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The 2019 Directive on Copyright in the Digital Single Market: Some progress, a few bad choices, and an overall failed ambition

Séverine Dusollier

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COMMON MARKET LAW REVIEW

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Aims

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Managing Editor: Alison McDonnell

Common Market Law Review

Europa Instituut

Steenshuur 25

2311 ES Leiden

The Netherlands

e-mail: a.m.mcdonnell@law.leidenuniv.nl

tel. + 31 71 5277549

fax: + 31 71 5277600

Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden. The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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THE 2019 DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET: SOME PROGRESS, A FEW BAD CHOICES, AND AN OVERALL FAILED AMBITION

SÉVERINE DUSOLLIER*

Abstract

After four years of fierce debate, the Directive on Copyright in the Digital Single Market was finally adopted in April 2019. The legislative text aims at adapting copyright to the digital world, remedying some gaps and uncompensated uses of works and other subject matter, and enhancing some valuable uses through new or reaffirmed exceptions. Two provisions have been particularly contested. Article 15 creates a new IP right benefiting press publishers in their online news, in an attempt to force Google News and similar platforms to remunerate their use. Article 17 requires video sharing platforms, such as YouTube, to obtain a licence for any copyrighted content uploaded by their users or, by default, to filter such content when requested by rights owners. But the Directive has much more to offer, even though it might not succeed in securing the digital single market it promises.

1. Introduction

The extensive reform of the copyright regulatory framework that the EU initiated in 2015 with what was then called the “Copyright Package”, reached its legislative resolution in April 2019 with the adoption of the much-disputed Directive on Copyright in the Digital Single Market¹ (hereafter “the CDSM Directive” or “the Directive”).

The Directive’s journey has been rather unquiet, as readers may be aware. The fierce lobbying and media interest were unprecedented, with a lot of money poured into public campaigns and social networks posts, trying to influence EU civil society. The outreach of some economic operators, trying to influence the debate, was so vast that the 10-year old son of one of my friends, who is also a Member of the European Parliament, told her that

* Professor, Sciences Po Law School, Paris.

1. Directive (EU) 2019/790 of the European Parliament and the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, O.J. 2019, L 130/92.

“Article 13”² was a real issue! Opinions were also divided amongst the Member States and the European institutions, with the text being voted against by the EU Parliament at a crucial time of the adoption process, and many countries being hesitant as to their vote in the Council until the very last minute.

This sound and fury has overwhelmed the content of the legislative initiative itself and its attempts at building a more comprehensive copyright package for the EU. No less than three regulations and two directives constitutes a legislative agenda of an unmatched scope.³ Most of the texts in that bundle addresses specific and well delineated issues. In contrast, the CDSM Directive was intended to launch a profound reform of copyright rules on several fronts, as a sort of epitome of the overall objectives announced by the Juncker Commission in its Digital Agenda.⁴

Aligning with the goal of consolidating a Digital Single Market, the Directive pursues three specific targets, as announced in its third recital:

- adapting exceptions to digital and cross-border environment,
- ensuring wider access to content, and
- achieving a well-functioning marketplace for copyright.

Each axis is meant to be a robust part of the edifice of a digital single market. Focusing this contribution only on the most discussed parts of the enacted provisions, such as the new right in favour of press publications, or the regime applying to platforms such as YouTube, would miss important parts of the story. The Directive deserves better. Whatever its incompleteness, inconsistencies and defaults, its agenda is ambitious and profoundly

2. Which became Art. 17 in the adopted directive, and related to the exploitation of works of video-sharing platforms such as YouTube.

3. The whole package, launched in 2015, consists of the following legal texts in addition to the DSM Directive: Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market, O.J. 2017, L 168/1; Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 Sept. 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled, O.J. 2017, L 242/6; Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 Sept. 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled, O.J. 2017, L 242/1; Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organizations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC, O.J. 2019, L 130/82.

4. Communication from the Commission, *A Digital Agenda for Europe*, 26 Aug. 2010, COM(2010)245 final/2.

transforms what the European legislature has done in copyright so far. More fundamentally, this Directive marks the transition of the EU intervention from mainly harmonizing existing national rules and strengthening the rights of its creative sector, towards a genuine regulatory actor that purports to better organize a thriving European market and a fair society for creations, culture, and information. It remains to be seen if the measures laid down by the Directive are fit for that purpose.

This contribution is certainly far too long. It reflects the mammoth that the CDSM Directive has become and tries to disentangle its complexity by underlining the background of each of its provisions. Each part will follow one axis highlighted before, the adaptation of exceptions to better satisfy digital needs (2.), the enhancement of EU-wide access to creative content (3.), and by far the most contentious part, the achievement of a well-functioning marketplace for copyright, that aims at restoring (perceived) failures or unfairness of current balances between the different stakeholders (4.)

2. Adapting exceptions and other protections of legitimate uses

2.1. *From limitations to enabling devices for legitimate social uses*

A major change in the regime of limitations to copyright might have got lost in the overall discussion about the details of the exceptions enacted by the new Directive: from the 2001 Directive on the information society (hereafter “the Infosoc Directive” or “the 2001 Directive”) to the 2019 legislative text, exceptions – at least some of them – have mutated from mere limitations of exclusive rights to proper enabling devices sustaining socially-benefiting uses of works and creations.

