comment, criticism or news reporting, would not be acceptable if it resulted in a reduction of competition and manifested an anti-competitive behaviour on the part of the licensor.⁵⁹⁵

A restrictive licence of use may also affect the users' fundamental rights, more particularly their freedom of expression. The users' freedom of expression might be considered affected if for example, individual licensees were unable to voice an opinion, a criticism or a comment on a matter touching the public interest. Numerous court decisions emphasise that not only the message conveyed, but also the form of expression are recognised as a protected exercise of freedom of expression under article 10 of the European Convention on Human Rights (ECHR).⁵⁹⁶ A contract term that restricts or prohibits the exercise of a statutory limitation on copyright essentially takes away the privilege of the user to accomplish a particular act with respect to a copyrighted work. Arguably, rights owners expect that the grant of such licences of use will allow them to exercise greater control over the use of their work so as to increase exploitation revenues and to prevent piracy. While rights owners are certainly entitled to protect their economic interests, privacy, or reputation within the bounds set by copyright law, it is highly questionable whether a restriction on the right to quote or to make a parody{ XE "Parody" } or

⁵⁹² C. Stromdale, "The Problems with DRM", *Entertainment Law Review* 2006/17, pp. 1-6, p. 4.

⁵⁹³ Hugenholtz 2000b, p. 79.

⁵⁹⁴ Stromdale 2006, p. 4; See also: Organisation for Economic Co-operation and Development, Digital Broadband Content, OECD, Paris, 2005, DSTI/ICCP/IE(2004)12/FINAL, 13 December, 2005, p. 53.

⁵⁹⁵ Guibault 2002, p. 249. See also: P. Akester and R. Akester, "Digital Rights Management in the 21st Century", *E.I.P.R.* 2006/28, pp. 159-168, at p. 162.

⁵⁹⁶ *Müller & Ors v. Switzerland*, European Court of Human Rights, 24 May 1988, Series A no. 133, § 27; *Oberschlick v. Austria*, European Court of Human Rights, 23 May 1991, Series A No. 204, § 57 where the Court writes: 'Article 10 (art. 10) protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed'; and Hof Amsterdam, 30 October 1980, NJ 1981, No. 422 (*Boycott Ontspan Aksie*). In Germany: Landgericht Berlin, 12 December 1960 (*Maijfeim*), in GRUR 1962/04, p. 207; BVerfGE, 29 June 2000, 1 BvR 825/98 (*Germania*), AfP 2000/5, p. 451; and BVerfGE, 17 December 1999, 1 BvR 1611/99 (*Havemann*), ZUM 2000/4, p. 316.

news report{ XE "News report" } would be considered ‘necessary’ and ‘proportional’ to the interest served by the contract, in the sense of article 10(2) of the ECHR.

The contractual language used in the majority of licences examined in section 5.2 may have a chilling effect on users who would like to use the protected material for otherwise legitimate purposes than strictly private non-commercial use. As one commentator explains, restrictive licensing practices together with the application of DRM systems may affect user autonomy in the following way:

“[U]ser autonomy is among the basic values of Western democratic societies. Autonomy in the Internet age includes at least three elements. First, an individual must have the freedom to make choices among alternative sets of information, ideas, and opinions. Second, informational autonomy necessitates that everyone has the right to express their own beliefs and opinions. Third, autonomy in the digitally networked environment arguably requires that every user can participate in the creation of information, knowledge, and entertainment”.⁵⁹⁷

Contrary to private individuals who have essentially no bargaining power *vis-à-vis* the rights owners to influence the content of the licence, traditional (institutional) users of copyrighted material, such as broadcasting organisations, sound and audiovisual producers, newspaper and book publishers, educational institutions, consortia of libraries, and archives, are usually capable of actually negotiating the terms of a user license. Organisations such these not only have greater bargaining power, but also possess greater information and experience in the matter, and are thus in a better position to react to a rights owner’s attempt to contractually restrict the use of copyrighted material beyond the bounds normally set by copyright law. One could argue that no group of individuals or organisation with reasonable bargaining power and knowledge of the law and the market would agree to a restriction on the exercise of a statutory limitation on copyright, unless some advantage could be drawn from the entire contract. Consequently, restrictive licence terms included in fully negotiated contracts are not likely to be as widespread as those included in standard form contracts, and presumably do not require any form of legislative redress. For this reason, we will concentrate in the pages below on the situation of the end-user confronted with a set of restrictive terms in non-negotiated, standard form contracts.

5.4.2 *Preserving the balance of interests*

The widespread use of restrictive standard form contracts in the online environment poses a threat to some of the basic objectives of copyright policy. If technological measures are prone to undermine essential user freedoms, the same is true *a fortiori* for standard form licenses. The LAB in its *Reply to the Green Paper* had already warned that ‘there is good reason to expect that in the future much of the protection currently awarded to information producers or providers by way of intellectual property will be derived from contract law’.⁵⁹⁸ In fact, the use of DRM systems in combination with on-line standard form contracts may accentuate information asymmetries, indirect network effects, high switching costs and lock-ins, leading to market failures and thereby preventing well-functioning competition.⁵⁹⁹ Absent certain limits to freedom of contract, lawful end-users may be forced to forego some of the privileges recognised by law, in order to be able to use protected material.

In order to restore the balance of interests between rights owners and lawful end-users, the relationship between the protection by copyright law, TPMs, and contract needs to be reassessed. What would be the most appropriate measure to achieve the objective of restoring the

⁵⁹⁷ Gasser 2006, p. 97.

⁵⁹⁸ Reply to the Green paper on copyright of 20 November 1996 of the LAB, § 9A.

⁵⁹⁹ Bechtold 2004, p. 362.

balance of interests? In which body of law would such a measure best be integrated: copyright law, contract law, or consumer law? In the following pages, we discuss the pro's and the con's of some of the options available to the European legislator to limit the freedom of contract in order to preserve the balance of interests between rights owners and content providers on the one hand, and lawful end-users of protected material, on the other hand. These options vary: adopting a rule in consumer protection law; regulating standard form contracts in private law; declaring limitations on copyright imperative; and promoting the development and acceptance of codes of best practice.

5.4.2.1 *Consumer protection rule*

As copyrighted works are increasingly being distributed on the mass market subject to the terms of standard form contracts, end-users of protected material are likely to be confronted more and more with contract clauses that attempt to restrict the privileges normally recognised to them under copyright law. The only choice of an end-user is often to refuse to transact under the conditions set out in the standard form contract. In view of the users' inferior bargaining power and information asymmetry, the question is whether and to what extent the introduction of a rule in consumer protection law could improve the user's position with respect to such restrictive contract clauses. Consumer protection rules typically purport operate on two levels: first, to increase the consumer's pre-contractual information and, second, to offer protection against unreasonable one-sided contract terms. A Community legislative intervention could be envisaged on both levels, namely impose an obligation to inform consumers of the licensing conditions before they proceed to a purchase, and regulate the content of the licences.

Imposing a duty on rights owners to disclose particular information or to observe specific formalities at the time of the conclusion of the standard form contract does contribute to reducing inequalities between parties, insofar as it increases transparency and compensates for the lack of information or experience on the part of the end-user. While they were absolutely unknown to the area of copyright just a few years ago, consumer protection measures related to copyright matters have recently become more frequent. This is the case for example of article 95d) of the German Copyright Act, which as a result of the implementation of the Information Society Directive, now requires that all goods protected by technological measures be marked with clearly visible information about the properties of the technological measures.⁶⁰⁰ Not only legislative solutions have been put forward to this end, but judicial decisions also play a role in protecting consumers. In a recent case, the Court of Nanterre upheld a complaint introduced by the French consumer association, UFC Que Choisir, against Sony UK and Sony France on the ground that the former had failed to inform consumers about the lack of interoperability of their products and services to other devices. The court found Sony liable for misleading the consumers by "the fact that Sony did not explicitly and clearly inform the consumer that the music players sold could read only the music files downloaded on the only legal site Connect." Sony UK was also held liable for failing to explicitly state in its contract that the music files downloaded from the Connect website could be read only by the music players dedicated for the Sony trademark.⁶⁰¹

However, the obligation to supply information imposed by the German law or by the French courts has so far addressed only the restrictions put by technology and not the restrictions imposed inside contractual agreements. These rules do not eliminate the risk that rights owners abuse their economic and bargaining position by making systematic use of licence

⁶⁰⁰ Schack 2002, p. 332.

⁶⁰¹ Tribunal de Grande Instance de Nanterre (6^e chambre), Union Fédérale des Consommateurs - Que Choisir v. Sony France and Sony United Kingdom, 15 December 2006, RG n° 05/04574, http://www.tntlex.com/public/jugement_ufc_sony.pdf

terms that are unfavourable to end-users.⁶⁰² Since, in practice, pre-contractual information regarding restrictive terms of use of copyrighted material would only have limited effect on the end-users' situation, another type of intervention may be called for. One possibility could be to extend the regulations concerning unfair consumer contract terms to cover copyright matters. In principle, the provisions of the European Directive on unfair contract terms⁶⁰³ cover mass-market licences for the use of copyrighted material, provided that the conditions of application are met. A term is to be regarded as unfair under the Directive if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer. The list presented in annex to the Directive is meant to give an indication of the clauses that are deemed or presumably deemed abusive or unfair. Unfortunately, none of the terms appearing in this annex is likely to apply in the case of a consumer faced with a restrictive copyright licence term.

The Community legislator could introduce an item in the list of unfair clauses, according to which a term in a non-negotiated contract would be deemed unfair if it departed from the provisions of the copyright act. This provision could be incorporated into the 'black' list of contractual clauses, e.g. those that are deemed unfair under consumer protection law and where the presumption cannot be rebutted. Such a presumption of unfairness would have the advantage of having a broad application, relating not only to limitations on copyright or related right, but also to any other provisions of the copyright act, such as those concerning the term of protection. One inconvenience with this option would be, however, that it would only apply to consumers, that is 'any natural person who, (...), is acting for purposes which are outside his trade, business or profession'. Accordingly, a handicapped person could invoke this protective measure, but only insofar as she acts for purposes which are outside her trade, business, or profession. Should she need to use a protected work - albeit lawfully obtained via an online service under restrictive terms - for professional purposes, the provision would be of no help. Unless the national law of the Member States was expressly declared to apply, this provision would therefore not benefit legal persons and professionals, like small businesses, public libraries, archives and educational institutions that make use of the services of online content providers and that may be disadvantaged by the restrictive licence terms.

5.4.2.2 *Regulating contractual agreements*

To make sure that not only consumers but all types of end-users of copyrighted material, be they professionals, public libraries, archives and educational institutions, benefit from a protective measure against the use of restrictive terms in standard-form contracts, a second option could be to introduce a provision in the general contract law of the Member States. The contract law in most Member States regulates a number of specific contracts, like lease, sale, insurance, and labour contracts. Like the consumer protection rules, the rules governing these specific categories of contracts purport to ensure the proper functioning of the pre-contractual phase, to regulate their content, and to impose formalities where necessary. Member States could be encouraged to introduce a section in their national contract law on the subject of copyright licences. A rule of contract law could be adopted to declare any clause in a non-negotiated licence null and void which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the other party. Alternatively, the rule could simply dictate that any contractual clause in a standard-form contract is deemed unfair if it departs from the provisions of the national copyright act.

The main problem with this option is that contract law is a matter generally not considered as falling under the competence of the European Union. Although some efforts have been deployed over the past decade to approximate the laws of the Member States in the field of

⁶⁰² Guibault 2002, p. 251.

⁶⁰³ Directive on Unfair Terms in Consumer Contracts, 93/13/EEC, of 5 April 1993, O.J. L 95/29.

contract law, the European Community has so far been only indirectly involved in the process.⁶⁰⁴ To date, the initiative has been limited to rationalising and tidying up the *acquis* in the field of consumer protection and to producing optional standard contract terms and conditions. This situation renders the adoption by the European Community of a new rule on contract law regulating copyright licences rather unlikely. Moreover, since the basic rules on contract law must still be officially harmonised across the Member States, the creation of such a specific set of rules on copyright licences may not be called for at this time.

5.4.2.3 *Declaring limitations imperative*

A third option to restore the balance of interests inside online contractual agreements would be to declare some or all limitations on copyright and related rights imperative.⁶⁰⁵ European copyright law recognizes very few imperative limitations. These flow from the Computer Programs Directive and the Database Directive, among which are: the right to make a back-up copy of a computer program, the right to study, observe and test the computer program as well as to decompile it for purposes of interoperability, and the right for the lawful user of a database to access and use the contents of the database. According to a provision in the two Directives, any contractual provision contrary to the provisions laying down these limitations is null and void. The Information Society Directive contains no imperative limitation on copyright and related rights. Let us recall that the Council rejected the European Parliament's proposed Amendment 156, according to which "no contractual measures may conflict with the exceptions or limitations incorporated into national law pursuant to Article 5".⁶⁰⁶ By contrast, some limitations in the Information Society Directive are expressly default rules, like article 5(3)n, which makes libraries and their patrons dependent on the benevolence of the rights holders. As a result, the vast majority of limitations on copyright and related rights in the *acquis communautaire* have been declared neither expressly imperative nor optional. In view of the silence of the Information Society Directive and a general lack of relevant case law, the status of the limitations listed in article 5 remains unclear. Even the status inside contractual relations of the mandatory provision of article 5(1) of the Directive has yet to be clarified.

Interestingly, two Member States, Belgium and Portugal, have actually dealt with the issue in their national copyright laws. In its Act of 1998 implementing the Database Directive, Belgium not only declared imperative every mandatory and optional limitation relating to databases, but it also proclaimed the imperative character of most other limitations included in the Copyright Act.⁶⁰⁷ According to article 23*bis* of the Act, articles 21, 22, 22*bis* and 23, §§ 1er and 3 have a mandatory character. Unfortunately since its enactment, article 23*bis* of the Belgian Copyright Act gave rise to no case law, although a few good occasions to test it might have been overlooked. However, with the implementation of the Information Society Directive, and particularly of its article 6(4), fourth paragraph, the Belgian legislator appears to have made one major step backwards in this matter. A second sentence was indeed added to the original text of article 23*bis* of the Act, which now reads as follows:

"The provisions of articles 21, 22, 22*bis* and 23, §§ 1er and 3 have a mandatory character. It is, however, possible to deviate from these provisions on a contractual basis in relation to works made available to the public on agreed contractual terms in such a way that

⁶⁰⁴ European Parliament, Committee on Legal Affairs and the Internal Market, European Parliament resolution on European contract law and the revision of the *acquis*: the way forward (2005/2022(INI)), Brussels, 23 March 2006.

⁶⁰⁵ Gasser 2006, p. 111.

⁶⁰⁶ European Parliament, Committee on Legal Affairs and the Internal Market, 17 January 2001, PE 298.368/5-197.

⁶⁰⁷ Belgian Copyright Act of 1994, as modified, art. 23*bis*.

members of the public may access them from a place and at a time individually chosen by them”.

This amendment is probably the result of an erroneous interpretation of the intention of the European legislator. The Belgian legislator must have confused, in article 6(4), fourth paragraph of the Directive, the absence of obligation to provide the means to benefit from a limitation in cases where the work is made available online according to the terms of a contract, with the possibility to contract around the limitations. The first measure has in fact little to do with the second. If a rights holder does not have to provide the means to exercise a limitation, either by providing a decryption key or a TPM-free version of the work, this does not imply that rights holders should be free to contractually take away the privileges granted by the law. In any case, all this leads to an odd result. While the Belgian legislator recognises the importance of protecting the beneficiaries of limitations on copyright in their off-line contractual relations, it leaves basically intact freedom of contract in online relationships, where the need for protection of users is much more pressing. Consequently, the Belgian law is probably doomed to remain a dead letter.⁶⁰⁸

The provision of the Portuguese Copyright Act is more convincing and probably much more effective than its Belgian counterpart. Article 75(5) of the Portuguese Act No. 50/2004 declares null any contractual provision eliminating or impeding the normal exercise of the free uses mentioned in the Act. As the wording indicates, this provision applies with respect to all limitations recognised in the Portuguese Copyright Act. This legislative modification occurred during the implementation of the Information Society Directive, and is premised on the observation that often the unequal bargaining power of the parties will mean that only one of them will be able to determine the terms of a contract to the possible detriment of the other party. As Akester points out, although it does not expressly say so, this provision is meant to avoid unilateral decisions as regards exceptions and limitations.⁶⁰⁹ But the Portuguese legislator showed more consistency in its policy decisions, when implementing article 6(4), fourth paragraph of the Information Society Directive. Article 222 of the Portuguese Copyright Act provides as follows:

“This scheme does not apply to copyright works made available to the public on agreed contractual terms, in such a way that members of the public may access them from a place and at a time individually chosen by them.”