In 2001, the objective was mainly to limit the cases where Member States could provide for an exception to the exclusive rights to a narrow and exhaustive list for the sake of harmonization across the EU.⁵ The primary concern was then to properly tame uses of works that could benefit from a copyright exception, so as to avoid their proliferation, which was perceived as a threat to effective copyright protection in the digital environment. At the

5. The first proposal only listed 9 admissible exceptions. Member States protested and decided to maintain their own national and somewhat discrete exceptions, by extending the list in the Directive, with the result of a final list of 23 exceptions. On the lack of harmonization of exceptions, see Hart, “The proposed Directive for Copyright in the Information Society: Nice rights, shame about the exceptions”, (1998) EIPR, 169–171; Hugenholtz, “Why the copyright directive is unimportant and possibly invalid”, (2000) EIPR, 499–502; Guibault, “Why cherry-picking never leads to harmonization”, 1 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* (“JIPITEC”) (2000), 62.

time, the Internet was still in its infancy as a channel for dissemination of works, with the web 2.0, where transformative and creative uses of works by Internet users would eventually thrive, only nascent. Uses of works on the internet, even for legitimate purposes, were considered “open doors” to uncontrolled circulation of works and to piracy. A few cases of authorized uses, limited by many constraints, were at first reluctantly admitted to the digital environment and the primary objective was to harmonize their existence across the Union. For instance, the Infosoc Directive allows for uses of works for private copying, quotation, parody, news reporting, illustration for teaching, some activities of libraries, adaptation of works for the benefit of disabled persons, and a few other minor cases. Each exception in that list was further constrained by strict conditions and requirements.

This harmonization objective largely failed. Due to the optional list in the 2001 Directive, Member States picked the authorized uses they wished to maintain or introduce in their copyright laws, and decided on their conditions for application in diverging ways.⁶ As a result, the conditions for making a quotation or an illustration for teaching might be different from one Member State to another, even though the ECJ has progressively recognized some exceptions as autonomous concepts of EU law that had to be interpreted uniformly.⁷ Such fragmentation stands in the way of valuable projects using works, such as cross-border e-learning programs, where the recourse to exceptions to justify the use of copyrighted works as illustrations might be difficult due to multiple applicable laws.

In the meantime, exceptions have gained momentum in public opinion or copyright scholarship as valuable tools. New uses have also emerged, and beg for acceptance despite copyright protection.

For all these reasons, the CDSM Directive now assumes that copyright exceptions should become enabling devices and not constraints imposed on valuable uses, such as education, access and preservation of culture and information, scientific research, or other socially positive interests, which should be enhanced in order to develop an information society for all.⁸ In other words, the exception is not just a derogation to the rule, it becomes a rule of its own to pursue certain objectives that prevail over the protection of authors and copyright owners. It is not just uses which are privileged, but some categories

6. Guibault, *op. cit. supra* note 5.

7. E.g. Case C-462/09, *Stichting de ThuisKopie*, EU:C:2011:397; Case C-145/10, *Painer*, EU:C:2013:138; Case C-201/13, *Deckmyn*, EU:C:2014:2132; Case C-117/13, *Eugen Ulmer*, EU:C:2014:2196.

8. Triaille, Depreeuw, Dusollier, Hubin, de Francquen, *Study on the application of Directive 2001/29/EC on copyright and related rights in the information society*, European Commission, 150 et seq.; Hugenholtz et al., *The Recasting of Copyright & Related Rights for the Knowledge Economy*, Study for the European Commission, 2006, 59–60.

of institutions are endowed with a regime favouring many of their dealings with copyrighted works. This is particularly the case with the so-called cultural heritage institutions (hereafter “CHIs”), comprising libraries, museums and archives, which, one directive after the other, have been granted a vast breathing space where they are entitled to digitize and even to provide access to a huge amount of copyrighted works, without the need for prior authorization from rights owners.

The increasing recognition of the public value of some exceptions started, in my view, with a strong political commitment of the European Union towards digital libraries and the digitization of the cultural and informational heritage of the European Union.⁹ In 2009, the EU Communication on Copyright in the Knowledge Economy¹⁰ signalled a major change, insofar as it focused only on uses of creative works by users and not on the strengthening of rights for creators or rightholders.

In the aftermath of this Communication, the orphan works Directive was adopted in 2012, as the first EU legislative text whose only purpose was to organize a regime limiting copyright and its exclusivity. Within the copyright package adopted during the last legislative period, the Directive and Regulation¹¹ transposing in the EU the obligations of the Marrakech Treaty on the access to works for visually-impaired people, equally consist in the setting up of a derogation to copyright for the benefit of a socially important category of users.

The CDSM Directive privileges some uses to a far greater extent than traditional rules or exceptions used to do, by granting those exceptions a twofold binding nature. First, their mandatory implementation by Member States should enhance their cross-border applicability and counter the negative impact their former optional nature may have had on the functioning of the internal market.¹² On the other hand, the newly adopted exceptions generally prevail over derogatory contract, which imposes them as legal rules to copyright and related rights owners.¹³

With that new context in mind, let us explore those new exceptions.

9. COM(2010)245 final, “A Digital Agenda for Europe”, at p. 30. The Comité des Sages, *The New Renaissance, Report of the Reflection group on bringing Europe’s cultural heritage online* (2011), commissioned by the EU to reflect on bringing Europe’s cultural heritage online, affirms that “Digitization is more than a technical option, it is a moral obligation” (at para 2.3.2.).

10. COM(2009)532 final.

11. Directive (EU) 2017/1564 and the Regulation (EU) 2017/1563, cited *supra* note 3.

12. See Recital 5.

13. See also the obligation in Art. 7(2) to preserve the newly enacted exceptions in the case of technological measures constraining the use of works, which extends what was provided in Art. 6(4) of the Infosoc Directive.

2.2. *Text and data mining*

2.2.1. *Notion and background*

Text and data mining (TDM) consists of automatized and electronic analysis of large amounts of data in order to extract information and patterns that cannot be processed or detected by human reading. Such data processing and knowledge management tools are now pervasive in many fields, from scientific research, pharmaceutical and medical domains, to journalism, information search and processing, so as to satisfy requests of consumer and internet users.¹⁴ Artificial intelligence, based on machine-learning, is also deeply reliant on data mining and analysing.