The two Portuguese provisions precisely fill the gap left by the Information Society Directive. They ensure that, while rights owners are under no obligation to provide the means to exercise certain limitations with respect to a work that is protected by a TPM and made available online on agreed contractual terms, they may not eliminate or impede the normal exercise of the free uses mentioned in the Act on the basis of these “agreed contractual terms”. In other words, rights owners may protect their works by TPMs, but they may not contractually prohibit users from exercising a limitation.

While the copyright laws of the other Member States do not expressly recognise the imperative character of limitations on copyright and related rights, the view that limitations form an integral part of the balance of interests established by the copyright system, from which contracting parties can not derogate by way of standard-form licenses, is slowly gaining acceptance throughout the European Union. While this position is generally well-admitted in

⁶⁰⁸ M.-C. Janssens, “De uitzonderingen op het auteursrecht anno 2005 – Een eerste analyse”, *Auteurs & Media* 2005/6, pp.482-511, p. 509.

⁶⁰⁹ P. Akester, “Implementation of the Information Society Directive in Portugal”, *Entertainment Law Review* 2005/16, pp. 7-12, p. 10.

countries following the common law tradition, a change of perception in this direction is noticeable in a number of countries following the *droit d'auteur* tradition.⁶¹⁰ Belgium and Portugal are, of course, prominent examples. In Germany, constant jurisprudence of the Federal Supreme Court and the Federal Constitutional Court emphasises the fact that limitations are an integral part of the German copyright system and that the balance established by the law should not be disrupted without careful consideration. Even in France, where limitations were until recently invariably construed as undesirable but necessary exceptions to the principle of the rights owner's exclusivity, Prof. Lucas now writes:

“Le droit d'auteur est un droit réel opposable à tous. Ses limites devraient, en bonne logique participer de la même nature, et donc être tracées par la loi indépendamment du contrat conclu par l'utilisateur avec le titulaire du droit ».⁶¹¹

In view of the above, the express recognition of the imperative character of statutory limitations may not encounter as much resistance on the part of European lawmakers as one might initially fear. Should the European legislator decide to declare limitations on copyright and related rights imperative in contractual relations, two issues should still be addressed: first, whether all limitations recognised in Community copyright law should be declared imperative; and second, whether such a declaration should apply to all types of contracts, irrespective of whether they are the result of a negotiation process or not.

With respect to the first question, the argument has often been made in the legal commentaries that while limitations represent the legislator's acknowledgment of the users' legitimate interests, not all of these interests should be given the same weight.⁶¹² In order to ensure the coherence and consistency in the Community copyright regime, we suggest following a similar distinction as the one proposed in sections 2.4.2 and 4.5 above. Indeed, as we have seen in section 2.3.1 above, quite a number of limitations included in the Information Society Directive would probably qualify as “minor reservations”. As such, there would be no justification to grant these limitations an imperative character. On the other hand, the European legislator could consider recognising the imperative character of the limitations that reflect the users' fundamental rights and freedoms enshrined in the European Convention on Human Rights, as well as those that have a noticeable impact on the Internal Market or concern the rights of European consumers. In other words, the same set of limitations could be declared mandatory on all Member States, be subject to the rights owner's obligation under article 6(4) of the Directive to provide the means to benefit from them despite the application of a TPM, and be declared imperative in contractual relations. This proposal could be without prejudice to article 6(4), fourth paragraph, of the Information Society Directive, which could remain unaffected. However, such a three-tiered regime would safeguard the integrity of the European legislator's policy goals with respect to the users' interest. For, if the legislator has deemed it appropriate to limit the scope of copyright protection to take account of the public interest, there would be no reason in principle why private parties should be allowed to derogate one way or another from the legislator's intent.

Concerning the second question of whether the imperative character of the limitations on copyright and related rights should be made opposable to all types of contracts, the risk of such a

⁶¹⁰ See for example, in the Netherlands: *De N.V. Drukkerij «de Spaarnestad» v. Leesinrichting 'Favoriet'*, HR, 25 January 1952, NJ 1952, No. 95; *Stichting Stemra v. Free Record Shop B.V.*, HR 20 November 1987, NJ 1988, p. 280, AA 1989/38, p. 941-948; in Germany: BGH, decision of 6 July 2000 – I ZR 244/97 (*Microsoft OEM Licence*).

⁶¹¹ Lucas/Sirinelli 2006, p. 309.

⁶¹² Janssens 2005, p. 510; De Werra 2003, p. 330; Guibault 2002, p. 110; T.C. Vinje, “Copyright Imperiled?”, 1999/21 *Eur. Intell. Prop. Rev.* pp. 192-207, at p. 207; P.B. Hugenholtz, “Fierce Creatures – Copyright exemptions: towards extinction?”, IMPRIMATUR Consensus Forum, Amsterdam 1997.

broad rule would be that it might frustrate the negotiation and conclusion of valuable contracts.⁶¹³ The principle of freedom of contract and party autonomy should prevail wherever it does not conflict with public policy or public order. When a licensor and a licensee negotiate with a view to concluding a bargain, they usually understand the nature of their respective rights and obligations, including those rights that the licensee agrees to forego. In principle, neither party would enter the agreement if the bargain were not favourable to each of them in the circumstances. On the other hand, the widespread use of standard form contracts has the potential to severely upset the traditional balance established by copyright law and of standing as an obstacle to the accomplishment of the full purposes and objectives of the legislator's public policy. These contracts typically attempt to redefine the boundaries of the copyright protection. Consequently, limitations should be declared imperative only with respect to standard form contracts. This proposal would actually coincide with the position adopted in Denmark, where limitations cannot be unilaterally contracted out by way of imposing restrictive terms and conditions.⁶¹⁴

5.4.2.4 Promoting the adoption of codes of conduct

As a last possible option, which could be combined with the previous options, Member States might encourage industry players to develop codes of conduct, which would promote the adoption of fair contractual terms. Self-regulation of the private sector could be more efficient, better fit the electronic environment, and reduce rule-making and enforcement costs. An example could be taken from the Directive on electronic commerce that promotes the adoption of codes of conduct in relation to the conclusion of electronic contracts and the notice and take-down procedures elaborated with respect to the liability of on-line intermediaries. An additional aspect of this self-regulatory mechanism could deal with the issue of on-line contracting on copyrighted material, and might codify certain imperative user freedoms.

Recommendations

Wherever the European legislator has deemed it appropriate to limit the scope of copyright protection to take account of the public interest, private parties should be prevented from unilaterally derogating from the legislator's intent. To avoid an expansion of the already noticeable restrictive online practices, the European legislator could consider the two following options:

- To declare the limitations described in section 2.4.2 imperative inside standard-form agreements. To this end, a provision could be introduced in the copyright legislation according to which any unilateral contractual clause deviating from the limitations on copyright and related rights would be declared null and void. In contrast to a provision in the consumer protection law, a provision in the copyright act would benefit all categories of users who are confronted with restrictive clauses in standard form contracts, and not only consumers.
- This proposal could be without prejudice to article 6(4), fourth paragraph, of the Information Society Directive, which could remain unaffected. In other words, rights owners would not be obliged to provide users with the means to exercise limitations on copyright with respect to works that are protected by technological measures, but made available on-demand subject to agreed contractual terms. Accordingly, rights owners would either negotiate the terms with users or would present standard form contracts

⁶¹³ Guibault 2002, p. 194.

⁶¹⁴ See Part II of this study, Report on Denmark, p. 167.

that do not deviate from the limitations on copyright. This solution would preserve the principle of freedom of contract.

- To stimulate the development and acceptances of codes of best practices in the area of online copyright contracts, which might warrant a basic set of user freedoms.

6 Summary and conclusions

The aim of the Information Society Directive was to foster growth and innovation of digital content services in the European Union. Part I of this study therefore assesses the impact of the Directive on the development of online business models. This was not an easy task, for a variety of reasons. In the first place, the implementation process has only recently been completed in important Member States, such as Spain and France. Other Member States have only between one and four years of experience with the norms of the Directive. The short time frame between implementation and assessment makes it difficult, if not impossible, to measure the actual impact, if any, of the norms of the Directive on the actual business decisions of market players.

The authors of this study have therefore resorted to a methodology that might predict, rather than actually describe the impact of the Directive. Based on the principal goals of the Directive, as reflected in its legal history and recitals, we have defined a benchmark test consisting of five criteria that is likely to influence market behaviour by digital content providers and users. These five benchmark criteria directly relate to the quality of the legislative framework resulting from the Directive and correspond to the goals that the European legislator has set himself to achieve: (1) consistency with international norms, (2) actual level of harmonisation achieved, (3) legal certainty, (4) sustainability and (5) balance.

Following a general history of the Directive and an overview of current online business models in Chapter one, Chapter two examines the effect of the Directive on the provision of services from the perspective of the rights and limitations on copyright. Chapter three deals with the provisions on the protection of technological protection measures (TPMs) that were newly introduced in national legislation as a result of the implementation of the Directive. Chapter four is devoted to one of the thorniest issues of the entire Information Society Directive, namely the relationship between the application of TPMs and the exercise of limitations on copyright. Finally, Chapter five describes developing contractual practices, and examines the interrelationship between contracts and the limitations on copyright.

Based on the five benchmarks, our assessment of the Directive can be summarised as follows:

1. Consistency with international norms

The Directive offers right holders in the European Union a higher level of protection than is required under the international treaties that bind the Member States. The reproduction right is wider in its definition than it internationally is for authors (in the Berne Convention) and holders of related rights (WPPT, Rome Convention, TRIPS). The making available right conforms to WCT and WPPT norms, albeit that those instruments do not recognize a making available right for broadcasting organisations and producers of first fixations of films.

With regard to limitations, the Directive complies with the three-step test that is the internationally agreed 'limitations' limitation', but goes further than the international conventions by identifying a large number of specific (categories) of exceptions, many of which cannot be found in the international instruments.

The Directive's rules on technological protection measures (TPMs), probably the *pièce de résistance* of the entire Directive, deviate from the WIPO Treaties in two important respects. The nexus with copyright infringement that is essential to the WIPO regime has been mostly lost in the course of the adoption of article 6. This gradual drifting away from the copyright paradigm is reflected in the broad scope of the Directive's definition of 'effective technological measure', which includes access control mechanisms. Not only does the European TPM regime go much

further than is required by the WIPO Treaties, it is also out of step with corresponding laws of its main trading partners. The ‘facilitation’ obligation of article 6(4) is a unique, albeit laudable attempt to reconcile the interests of right owners and with those of certain potentially disenfranchised user groups.

2. Actual harmonisation

The standards set by the Directive regarding the rights of reproduction and communication to the public – both essential in the digital environment – have led to a satisfactory level of actual harmonisation of the laws in the Member States. Distinct national concepts and categorizations have remained, but this is to be expected as literal transposition is not required.

By contrast, the provisions on limitations and exceptions have not led to a similar result. Here, actual harmonisation has hardly been achieved, for a number of reasons. In the first place, the provisions of the Directive are mostly phrased in broad and categorical terms, leaving wide discretion to the Member States. Even worse, from a perspective of approximation, is the Directive’s failure to come up with a set of mandatory limitations. Member States are left with near-total freedom to pick and choose from the Directive list of optional limitations those that they see fit. The result is a mosaic of exceptions and limitations that vary from Member State to Member State, which might seriously impede the establishment of cross-border online content services.

The Directive’s rules on TPM’s have had a modest harmonizing effect at best.. Article 6(1) instructs Member States to offer ‘adequate legal protection’, without indicating the nature of such protection, thereby leaving States a broad spectrum of legislative solutions, varying from civil law to criminal law. Other key concepts in article 6 are highly ambiguous or have remained unarticulated, which has led, not surprisingly, to large variations in implementation by the Member States. For instance, while some Member States have maintained a certain nexus to copyright, as was originally foreseen by the European Commission, others are more faithful to the final article.

Even worse, the particularly opaque rules of article 6(4), which offer the Member States virtually no legislative guidance, have inspired the Member States to establish at the national level an array of different solutions, procedures and even agencies.

3. Legal certainty

The broad definitions of restricted acts given by articles 2 and 3 of the Directive appear to have increased legal certainty for players in the online content industry. The Directive has left little doubt that, in principle, authorization must be sought for any type of digital use of copyright works or other subject matter, including the ‘file sharing’ over peer-to-peer networks. The right of communication to the public that now includes an exclusive right of ‘making available’, serves as a powerful enforcement tool in the hands of right holders, both against infringing ‘file sharers’ and, more importantly, against ISP’s.

On the other hand, the combination of a broadly defined reproduction right and an equally broad right of communication to the public causes uncertainty about their interplay, especially when article 5(1) regarding incidental and transient copying is factored in. The overlap of both economic rights gives rise to confusion in the market place, and may result in unjust or inefficient licensing practices. Consultations with stakeholders have revealed that this overlap is not merely an academic problem, but that it has actually led to undue and unjustifiable ‘double payment’ to different right holders for unitary acts of exploitation, resulting in market distortions.

Article 5(1) is another source of uncertainty. In particular, the article’s requirement that a transient copy be without “independent economic significance” makes the line between infringing and non-infringing activities unpredictable.

As to limitations, the lack of harmonised rules directly affects legal certainty of market players offering online services across national borders. A serious consequence of the prevailing uncertainty regarding the scope of limitations in the digital networked environment has been to force users to negotiate the conditions of use of protected works with every single rights holder, for every territory involved. This clearly raises transaction costs.

Regarding TPM's, the vague wording of articles 6(1) and 6(2) of the Directive again leave much to be desired in terms of legal certainty. The wording of Article 6(4) is particularly convoluted and obscure. The provision fails to instruct Member States what 'appropriate measures' should be taken to protect disenfranchised users, or how long they should wait before taking action. Moreover, Member States are left with complete discretion as to the procedures leading up to such measures.

4. Sustainability

The harmonised right of communication to the public, one of the centrepieces of the Directive, has been purposefully defined in abstract technology-neutral terms, making it particularly suitable for future application in an environment of rapid and dynamic technological change. By focussing on the technology of actual copying, the harmonised right of reproduction, by contrast, is much less sustainable. This is certainly the case for article 5(1), the terms of which clearly appear to have been written with a certain state of technology in mind.

The limitations mentioned in article 5(2) and (3) are mostly phrased in technology-neutral terms. Notable exceptions are the provision on reprography, and the private copying regime that establishes a link to the 'application or non-application' of TPMs⁶¹⁵ More importantly, the sustainability of the list of limitations is undermined by its exhaustive character. A fixed and finite list of limitations cannot take account of future technological developments. A dynamically developing market, such as the market for online content, requires a flexible legal framework. While an exhaustive list offers more legal security to established rights holders and content providers, it may also hinder the emergence of new services and business models.

The sustainability of the Directive's TPM regime is also highly questionable. In particular, it raises concerns regarding its compatibility with the two other existing legal regimes that prohibit the business of trafficking in illicit devices: those of the Computer Programs Directive and the Conditional Access Directive. Apart from its opaque wording, the 'facilitation' rule of article 6(4) lacks sustainability in that it is not formulated in technology-neutral terms. The rule immediately collapses as soon as content is delivered online and on-demand on agreed contractual terms.

5. Balance

The broad scope of the right of reproduction, which according to article 2 encompasses direct or indirect, temporary or permanent reproduction, by any means or in any form, in whole or in part, gives right holders near-absolute control over acts which in the off-line world were never the right holder's prerogative. For users and end-users (consumers) the impact of this extensive right seems to go further than the limitation of article 5(1) accommodates.