Technically speaking, TDM makes transient copies of data and any content embodying them in order to carry out its analysis. From a copyright point of view, this amounts to a reproduction due to the unfortunately all-encompassing definition of that right in Article 2 of the Infosc Directive.¹⁵ As all copies, irrespective of their purpose, permanence, transitory character or ancillary nature, are included in such a definition,¹⁶ copyright holders have argued that they were entitled to control such acts of reproduction of their works and have to grant prior authorization.

This is not the place to return to the vacuity of this argument. One could have defended instead that the reproduction is only technical and does not amount to an act of exploitation of the works themselves, but an exploration of their informational content.¹⁷ Furthermore, data are not protected by

14. On the particular use of TDM in Smart Disclosure Systems providing information to online consumers about their preferences and rights, see Ducato and Strowel, “Limitations to text and data mining and consumer Empowerment: Making the case for a right to ‘machine legibility’”, 50 *International Review of Intellectual Property and Competition Law (IIC)* (2019), 650.

15. Copyright grants a right of reproduction that extends to any act of copy, even transitory and of a minimal duration. An exception for temporary acts of reproduction, if economically insignificant, exists but would only partially cover activities of TDM. For a more complete analysis, Triaille et al., *Study on the legal framework of text and data mining (TDM)*, (2014) European Commission, available at <op.europa.eu/en/publication-detail/-/publication/074ddf78-01e9-4a1d-9895-65290705e2a5/language-en/format-PDF/source-116634807> (last visited, 15 Feb. 2020); Margoni and Kretschmer, “The text and data mining exception in the proposal for a Directive on Copyright in the Digital Single Market: Why it is not what EU copyright law needs”, 2018, available at <www.create.ac.uk/blog/2018/04/25/why-tdm-exception-copyright-directive-digital-single-market-not-what-eu-copyright-needs/> (last visited, 15 Feb. 2020); Ducato and Strowel, op. cit. *supra* note 14, at 653 et seq.

16. Note also that the exception provided for by Art. 5(1) Infosc Directive authorizing acts of temporary reproduction might not apply as, strictly speaking, the sole purpose of the reproductions occurring in TDM activity is not to enable a transmission in a network between third parties or a lawful use.

17. Dusollier, “Realigning economic rights with exploitation of works: the control of authors on the circulation of works in the public sphere”, in Hugenholtz (Ed.), *Copyright*

copyright, so technical acts needed to get access thereto, despite their ancillary copying of protected works, should be excluded from the copyright scope altogether.¹⁸ This was not the option chosen; the European Union instead decided to allow for such text and data mining through the tool of an exception¹⁹ (hence recognizing, to my regret, that such transitional and ancillary copying is infringing in the first place). By granting such an exception to TDM, the Commission first intended only to authorize TDM activities undertaken for scientific research. But text and data mining is also crucial for investigation journalism, which increasingly relies on big data sets,²⁰ and for the big data economy that the EU wants to sustain. Therefore, enlarging the beneficiaries of this new exception beyond the scientific research was felt necessary. In the end, the adopted directive admits two exceptions, one for scientific research and the other for any other purpose, with slightly different conditions and more leniency granted to the former.

2.2.2. *The regime of the TDM exceptions*

First, “text and data mining” is defined in Article 2(2) of the Directive as “any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations”. Recital 8, commenting on that definition, makes an explicit reference to the prevalence of the TDM technologies across the digital economy, already indicating that the exception has steered away from a strictly scientific research purpose.

Article 3 authorizes text and data mining for the purpose of scientific research, carried out by research organizations and cultural heritage institutions. Examples could be the application of TDM techniques to newspapers archives by linguists to identify the evolution of some language patterns, or to all scientific articles published in one field to analyse gender distribution in authorship or quotations. The beneficiaries of the exception,

Reconstructed: Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change, (Kluwer Law International, 2018), at 196; Ducato and Strowel, op. cit. *supra* note 14, 667–668.

18. Recital 9 of the Directive mentions the possibility that some TDM acts are not infringing, either because they deal with mere facts or data, or because they fall under the temporary reproduction exception of Art. 5(1) of the 2001 Infosoc Directive.

19. As was done in some countries allowing TDM activities by a copyright exception, such as France, the UK or Japan.

20. Geiger, Frosio and Bulayenko, “The Exception for Text and Data Mining (TDM) in the Proposed Directive on Copyright in the Digital Single Market – Legal Aspects”, CEIPI Research Paper No. 2018-02, available at <<https://ssrn.com/abstract=3160586>> (last visited, 15 Feb. 2020); General Opinion of the European Copyright Society on the EU Copyright Reform Package (2017), 5, available at <<https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/ecs-opinion-on-eu-copyright-reform-def.pdf>> (last visited, 15 Feb. 2020).

i.e. a “research organization”,²¹ which includes universities, other higher education institutions and research institutes, or a “cultural heritage institution”, need to conduct research on a not-for-profit basis (Art. 4). The notion of scientific research itself is not further addressed but is only said, in Recital 12, to encompass both the natural sciences and the human sciences.

Conditions applying to the exception are that the research organizations and cultural heritage institutions have a lawful access to the material on which they undertake TDM²² and that they store copies of such works or other subject matter with an appropriate level of security, including when they retain such copies to allow verification of research results.²³ Member States are not allowed to set up a compensation scheme to accompany such exception, as the harm potentially inflicted upon rightholders is deemed to be minimal.²⁴ Rightholders are authorized to implement security measures around their data to control lawful access thereto, but the Directive states that it should not impede the effective application of the exception. Despite this precaution, security controls, if too invasive, might deter or encumber legitimate TDM activities by researchers.