While the substance and often broad wording of the limitations contained in the Directive may initially suggest a certain balance between the interests of rights holders and those of users, this superficial balance may be seriously undermined not only by the optional character of all but one limitations, leaving Member States discretion to arrive at 'imbalanced' legislative solutions, but also by the fact that they are not imperative and thus may be overridden by contract. This is exacerbated by the Directive's failure to directly correlate the legal protection of TPMs with acts

⁶¹⁵ Note that the issue of private copying is outside the terms of reference of the present study.

of copyright infringement. Thus the Directive fails to recognise that certain acts of circumvention may be done for entirely legitimate purposes. Moreover, it may serve as an incentive for the deployment of DRM for reasons well beyond the rationales underlying copyright protection, e.g. to protect de facto technical standards. Unfortunately, despite all the good intentions underlying article 6(4), another source of potential imbalance lies in its seemingly haphazard list of sheltered limitations.

Our assessment of the Directive thus leads to the following recommendations to the Community legislature.

Recommendations

1. Economic rights

The relationship between the economic rights conferred on rights owners should be clarified, giving particular attention to the question of the rights' overlap. Given that the right of communication to the public (including making available) was especially tailored to serve as the primary economic right involved in acts of digital transmission, it would make sense for the scope of the right of reproduction to be reduced in line with the normative interpretation of the right which has been advocated by scholars for several years.

Furthermore, the EC legislator should consider revising article 5(1). One way to achieve this is by reshaping the entire regulation on temporary reproductions, including both articles 2 and 5(1) of the Directive, by introducing a purpose-oriented definition of the concept of reproduction. This solution would eliminate the need for an additional limitation such as the current article 5(1). Alternatively, one might preserve the current model of a broadly defined right subject to a broad limitation. In the latter case, however, certain terms would require clarification.

The “no separate economic significance” requirement could be aligned with the “lawful use” criterion of article 5(1)(b). If a specific use of a work is lawful, technical reproductions necessary to enable such use should be deemed as not having independent economic significance (hence copyright relevance). The meaning of “lawful use” would also merit clarification.

2. Limitations

To remedy the lack of harmonisation with respect to limitations on copyright and related rights, the EC legislator might follow a two-tiered approach, which would take into account the principles of subsidiarity and proportionality. First, the current ‘optional’ list would need to be replaced by a shorter enumeration of mandatory limitations, reflecting fundamental freedoms, internal market considerations and the rights of European consumers. The second tier would be the adoption of an open norm leaving Member States the freedom to provide for additional limitations, subject to the three-step test and on condition that these freedoms would not have a noticeable impact on the Internal Market. To this end, the European legislator could consider clarifying that national lawmakers and, where relevant, national courts apply the three-step test in a flexible and forward-looking manner. This could be achieved by not interpreting the first and second steps too narrowly, and thereby making the third step, which allows a certain balancing between the interests of right holders and the needs of society, the focal point of the three-step analysis.

3. Technological protection measures

To remedy the lack of legal certainty and harmonisation with respect to the legal protection of TPMs, and to align the European provisions with the EU's international obligations under the

WIPO Treaties, the EC legislator should consider clarifying the legal framework in four respects. First, the prohibition on acts of circumvention should only find application in circumstances where the act of circumvention results in copyright infringement. Second, the relationship between articles 6(1) and 6(2) should be clarified. The prohibition on commercial dealings in devices and services should only apply if the result of such commercial dealings directly leads to acts of circumvention prohibited under article 6(1). Third, and as a corollary to the preceding two recommendations, it should be made clear that the protection provided for under articles 6(1) and 6(2) constitutes an ancillary form of protection rather than an exclusive right of the rights owner. Finally, the legal or physical person who applies the TPM on a work with the consent of the rights owner, i.e. usually the content provider or distributor, should be legally entitled to invoke protection against circumvention.

As to article 6(4), although the principle underlying this provision is certainly worth maintaining, it is in urgent need of simplification and clarification. A revised provision should not distinguish between the types of TPMs for which accommodation must be provided, nor between interactive or non-interactive modes of making a work available. A revised provision should furthermore identify limitations for the exercise of which accommodation must be provided on solid grounds and in an objective manner. A rational approach would be to give protected status to those limitations that, as our study advises, deserve mandatory status. In other words, limitations that reflect the fundamental rights and freedoms enshrined in the European Convention on Human Rights, those that have a noticeable impact on the Internal Market or concern the rights of European consumers deserve accommodation, while other “minor reservations” do not.

The determination of the conditions of application and its practical implementation might be entrusted to a European monitoring or observatory body. Further research should be carried out in order to define the possible contours of such a European body, and to examine whether such a body should co-exist with, or rather replace, existing national bodies.

In line with article 95d of the German Copyright Act, a revised article 6 should oblige content providers to disclose the scope and characteristics of the DRM protection they use, so as to properly inform consumers.

4. Contracts

Private parties should be prevented from unilaterally derogating from the EC legislature’s intent, as reflected in statutory rights and limitations. To counteract emerging unfair online practices, the legislature could consider declaring null and void any unilateral contractual clause deviating from those limitations that, as our study advises, deserve mandatory status. Moreover, measures should be taken to promote the development and acceptances of codes of best practices in the area of online copyright contracts, which would warrant a basic set of user freedoms. While these two options would hold back the proliferation of restrictive online standard form contracts, it would nevertheless preserve the parties’ freedom of contract.

In sum, it is fair to conclude that the Directive has at best only partly achieved its main goal of promoting growth and innovation in online content services. As our benchmark test has revealed, the Directive deserves particularly low marks for its (lack of) harmonising effect and its (lack of) legal certainty. While the harmonised right of communication to the public is a model of technology-neutral regulation, the Directive’s convoluted rules on TPM’s have little more to offer to the Member States and its market players than confusion, legal uncertainty and disharmonisation. While the Directive’s regime reflects the EC’s faith in a future where DRM and contract rule, it is ironical to observe that the main stakeholders themselves seem to have lost

their belief that the answer to the machine actually lies in the machine.⁶¹⁶

⁶¹⁶ 'EMI mulls lifting online-music restrictions', Wall Street Journal,
<http://online.wsj.com/article/SB117098284722103100.html>;
'Jobs Calls for End to Music Copy Protection', New York Times,
http://www.nytimes.com/2007/02/07/technology/07music.html?_r=1&th&emc=th&oref=slogin

Annex 1

**Workshop on the Impact of the Information Society Directive
on Online Business Models**
Berlin, June 9, 2006

Summary of the Discussions
Prepared by Mara Rossini (IViR)

On 9 June 2006, a fact-finding workshop on the impact of the Information Society Directive on online business models was held in Berlin, which was hosted by Berlecon Research. Participants included representatives from content providers, phonogram producers, music publishers, song writers, online service providers, libraries and consumer organisations, as well as experts in the field of DRM and academics. The discussions were divided into two parts. The first dealt with the impact on business models of the rights and limitations laid down in the Directive. The second related to the anti-circumvention rules the Directive prescribes. These two parts were subsequently divided into four different issues. The first issue focused on the Directive's track record in encouraging the emergence of online business models, while the second invited participants to identify the negative effects, so far arising from its provisions. The third and last points respectively concentrated on the benefits and disadvantages of the anti-circumvention rules of the Directive. Technical Protection Measures (TPMs) are now widespread and the question put to the participants was whether legally protecting these technological tools has been to the advantage or to the detriment of innovative online business models. This report summarises the observations made during the roundtable following the points made during the discussions. To set the context, the main rights introduced by the Information Society Directive were briefly recalled, after which participants⁶¹⁷ fully engaged in the discussions.

I. Impact of rights and limitations: are they conducive or an impediment to the deployment of online business models?

Impact of rights

Before delving into the core of the matter, the current status and purpose of the Directive were briefly summarized. It was recalled that the Directive was adopted in 2001 and has since been implemented in nearly all Member States. However, at the time of the workshop France and Spain has still not completed the implementation process. As a result, the Commission was unable until now to produce the review prescribed by art.12 of the Directive. The Directive's was to harmonise the three main economic rights, namely, the right of reproduction, the right of communication to the public, which includes the right of making available (a first in certain Member States such as Germany), and the distribution right. The last of these rights was not considered throughout the day because it is considered more relevant to the distribution of physical copies. Great emphasis on the contrary was placed on the right of making available to the public which lies at the heart of online activities. It was noted that the harmonisation of these rights pursued goals outlined in recitals 4 and 5 of the Directive: increased legal certainty and a high level of protection for intellectual property in the interest of enhanced creativity and innovation, a competitive European industry and ultimately the emergence of new business models. When asked if these objectives have thus far been achieved, participants agreed the

⁶¹⁷ Participants were assured Chatham House rules would apply to the session. Consequently, their observations are reported throughout this paper on an anonymous basis.

Directive has had an overall positive impact on the emergence of new online business models.

The right of making available

There was general consensus as to the Directive's merits in providing legal certainty and in clarifying the rights by expressly identifying them. Consequently, content could be offered through mobile services as well as online services and companies operating on the basis of a stock of the very rights introduced by the Directive were created whereby simple models for permanent downloads can freely flourish. In addition, such processes as streaming and downloading digital material, the status of which would in some countries have been uncertain before the adoption of the Directive, are now certainly covered by exclusive rights. Also, though many contracts were in need of redrafting (especially between authors/performers and publishers/producers), this legal framework of the Directive has led to increased confidence on the part of industry players. Contracts entered into with the intent of acquiring content from providers can now be drafted along clear lines.

A difficulty, noted is the accurate qualification of rights. In particular, broadcasting rights and interactive rights falling within the category of the right of making available tend to be easily confused.

In several Member States, the right of making available as laid down in the Directive was simply a confirmation of an already existing right rather than a novel right. By contrast, the extension of the right of making available to neighbouring rights holders was generally perceived as a breakthrough, and was regarded by some participants as one of the Directive's real achievements. Record labels who now own related rights can now enter the licensing business. It was suggested that the introduction of the right of making available might have initially confused the recording industry which rather than licensing content was accustomed to merely selling physical products containing content. It was contended that the emergence of new online business models has been, and to a certain extent still is, inhibited by the recording industry's reluctance to relinquish its dominant position in the market and its inherent reluctance to innovate.

Besides the recording industry, the role played by collecting societies in the emergence of innovative online business models was also mentioned. Participants remarked that there are new possibilities for the management of rights, and observed that there is now an alternative to entrusting management of rights to collecting societies as music publishers, for example, can choose to license content individually rather than collectively. On this very issue, a need for greater transparency on the part of collecting societies was stressed. Also, the creation of one-stop shops would significantly facilitate negotiations. Tying into this, one participant anticipated rights management information would soon become a major issue in the development of online business models. Access to this information, it was predicted, will become an important driver for a variety of business models.

Though participants considered the incidental roles played by the recording industry and collecting societies in the emergence of online business models, they especially dwelled on the effects of the Directive itself in their attempt to provide an answer to the questions at hand.

While there was consensus as to the overall welcome effect of the Directive, notably due to its laying down a harmonised making available right, doubt was expressed as to whether the Directive can directly be credited for the creation of new business models. The Directive has not, properly speaking, fostered new business models. It was argued that in general all the rights laid down in the Directive already existed before its adoption. The example of German copyright law was taken as it provided right holders with all the rights required for online exploitation of content, including the right of making available, before the Directive was implemented.⁶¹⁸ In

⁶¹⁸ The making available right was recognised by the BGH shortly before implementation, albeit in an obiter dictum; BGH GRUR 2003, 958 – Paperboy.

practice, business models precede the legal instruments meant to frame them. These models merely look to the law when they are in need of being legitimised. Therefore, in this respect, the Directive has had no real impact on ways of doing business. It was felt mixing market considerations and legal considerations should be avoided. This would make the conception of new business models a more arduous task as it would be clouded by the wrong questions.

As an increasingly popular model for offering content online, whether legal or illegal, peer-to-peer dissemination was also discussed. Participants could not attribute to the Directive any concrete impact on massive unauthorised peer-to-peer use. It was argued that the only real problem here was securing the interests for the right holders and setting the legal boundaries to such use. In addition, it was remarked that legal peer-to-peer networks such as *Imesh* and *Peer Impact* have been developed to counterbalance illegal uses so the real problem is rather that of enforcing copyright when infringement occurs. It was also noted that the losses inflicted on the industry by peer-to-peer file sharing are unclear. Other means of calling a halt to illegal use should be explored rather than compromising individuals' privacy.

The right of reproduction

Attention was then turned to the reproduction right which was also broadly harmonised by the Directive, and now expressly included the making of temporary copies, subject to the exception of Article 5(1). Participants' views on this right somewhat diverged when discussing its effects on the emergence of innovative business models. To some it was a crucial right, licensing of which allowed to maintain a revenue flow on the Internet. To others, it was largely superfluous in the digital environment as due to its broad scope it now overlapped with the right of making available to the public.

As several participants observed, the broad scope of the reproduction right, which now includes acts of temporary copying, is increasingly invoked as a basis for claims by right holders to obtain remuneration for the online dissemination of content (where before remuneration claims were based only on the rights of communication to the public). In practice this implies that content providers are required to seek multiple licenses, often from different rightholders or collecting societies. This is perceived by many participants as an unsatisfactory situation, and an undesirable side effect of the Directive.

Territoriality

The question of territoriality despite EU efforts to create an Internal Market was also considered. Exclusive rights are still drawn along national borders and participants were asked if this was a matter for the European lawmaker to address in the interest of promoting new business models. Content providers and users expressed their enthusiasm for Community-wide licensing which also extended to the idea of a European copyright. A European license for Internet and mobile services would facilitate the emergence of innovative business models as diverging local laws were found to hinder effective cross-border licensing. Cultural differences in copyright such as different regimes governing the private copy exception from country to country were cited as obstacles to be overcome. On the other hand, some participants stressed the importance of protecting cultural diversity, as reflected in copyright system drawn along national borders.

It was questioned whether such a unified copyright regime made sense, since it is doubtful it would really change corporations' commercial practices of exploiting intellectual property on a territorial basis. Others insisted that a European copyright would enhance the provision of cross-border services, while the remuneration would vary from country to country. Lastly, it was argued a unified European copyright regime would not solve all complications as many legal aspects relevant to the provision of content-based services would remain in the realm of national law, such as fiscal matters. Also, though not averse to the idea of a unified regime, one participant preferred the status quo to a European regime that may turn out to be detrimental to consumers.

Impact of limitations

The session on the positive effects the Directive has had on the emergence of innovative business models was followed by a closer look at the negative impact, if any, its provisions have had on online business. It led participants to analyse in particular the impact of the limitations laid down in the Directive. It was recalled that the Directive has not provided a clear framework for limitations. Of the 21 exceptions to copyright enumerated only one is mandatory, the rest being a list of optional limitations from which national legislators may 'pick and mix', according to national priorities. Among the Member States having already implemented the Directive, some have added a number of exceptions in their legislation, whereas very few have deleted existing exceptions not on the list.

Limitations from the industry's perspective

Industry representatives unanimously expressed discontent with the way the Directive has dealt with limitations. The Directive's optional list has not increased legal certainty. Since each Member State has its own understanding of what is to be considered a limitation to copyright and has developed its own case law in the matter, content providers must ascertain the exact status of the law in every Member State at which their services are directed. As one participant put it, it is difficult to fathom the benefit of 21 optional exceptions which after transposition not only vary from one state to another, but also fail to provide the kind of flexibility needed to pursue online activities.

Relating their experience in day-to-day business activities, participants made clear that this aspect of copyright in practice is often ruled by contractual relations which, to further complicate matters, obey different legislations. It was pointed out the Directive provides for rights and limitations without prejudice to contracts as affirmed by its Art. 9. As a consequence, many of the exceptions to copyright are negotiated on a contractual basis. In practice, existing contracts entered into are almost never as generous as national law whereas the overwhelming majority have been drafted along more restrictive terms. For (particularly smaller) stakeholders for whose business exceptions are crucial it is an impossible task to negotiate contracts on a national basis. Because limitations to the rights held by copyright owners are governed by national legislation, it is necessary to look at the law of the country from where the offer originates as well as all the countries where the recipients of the digital content are based. In addition, having to negotiate with each individual publisher in each country translates into hundreds of contracts.