The second prong of the TDM exception lies in Article 4, which allows for text and data mining of lawfully accessible works and other subject matter for any undefined purpose,²⁵ regardless of its possible commercial or for-profit motive. This could benefit text and data mining for commercial research, investigative journalism, consumer information provision, statistical analysis, or any process of artificial intelligence.

A supplementary and critical condition distinguishes this exception from its counterpart in scientific research: rightholders should not have expressly

21. Art. 2(1) defines this as “a university, including its libraries, a research institute or any other entity, the primary goal of which is to conduct scientific research or to carry out educational activities involving also the conduct of scientific research: (a) on a not-for-profit basis or by reinvesting all the profits in its scientific research; or (b) pursuant to a public interest mission recognized by a Member State; in such a way that the access to the results generated by such scientific research cannot be enjoyed on a preferential basis by an undertaking that exercises a decisive influence upon such organization”. The exception does not exclude research carried out in the framework of public-private partnerships.

22. According to Recital 14, it covers “access to content based on an open access policy or through contractual arrangements between rightholders and research organizations or cultural heritage institutions, such as subscriptions, or through other lawful means”, as well as “access to content that is freely available online”.

23. Other elements of the exception are that rightholders are allowed to apply proportionate measures to ensure the security and integrity of the networks and databases hosting the data, and that best practices commonly agreed between the rightholders and the beneficiaries of the exception should be encouraged.

24. See Recital 17.

25. Recital 18 gives as examples: “including for government services, complex business decisions and the development of new applications or technologies.”

reserved such use of their works or protected subject matter, including by contract, unilateral declaration, machine-readable means or terms and conditions.²⁶ In contrast with the exception for TDM for scientific research – which is stated not to be overridable by contract, in Article 7 of the Directive – the general TDM exception is conditional on the absence of prohibition by rightholders, namely by machine-readable means as robots.txt files affixed to web pages to prevent indexation by search engines. To prevent TDM, it would then be sufficient for rightholders to make an explicit declaration or to insert metadata disabling any re-use of data. The Directive therefore preserves the capacity of rightholders to grant licences for TDM activities and receive remuneration for the use of their data.²⁷

The exception for TDM for non-research purposes is thus rather precarious and is subservient to its prohibition by rightholders. Some impact on the TDM exception for scientific research is likely. While Article 4 gives rightholders an incentive to install proper technological measures around their data or content, to ward off commercial data miners, researchers might increasingly be deterred from mining such material, due to the presence of robot.txt metadata in the source code of freely available webpages. The case of investigation and data journalism also remains problematic. In order to denounce or inform, journalists generally have access to documents provided by whistleblowers, without any proper authorization, and such documents could be configured to prevent any data analysis, two reasons which would bar them from benefiting from the exception provided for by Article 4.

2.3. *Online education*

2.3.1. *Notion and background*

The EU *acquis* already provides for some freedom to use works in educational frameworks. The 2001 Directive on copyright in the information society includes an exception allowing uses of works and other protected subject matter for illustration of teaching and scientific research. Most Member States have implemented it, but with a large diversity, as to its beneficiaries, the types of authorized activities, or covered works.²⁸

Such lack of harmonization leads to a fragmentation of the Internal Market for education and to uncertainties when undertaking online educational

26. See the examples mentioned in Recital 18.

27. See Recital 18, clearly stating that “Rightholders should remain able to license the uses of their works or other subject matter falling outside the scope of the mandatory exception provided for in this Directive for text and data mining for the purposes of scientific research and of the existing exceptions and limitations provided for in Directive 2001/29/EC”.

28. For a comparative overview of national transposition, see Triaille et al. *op. cit. supra* note 8, 368–378.

activities, particularly in the case of cross-border distance learning projects. Despite the insistence of the 2001 Directive that the exception should also cover e-learning, some countries, such as Spain, Greece or Hungary, limited the benefit of the exception to off-line environment and classroom uses. Therefore, the fundamental objective of Article 5 of the CDSM Directive is to improve the situation of teaching establishments by obliging Member States to allow for digital uses of copyrighted works and other subject matter²⁹ for the purpose of illustration for teaching.³⁰

Instead of abrogating or replacing the existing exception for educational uses, the CDSM Directive adds a new provision whose scope partially overlaps with it.³¹ This is a peculiar legislative technique that might end up with a messy legal framework. Indeed, the exception provided for in the 2001 Infosoc Directive was optional for Member States, open to contract overridability, and subject to fewer conditions than this new provision. For the countries that had enacted the educational exception of Article 5(3)(a) of the 2001 Directive, the new text might either expand or narrow the conditions for the admissibility of an educational use. As the new exception is mandatory for Member States, more restrictive conditions that might exist in national copyright laws³² should, in our view, be abandoned. Conversely, if some States allow online teaching activities more generously, for instance in an open environment accessible beyond the enrolled students or pupils, they must now align with the stricter requirements. In any case, two distinct regimes might coexist at the national level, one for offline educational uses, which would be partially harmonized with the regimes of other Member States, and another

29. The 2019 Directive extends the scope of exception of illustration of teaching to computer programs (which was uncertain under the current copyright framework) and the new right of press publishers. The exception existed for the copyright and sui generis rights in databases, but was limited, for the sui generis right, to acts of extraction, and did not authorize acts of re-utilization, which rendered it rather useless. The new exception would arguably be extended now to acts of digital re-utilization.

30. See Art. 5(1) CDSM Directive.

31. Art. 1(2): “this Directive shall leave intact and shall in no way affect existing rules laid down in the directives currently in force in this area, in particular Directives 96/9/EC, 2000/31/EC, 2001/29/EC, 2006/115/EC, 2009/24/EC, 2012/28/EU and 2014/26/EU”. Additionally, Art. 24 amends the exception for illustration for teaching in the 2001 Directive by adding “without prejudice to the exceptions and limitations provided for in Directive (EU) 2019/790”. See also the strange formulation of Art. 25: “Member States may adopt or maintain in force broader provisions, compatible with the exceptions and limitations provided for in Directives 96/9/EC and 2001/29/EC, for uses or fields covered by the exceptions or limitations provided for in this Directive”.

32. For instance, the UK provision limiting the making available for works for educational purpose to the premises of the establishment, or the French narrow construction of the illustration for teaching, now countered by the interpretation given in Recital 21.

for online educational uses, that would follow a higher, but not complete, degree of EU harmonization.

It is also worth noting that, compared to the “old” exception, this new provision does not extend to scientific research. In the 2001 Directive, uses for illustration of teaching and *for scientific research* were authorized, this second purpose having been implemented in most Member States.³³ In the 2019 Directive, scientific research is left out. Was this on purpose, or were digital uses for scientific research considered not in need of a clarification and certainty? Nothing in the preparatory work of the Directive explains why it is missing. The existing fragmentation across the EU as to the scope of the legitimate use of copyrighted works for scientific research and the legal uncertainty about its digital application (e.g. online conferences or research discussions during the COVID-19 lockdown), therefore continues to exist, which is regrettable.

2.3.2. *The regime of the teaching exception*

The purpose of the new exception is to authorize online use of works for illustration in teaching. Beyond this mandatory extension to digital uses, the provision is mostly a replica of the exception in the Infosoc Directive, whose key conditions are reiterated. First, the sole purpose of the use of works needs to be illustration of the teaching, which is defined “as covering digital uses of works or other subject matter to support, enrich or complement the teaching, including learning activities”.³⁴ Illustrative use should not, however, substitute the purchase of materials primarily intended for the educational market. Second, the use of works should be limited to the extent justified by the non-commercial purpose to be achieved. And finally, the source and the author’s name (except where this is impossible) has to be indicated.

The need to prevent the circulation, in the digital environment, of the protected material beyond the enrolled students, justifies a supplementary condition: the use must take place under the responsibility of an educational establishment, on its premises or at other venues,³⁵ or through a secure electronic environment accessible only by the educational establishment’s pupils or students and teaching staff. This secured access could occur through authentication procedures, for instance based on a password.³⁶ In practice, it

33. See the analysis of the uses for scientific research in Triaille et al., op. cit. *supra* note 8, at 388–396.

34. Recital 21. Such definition was absent in the 2001 Directive. National legislatures are free to determine the proportion of a work that could be used, which could be a source of concern for a possible national restriction of the freedom so granted to educators.

35. Such as museums, libraries or other cultural heritage institutions, as admitted by Recital 22.

36. See Recital 22 *in fine*.

means that copyrighted content cannot be posted on publicly available webpages of the educational establishments but only made available to enrolled students. The inclusion of copyrighted content on massive open online courses (MOOCs) that anybody can attend, would not benefit from the exception.

The beneficiaries of this now mandatory educational exception are no more defined than they were in the 2001 Directive. Recital 20 mentions that it should encompass “all educational establishments recognized by a Member State, including those involved in primary, secondary, vocational and higher education”, their organizational structure or the means of their funding not being “decisive factors in determining whether the activity is non-commercial in nature”.

The specific accessibility needs of students with a disability should be taken into consideration. To better clarify the cross-border situation of use of works in distance learning activities, Article 5(3) provides that the use of works undertaken in that context is deemed to occur solely in the Member State where the educational establishment is established. This is a welcome precision, for the act of making available is not located with certainty under current EU law or ECJ case law.³⁷ The unique location of the use will facilitate the setting up of distance teaching programs and the assessment of the copyright status of the educational uses of works. Member States may provide for fair compensation for rightholders for the use of their works or other subject matter under that exception, which is a practice in many Member States.³⁸

The most controversial aspect of Article 5 is its interface with licensing. The exception is said to be unwaivable by contract, pursuant to Article 7 of the Directive. Yet, Article 5(2) preserves the possibility for Member States to authorize rightholders to allow for digital educational uses through a licensing system, either in whole or for some types of works or subject matter, such as works intended for the educational market or sheet music, to the extent it does not impair the effective application of the exception. This intricate formulation intends to preserve existing licensing systems, that exist in Member States where the educational uses are authorized by specific licensing arrangements with collective management organizations, such as in France.³⁹ It also answers a concern of publishers of textbooks and educational material who feared that the exception would significantly erode their normal market, and asked either to be excluded from the exception or to maintain a licensing possibility.

37. See on that point, Triaille et al., *op. cit. supra* note 8, 383–386.

38. See Recital 24, which lists some factors in deciding the system and amount of such a compensation.

39. See Recital 23.

However justified these concerns might be, this carve-out for licensing bears the risk of submitting the exception for educational use to the contractual control of rightholders, if the Member States decide to make the exception subsidiary to the application of a licensing system in the hands of copyright owners.⁴⁰ In countries choosing this implementation option, the educational establishments might end up in a hybrid situation, based on one side on licences and remuneration for some categories of content (that could hopefully result in better availability of some works, notably textbooks) and, on the other side, on a subsidiary and perhaps more limited exception.