It could be concluded from these accounts that business has lost sight of statutory limitations, and is overwhelmed by contractual provisions as contractual practice increasingly seems to prevail over the limitations to copyright listed in the Directive.

Limitations from a consumer's perspective

From the consumers' angle, it was said to be equally daunting to deal with digital content. Consumers are being treated as potential copyright 'pirates' and are asked to click "I accept" marking the beginning of a slew of restrictive terms concealed in the small print imposed by (usually very large) content providers. Moreover, it is quite confusing for consumers to identify the mass of different terms attached to the licenses offered by content providers. It was therefore argued that correct and clear labelling as a means of giving consumers an opportunity to shield themselves from legal reproach cannot be the only tool to safeguard consumers' interests. The example of Norway was given in this context where the Ombudsman has given Apple until August 1, 2006 to defend itself against the accusation that some of its iTunes' terms and conditions are unreasonable. In this case, the Ombudsman ruled on the basis of the law prescribing fair contract terms. However the Norwegian legislator has now taken the issue a step further as Parliament is bracing itself to include digital products in the law of consumers. Many participants agreed that copyright law is ill equipped to deal with the protection of consumer

rights, and that this should be first and foremost a matter of consumer law instead. Another example was given pertaining to French case law where judges have ruled in favour of users taking into consideration legal provisions of consumer protection. The participant who put forward this example deplored the fact that French judges display a tendency to include even apparently illegal material downloaded from the Internet in the private copying exception. This, it was suggested, is too broad an interpretation and private copying should only be allowed on the express condition that the material is taken from a legal source.

Alternatives to the Directive's optional limitations

The alternative to the a long list of optional limitations, which has resulted in a diverging exceptions landscape across the EU, could be a relatively short list of mandatory exceptions, some of which might be declared non-overridable. Many participants agreed this would probably simplify business practices and encourage online business models. Some worried however that such a list may end up having a negative impact on the remuneration due to authors, and suggested a larger role for statutory licenses and collective rights management instead..

Another alternative that was advanced was to move closer to the 'fair use' concept used in the United States, which would allow for more flexibility than the 'closed' list of the Directive currently provides. This might be conducive to the development of new business models, particularly in a very dynamic and unpredictable as is the Internet.

Thus, this part of the session ended on general consensus as to the necessity of revising the Directive as to its provisions pertaining to limitations. Most participants favoured the initial idea of a mandatory list of limitations. Such a list would form a good and clear guide upon which to base the conception of future online business models. In addition, it would leave DRM with a viable role to play as clear-cut limitations can be easily identified ex ante, and thereby emulated in conditions of use. Others disagreed and remarked that such technical tools would always remain too rigid, and unable to identify what use is actually being made of digital content, and by what users.

II. Impact of anti-circumvention rules

It was on this note that the second part of the day can be recounted as participants proceeded in sharing their views on the role played by the anti-circumvention of TPMs rules on the emergence of online business models. Here again, the object of the exercise was to determine whether and how the anti-circumvention rules provided for in the Directive have had an impact on online business models. Were the latter encouraged by such rules, were they on the contrary thwarted, was there any effect at all? The answer was ambivalent as participants generally could not say what concrete impact these rules have had on online business models nor whether the situation would have been different had these rules not been included in the Directive.

Discussing "effective" TPMs

One group of participants believed the anti-circumvention rules have unequivocally laid the foundations for online business models to thrive. One participant noted hackers have stopped posting circumvention methods on the Internet and felt the industry had certainly benefited from these rules. Copyright owners were certainly more inclined to license content if licensees agree to apply TPMs to technically protect the licensed content. Licenses being more easily obtained translates into more legitimate online business models being launched. Conversely, some right holders (notably record companies) nowadays deny licenses to service providers that do not apply DRM technology.

Some drawbacks were mentioned, however. First, the complaint made earlier of having to deal with as many contracts as there are content owners, or right holders, was repeated. The

Titanic task of adapting solutions to the wishes of each content owner was said to be unbearable. One participant even used the word “paranoia” to describe how major record labels are now so concerned with unauthorised uses that they sometimes refuse to enter into licenses with users without imposing terms which oblige licensees to track down and neutralise the PCs of every users found to circumvent TPMs.

Second, the Directive was criticised for failing to properly define the notion of what constitutes an “effective” TPM. This was found by some participants to entail an uncertain legal situation for consumers who cannot be held responsible for second-guessing which uses are permitted and which are not and may circumvent an “ineffective” TPM. This is especially relevant when a distinction is to be made between rental services such as *Napster* and services that sell the content such as *iTunes*. In the first case use is instinctively known to be restricted, in the second case, a sale marks the beginning of the user’s property of the content, where restrictions to acquired content are not accepted in the same way. From a consumer standpoint, one participant stated it was unacceptable to impose DRM on purchased content. It was suggested the EU could alleviate the uncertainty by recommending an industry-wide labelling standard to clearly inform consumers of the use they are entitled to make of the content.

Access and usage of digital content were agreed to be two very different issues which Digital Rights Management techniques cannot deal with in the same manner. In fact, one participant rejected DRMs as an effective means to foster online business models. DRMs, this participant went on to say, are expensive and frustrate consumers who should be able to use their purchased content in any way they please provided they do not commercially exploit it. Other participants, on the contrary, stressed that in the interest of accurately remunerating creators it is essential to control the use that is being made of digital content and that certain activities such as library downloads, of a temporary nature, are dependent on DRMs.

Questioning the legal protection of TPMs

The workshop went on to discuss the impact of Art. 6 of the Directive. Several participants were rather sceptical about the necessity of having this new legal layer of protection for TPMs. One participant observed that where TPMs are concerned there are in reality several layers of (legal and technical) protection which make Art. 6 par.1 superfluous. This participant pointed out that copyright already covers the content, which is itself protected by a technical layer which in turn is protected by anti-circumvention legislation. If these three layers are not enough then surely the additional protection on the basis of contractual terms prohibiting circumvention of TPMs should do the trick.

Another reason for finding the system to be essentially flawed was that the legal protection against circumvention is given to rightholders whereas the intermediaries, who are usually not rightholders, are in reality the ones applying them. In addition, some participants felt Article 6 had been unnecessarily divided into circumvention and facilitating circumvention. It was recalled that certain countries such as Australia and Japan had confined themselves to prohibiting the act of facilitating circumvention. This was seen by some as a viable option because enforcing the actual prohibition of circumvention was an unrealistic task without the risk of serious infringement of privacy. These participants were, however, countered by those who believed the one could not, in practice, effectively function without the other.

Some participants pointed out that in practice providers of DRM technology sometimes resort to pragmatical solutions to contain circumvention. For instance, Macrovision, rather than taking cases of circumvention of protection measures to court, has neutralised the very technology that allowed it, by buying it and preventing its circulation in the market.

Another example was that of the IFPI and a German library who had struck a deal in the latter’s ambition to archive music. By the terms of this contract, the German library was allowed to circumvent TPMs instead of being given the key for decryption. The same practice was said to be found in Denmark where legislation has made it legal for libraries to circumvent TPMs. This

started the discussion on Article 6(4) of the Directive, which obliges right holders using TPM's to take certain voluntary measures to secure the interests of certain users, in the absence of which Member States must intervene. It was generally felt that the Directive has not been clear enough on this point and should be more precise as to how and when measures must be taken either by copyright holders or by Member States. Such aspects as whether copyright owners must be active or passive, i.e. wait for a formal request or not, in granting access were cited as examples.

These discussions on the impact anti-circumvention rules of TPMs have had on online business models were concluded with one last point relating to the anti-competitive streaks observed in the application of TPMs. Several participants took aim at the perversion of these anti-circumvention rules introduced by certain corporate practices. It was indeed suggested that certain companies are using these rules to protect their own business models rather than protecting the content offered by their services as is intended by the Directive. *Apple* notoriously links *Itunes* to its *Ipod* and has thus maintained its dominant position in the market. This observation triggered a debate on interoperability and the fact that codecs are often linked to TPMs.