2.4. *Uses by cultural heritage institutions*

2.4.1. *The European recognition of the role of cultural heritage institutions*

The case of uses of copyrighted works by cultural heritage institutions is a perfect illustration of the gradual shift from a logic of exception to a scheme of enabling privileges. Before the advent of digital technologies and the internet, the meeting of copyright and libraries was rather minimal. Mostly it consisted of public lending which had been authorized by an EU directive in 1992,⁴¹ with a broad recognition of the social value of such public lending. In addition, the Infosoc Directive of 2001 allowed specific acts of copying when needed for preservation purposes and the making available of works on dedicated devices on the very premises of the institution. But those exceptions were unharmonized and rather limited and proved rapidly too narrow for the new practices of libraries in the digital environment.⁴²

In parallel with the growing frustration of libraries with the exceptions granted to them by the 2001 Directive, the social, scientific and cultural value of museums, libraries and archives, and their role in preserving and making available culture, information and historical documents have been steadily recognized in the European Union. Libraries have traditionally been a repository for cultural artefacts and a place to get access to culture and knowledge, to do research and learn. Digitization is also a remarkable way to maintain the quality of collections for future and frequent consultation as well as to increase their availability, including their online dissemination, all activities that would trigger the application of copyright for acts of reproduction or making available.

40. Member States should in that case take measures to ensure the easy availability of such licences and the awareness of the educational establishments.

41. Directive 2006/115/EC of 12 Dec. 2006 on rental and lending right and on certain rights Related to copyright in the field of intellectual property (codified version), O.J. 2006, L 376/8.

42. Triaille et al., op. cit. *supra* note 8, 243–319; Case C-117/13, *Eugen Ulmer*.

The Union has expressed a strong political commitment towards digital libraries and digitization of the EU's cultural and informational heritage, as demonstrated by a succession of policy documents and initiatives such as the High Level Group on digital libraries set up by the Commission in 2006, the Recommendation of the Commission on digitization of 2006 and its revision in 2011,⁴³ the Report of the *Comité des Sages* on the Digitization of Europe's cultural heritage,⁴⁴ and the Council conclusions of 2012 on digitization of cultural heritage.⁴⁵ All insist on the need to foster long-term digital preservation of cultural material, in full respect of international and European copyright laws.⁴⁶

The increasing need and political will to digitize the EU cultural heritage *en masse* put libraries at the forefront, as key actors of a knowledge society, rather than economic operators.⁴⁷ A first step was the enactment of the orphan works Directive in 2012 which aimed to enhance availability, through cultural heritage institutions, of works that are not marketed anymore, due to lack of proper identification of their rightholders. The construction of a prominent role for libraries, museums and archives, in dissemination of culture and knowledge, is completed by the new Directive, on two fronts, first by refining the exception for preservation and making it mandatory for Member States; and second, by setting up a regime to facilitate the re-use of out-of-commerce works.

2.4.2. *The definition of cultural heritage institution*

The notion of cultural heritage institution (CHI) is essential throughout the Directive.⁴⁸ It is defined by Article 2(3) as “a publicly accessible library or museum, an archive or a film or audio heritage institution”. It could also cover libraries of educational or research establishments and of public sector broadcasting organizations. This vast notion is likely to encompass a great number of institutions on condition they are open to the public as libraries and museums. Conversely, archives or film institutions would be included in that

43. Commission Recommendation of 24 Aug. 2006 on the digitization and online accessibility of cultural material and digital preservation, 2006/585/EC, O.J. 2006, L 236/28; Commission Recommendation of 27 Oct. 2011 on the digitization and online accessibility of cultural material and digital preservation, O.J. 2011, L 283/39.

44. Comité des Sages, Report cited *supra* note 9, 14.

45. Council conclusions of 10 May 2012 on the digitization and online accessibility of cultural material and digital preservation, O.J. 2012, C 169/5.

46. Comité des Sages, Report cited *supra* note 9.

47. As Google was then very active in digitizing the EU libraries collections for its Google books service, the efforts by the EU in enabling libraries to become digital and in launching Europeana, was clearly in response to the US company.

48. CHIs are also eligible to the benefit of the TDM exception for research.

definition irrespectively of their public accessibility, which makes sense, as this is not usually their primary mandate.

2.4.3. *Exception for preservation*

Article 6 of the Directive requires Member States to authorize CHIs to make copies of works in their collections for purposes of preservation. This provision aims at remedying the current situation where a non-mandatory and narrow exception only admits “specific acts of reproduction” with no explicit purpose, which does not allow acts of digitization of an entire collection.⁴⁹ The inconsistent implementation of the 2001 Directive exceptions⁵⁰ also hampered cross-border cooperation amongst CHIs,⁵¹ which was essential for setting up the digital portal Europeana.

The exception is now made mandatory for Member States and cannot be overridden by contract.⁵² Its purpose must be strictly that of preservation, namely “to address technological obsolescence or the degradation of original supports or to insure such works and other subject matter”.⁵³ No tool or technology, format, medium or number of copies can be imposed as a further constraint, and all works or other subject matter, irrespectively of their “age”,⁵⁴ should be accessible to the benefit of the exception, on condition they are owned or permanently held by the CHI. Yet, the notion of preservation is not really explained. Generally understood as maintaining something in its original or existing state,⁵⁵ does the notion require that the work concerned be damaged or at a risk of deterioration? Or can a CHI more generally digitize works to preserve them in a preventive manner, to migrate to a more sustainable format, to counter foreseen obsolescence, or simply to archive them better? Some clarification would have been useful.

2.4.4. *Out of commerce works*

Out-of-commerce works are works that are not available to the public on the market and whose exploitation rightholders do not intend to pursue. This lack of availability of possibly valuable works, as in the case of orphan works

49. Case C-117/13, *Ulmer*; para 45.

50. For an overview of – sometimes restrictive – national implementations of the exception, see Triaille et al., *op. cit. supra* note 8, 281 et seq.

51. See Recital 26, which lists lack of cross-border cooperation as a justification for that new exception.

52. Art. 7.

53. Recital 27.

54. Which means that even born digital works can be reproduced for preservation purposes which might be necessary to adapt the works in a new accessible format.

55. Oxford English Dictionary.

whose rightholders are not identifiable or locatable, is perceived as a loss for the public. The EU legislature decided to entrust cultural heritage institutions with the restoration of such availability by mitigating the difficulty of getting a licence from absent or unwilling rightholders.⁵⁶ The Orphan Works Directive of 2012 already authorizes, through an exception to exclusive rights, the making available, by CHIs, of works whose authors or rights owners could not be found.⁵⁷ The CDSM Directive takes care of out-of-commerce works by setting up a complex scheme to enhance their availability.⁵⁸ It is worth noting that as an orphan work is generally out-of-commerce too, it could equally benefit from the application of this new provision, whose conditions are less rigid.⁵⁹ A work is said to be out-of-commerce, according to Article 8(5), “if it can be presumed in good faith that the whole work is not available to the public through customary channels of commerce after a reasonable effort has been made to determine whether it is available to the public”.⁶⁰ As in the Orphan Works Directive, a requirement of some search is a key factor for the declaration of out-of-commerce status. However, the notion of “reasonable efforts” seems less stringent and burdensome than the “diligent search” required for orphan works and the scheme put in place is far more flexible and agile than for orphan works.

Specific requirements, as far as they are reasonable, may be added by Member States, such as a cut-off date, i.e. a date of publication of works before which the regime would not apply.⁶¹ Discrete categories of content should be eligible to the mechanism put in place by the Directive, including photographs, software, phonograms, audiovisual works and unique works of

56. The ECJ struck down the solution put forward by French copyright law, as it was a reduction of exclusive rights of copyright owners without being admitted as an exception by the EU *acquis*: Case C-301/15, *Soulier & Doke*, EU:C:2016:878.

57. Directive 2012/28/EU of the European Parliament and of the Council on certain permitted uses of orphan works, O.J. 2012, L 299/5.

58. Prior to the CDSM Directive, a soft law instrument provided a first attempt to enhance the availability of such works, see MoU on key principles on the Digitization and Making Available of Out-of-Commerce Works (2011).

59. The orphan works Directive has not had much result for cultural heritage institutions. It is to be seen whether this new regime might be more successful in enhancing availability of European cultural heritage.

60. Recital 38 further determines the notion of a reasonable effort and its practical assessment. See also Art. 8(7) and its related Recital 39, which excludes from the regime foreign works originating from a non-EU State, hereby acknowledging the territoriality of copyright, in accordance with international comity.

61. The adoption of specific requirements and procedures at the national level should be decided after consultation of rightholders, CHIs and CMOs, according to Recital 37 and to Art. 11, setting up a regular stakeholders’ dialogue. Recital 37 also specifies how to assess the availability of works that exist in different versions, manifestations, or language versions.

art, including works that have never been in commerce or published.⁶² Public availability of such works by CHIs will be facilitated by two alternative mechanisms. The first consists in a non-exclusive licence that the CHI can enter into with representative collective management organizations,⁶³ in order to be authorized to reproduce, distribute or communicate works held permanently in its collection, whether for profit or not.⁶⁴ The CMO can grant the licence for authors and other rightholders for whom it does not hold an explicit mandate.⁶⁵

By default of a sufficiently representative CMO for a category of works or other subject-matter, or the availability of licensing solutions,⁶⁶ Member States will provide for an exception allowing CHIs to make them available for non-commercial purposes on condition that such content is permanently in their collection, that the name of authors and any other identifiable rightholders is indicated, and that such making available takes place on non-commercial websites.⁶⁷ An exception is thus offered as a subsidiary solution to a regime of licensing, in order to encourage as much as possible the making available of out-of-commerce works. In other words, a library that would like to engage in the communication on its website of works that are not commercially available, can request a licence from a relevant collective management organization, even without the explicit consent of the right owner, or rely on an exception provided by copyright law, to proceed with such communication.

The rightholders in those out-of-commerce works and other subject matter retain a right to oppose the exploitation by the library, either based on the licence or the exception, at any time, even after the conclusion of the licence or beginning of the use.⁶⁸ An opt-out mechanism thus substitutes the rule of

62. Recital 37 gives the example of posters, leaflets, trench journals, or amateur audiovisual works.

63. Such representativeness should be based on the category of rights managed by the organization, its ability to manage the rights effectively, the creative sector in which it operates, and whether the organization covers a significant number of rightholders for the type of works concerned.

64. Art. 8(1). See also Recital 40.

65. The remuneration collected on the ground of the licence will be distributed to the rightholders of the works concerned.

66. A lack of agreement on the conditions of the offered licence would not be sufficient, see Recital 32 *in fine*.

67. Art. 8(2) and (3).

68. Art. 8(4). The details and practicalities of such an opt-out, necessary to respect the rule of exclusivity in copyright, are left to Member States. Similar flexibility for Member States also governs the specific type of licensing mechanism that could be put in place by CMOs, and determination of the requirements to assess their representativeness.

prior consent by copyright owners, and is justified by the specific nature of the works concerned (i.e. works whose owners do not pursue exploitation) and the challenge and social value of some massive digital uses of works (at least by CHIs and not by any private actor who could compete with rights owner). In other words, actual availability of works prevails over the principle of exclusivity.⁶⁹

The Directive does not make this opt-out conditional on an obligation of renewed exploitation or putting into commerce of the said works. Oddly enough, this means that copyright owners can opt out of the application of an exception, without even demonstrating that they intend to remedy the lack of availability that the exception aimed to alleviate. In a way, the exception applies if they do not care about the fate of the works in which they have rights. If they do, they regain full exclusivity just by manifesting themselves. Article 9 provides that the licence granted under this regime could cover any Member State, and that the use authorized by the exception is deemed to occur solely in the Member State where the CHI is established.