Interoperability issues

Most participants deplored the lack of interoperability that some companies are artificially maintaining thereby tying consumers' use of digital content to certain business models. This was said to be unacceptable from a consumer's point of view as the purchase of content was closely linked to the desire to use that content on many different devices. The phenomenon of attaching codecs⁶¹⁹ to TPMs, as the movie industry is now displaying, was analysed as an abuse of the anti-circumvention rules. The only ones truly benefiting from this practice are the platform and technology vendors. Codecs, described by one of the participants as "a lesser form of DRM", are being misused and are worth being studied from a competition law perspective. Though it was predicted new business models would emerge on the basis of TPM-free platforms, as the e-music service would seem to herald, there were significant developments which warranted measures be taken now.

Firstly, codecs undermine the long-term use consumers can make of their digital content. Indeed the tendency observed is that of updating them after a couple of years which could prevent users from gaining access to the content they already possess. This carries with it serious consequences for archiving services which could end up with obsolete material if access to content were denied by technological means at a later stage. The same difficulties await content back-up services which would not be viable in an environment where codecs vary on a five-yearly basis. One participant believed such back-up services will play a big part in future transcoding services if the practice of updating the codecs does not change. Other participants argued that codecs may well be an ephemeral phenomenon that will eventually be killed off by consumers. The example taken here was the now near-extinction of TPM application on CDs as a result of consumers' refusal to purchase TPM-protected CD's. However, if consumer behaviour failed to produce such an outcome then a standard introduced by EU authorities could be envisaged. It was in this context that the French copyright bill was cited which authorises DRM on the condition the source be revealed.

A few participants complained TPMs were often portrayed too negatively, whereas they are in reality essential to the emergence of online business models. One participant saw it as precisely

⁶¹⁹ "A Codec is a device or program capable of performing encoding and decoding on a digital data stream or signal. The word 'codec' is a portmanteau of any of the following: 'Compressor-Decompressor', 'Coder-Decoder', or 'Compression-Decompression' algorithm. Codecs encode a stream or signal for transmission, storage or encryption and decode it for viewing or editing." Definition taken from Wikipedia, available at: <http://en.wikipedia.org/wiki/Codec>, last visited on 14 July 2006.

what they were intended as, namely, a means of protecting copyrighted content and in no way an inhibitor of new business models. Another did not agree with the interoperability mentioned, and failed to see why interoperability would be a ‘god-given’ right of consumers. The examples of *Xbox* and *Playstation* were given here which have apparently met no resistance on the part of consumers, even if the games can only be played on proprietary platforms.

This part of the session closed on the idea of reintroducing copyright formalities, which might entail an obligation to publicly register metadata. This suggestion derived from the observation made by a participant that beyond content, TPMs can also be used to protect metadata about content. Some participants welcomed this as a means of simplifying the task of identifying rights. Others, notably the content-owners, felt this would be “unworkable” both financially and administratively.

Closing remarks

It could thus be concluded after the day’s discussions that the exclusive rights laid down in the Directive have indeed contributed to increased confidence in emerging digital markets and online business models. This conclusion however was to be mitigated by the fact that many of these rights already existed prior to the Directive, albeit not in a harmonized European framework. An unequivocal innovation could be seen in the creation of a right of making available for related rights owners. What the right of making available has undoubtedly resulted in is a large-scale redrafting of contracts to adapt to online markets. However, applying the terms of the Directive does not always lead to clear-cut results. To cite one example, it remains unclear and entails practical problems whether streaming is to fall under the right of making available or if it is to be counted under broadcasting rights.

The codification of a broad right of reproduction that includes temporary copying is widely perceived as having created obstacles to budding online business models. This stems from the fact that it has created an overlap with the right of communication to the public, which adds complexity to the licensing process and sometimes a need for ‘double’ licenses from concurrent rightholders or collecting societies. Indeed, it could be said that this aspect of the Directive has raised transaction costs. It was therefore suggested to further restrict the right of reproduction to the realm of physical copies.

The need to simplify cross-border licensing which is still tributary to national laws was also broached. One way to deal with this was to promote Community-wide licensing, as was being attempted by the Commission’s Recommendation. Another, more fundamental approach would be to truly unify copyright norms by establishing a unified European copyright regime.

A clear need for a higher degree of harmonisation was certainly felt in the area of limitations. Most participants seemed to favour the introduction of a list of mandatory exceptions, possibly including certain non-overridable limitations. However, because many such exceptions are informed by cultural considerations, not everyone agreed such a mandatory list is desirable. Those who favoured a rapprochement with the American ‘fair use’ concept were countered with the argument that its flexibility could undermine legal certainty. It was agreed that consumer interests which are also reflected in certain exceptions to copyright should be dealt with primarily in the framework of consumer law.

The application of TPMs, in turn, has likely fostered the emergence of online business models as investment in online subscription services has apparently increased. However, many doubt the necessity of adding an additional legal layer of protection through anti-circumvention rules. It was observed that there is not much case law in the EU on these issues, and the little that has emerged is directed against the intermediaries rather than circumventing consumers. It was also stressed that the current definition of what constitutes an ‘effective’ protection measure leaves to be desired as it is defined in a circular way. Art. 6(4) is also a mystery to many since it remains unclear as to how it must be interpreted with regard to the obligations of the right holders when faced with users invoking the exceptions laid down by the Directive.

In any event, DRM must be made more transparent in the interest of both emerging business models and consumers. In this context, the need to protect consumers' privacy was underscored. Finally, a dangerous tendency was observed to use TPMs to protect business models rather than content. It was agreed this perverted the purpose of the Directive which is to protect TPMs to benefit of rightholders. A standardisation of TPMs could help to avoid such abuses. Legal solutions to this problem, however, are best found in consumer law and competition law rather than copyright law.

Annex 2

Berlecon Research Interview Partners

Interviews conducted in July and August 2006

Name and title interview partner	Affiliation
Valtteri Niiranen (Director) Sophie Scribe (Deputy Director Legal Affairs)	European Newspaper Publishers' Association
Anne Bergman-Tahon (Director) Olga Martín Sancho (Legal Advisor)	Fédération des Editeurs Européens
Uwe Schwersky (Deputy Director of the Readers Services Department)	State Library Berlin
Heijo Ruijsenaars (Legal Advisor)	European Broadcasting Union
Beat Knecht (CEO) Sugih Jamin	Zattoo
Johan Englund (CEO) Mark Dennis (Licensing Manager)	Musicbrigade
Karsten Popp (Senior Manager Public Policy)	Musicload
Pascal Grierson (CEO)	UBC Media
Doris Schönhart (Senior Legal Adviser)	Telekom Austria
William Valkenburg (Content Manager)	Nederlandse Omroep Stichting
Roger Vercammen (External Relations Europe)	Sony Europe
Markus Petersen (General Manager Marketing & Sales)	Naxos
Susanne Lutz (Online Accessibility Adviser)	German Federation of Blind and Visually Impaired People
Stefan Gradmann (Director)	Hamburg University Press
Peter Weber (Legal Counsel)	Zweites Deutsches Fernsehen (ZDF)
Andreas Schweizer (Legal Counsel)	Tiscali Business

Participants in the Workshop on the Impact of the Information Society Directive on Online Business Models

Berlin, June 9, 2006

Name and title interview partner	Affiliation
Sascha Lazimbat (Managing Director)	Zebralution
Till Kreutzer (Lawyer and Counsel)	www.iRights.de and Büro für informationsrechtliche Expertise
Berndt Dugall (Chairman of the Board)	Subito
Jenny Vacher (General Counsel)	ICMP/CIEM
Chris Barlas (Senior Consultant)	www.rightscom

Name and title interview partner	Affiliation
David Ferguson (Chairman of the Board)	British Academy of Composers & Songwriters British Music House
Dr. Oliver Schwenzer (Vice President, Business & Legal Affairs)	Arvato mobile
Benjamin White (Copyright Compliance and Licensing Manager)	British Library
Lars Grøndal (Adviser / Associate Lawyer, Legal Section)	BEUC
Bunmi Durowoju (Acquisitions Manager-Europe)	Microsoft
Florian Hensel (Manager Legal Affairs)	Sony Network Services Europe
Dr. Philipp-Christopher Peitsch (Senior Manager Legal Affairs)	Sony Network Services Europe
Maurizio Maria Monti (Legal Affairs)	Telecom Italia Media
Markus Petersen (General Manager)	Naxos

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