The practicalities of the system are completed by Article 10 of the Directive, which sets up a portal containing comprehensive information and publicity about the licences agreed upon, their parties and their objects and scope, as well as opt-outs, to be established and managed by the European Union Intellectual Property Office. It is worth noting that this provision further enlarges the competence of EUIPO, already entrusted with the orphan works registry, thereby completing the transformation of EUIPO, originally responsible for unitary trade marks and design rights, into a comprehensive EU institution in charge of all administrative aspects of intellectual property.

This complex construction, intermingling the technique of an exception to exclusive rights with that of a mandate to collective management to licence, generally in return for remuneration, is a further recognition of the essential role of cultural heritage institutions in providing works to the public. The limitation of exclusive rights for out-of-commerce works may be a pragmatic solution, but is also a normative one as it does not apply to all prospective exploiters of out-of-commerce works but to non-for-profit institutions. Therefore, it is not a mechanism of market facilitation, but a device enabling use by privileged institutions pursuing a public interest.

69. By contrast, in Case C-301/15, *Soulier & Doke*, the ECJ had emphasized the key principle of exclusivity and preventive nature of copyright to strike down the French system permitting libraries to digitize out-of-commerce works.

2.5. Protection of public domain works

Article 14 of the Directive⁷⁰ was a last-minute addition that suddenly appeared during the final round of discussion at the European Parliament. Yet it is significant and unprecedented. Its purpose is to prevent reproductions of public domain works being vested with a regained exclusive protection, in the form of a copyright or any related right in the reproduction itself. This is a regular practice in museums where photographs of works in their collections are accompanied by a copyright notice requiring authorization or licence from the museum itself before any use.⁷¹ Such a copyright claim is usually illegitimate, as the photograph tends to be a faithful reproduction of the painting or other type of work with no creative choices that could establish some originality in the photograph itself. Still in some Member States,⁷² a related right or even a special copyright on photographs, which does not require originality, proffers some ground for a renewed exclusive right. The Wikimedia Foundation has been condemned in Germany for their use of images of paintings in public domain, and the copyright of the museums in those photographs was confirmed.⁷³

The CDSM Directive puts an end to such excessive reservations by asking Member States not to grant copyright or any other exclusive right in material reproducing works of visual art that are in the public domain, save for reproductions that are “original in the sense that it is the author’s own intellectual creation”. However, as many courts in Europe grant copyright protection to photographs under a very thin level of originality, some rights in simple images of works whose copyright has expired could still be protected.

The prohibition of any exclusive right in reproductions of public domain works is limited to works of visual art. One could regret that it does not extend to manuscripts, old documents, music sheets, maps or parchments kept in collections of cultural heritage institutions, on which they regularly claim copyright protection and affix a copyright notice.

70. Albeit included in the second title of the Directive, “Measures to improve wider access to contents”, this protection also gives value to a copyright limitation.

71. See the examples given in Wallace and Deazley, *Display At Your Own Risk – An Experimental Exhibition of Digital Cultural Heritage* (2016), available <papers.ssrn.com/sol3/papers.cfm?abstract_id=3378193>, last visited, 20 May 2020.

72. See Art. 72 of German copyright law, the right having a duration of 50 years; Art. 128 of Spanish copyright law, for a duration of 25 years, or Art. 87, of Italian copyright law, for a duration of 20 years. For a complete overview, see Margoni, “Digitizing the Public Domain: Non original photographs in comparative EU Copyright Law”, in Fitzgerald and Gilchrist (Eds.), *Copyright, Property and the Social Contract: The Reconceptualisation of Copyright* (Springer, 2018), available at <ssrn.com/abstract=3108760> (last visited, 15 Feb. 2020).

73. Bundesgerichtshof, 20 Dec. 2018, I ZR 104/17, *Museumsfotos*. Refusing protection under copyright, Ger. Arnheim-Leeuwarden, 19 March 2019, ACLI 2019/24234.

The re-affirmation that copyright or a related right should vest again upon a faithful reproduction of a public domain work does not go as far as sanctioning the false claim of copyright protection, sometimes referred to as “copyfraud”,⁷⁴ that may consist in inserting a copyright notice or terms and conditions in the digital reproduction. This practice of many museums and other cultural heritage institutions certainly has a chilling effect in its claim to benefit from copyright or to prohibit reproductions, irrespective of the lack of any legal ground for that prohibition.

Despite these limitations, Article 14 is a remarkable provision that, for the first time in the EU, grants a positive status to works belonging to the public domain,⁷⁵ by prohibiting any regaining of exclusivity therein, thereby enhancing public access to such cultural heritage.

3. Enhancing access to content

In its third Title, the CDSM Directive endeavours to better organize the digital exploitation and making available of works, thereby fostering a genuine digital single market. Two main obstacles have stood in the way for years. The first is legal, and results from the essential rule of territoriality in copyright.⁷⁶ According to the territorial nature of copyright, like any other IP right, exploitation of a copyrighted work has to be authorized by its holder for each Member State where it is exploited. Even though it does not prohibit the granting of a pan-European licence when needed, content providers with a service targeting several EU Member States face many difficulties in getting the right identification, notably due to the need to identify the proper rightholders in each country, to deal with collective management organizations mostly organized by national territories, to determine whether the exploitation might be excused under an exception, or to navigate intricate, and sometimes non copyright-related, national regulations.⁷⁷ Any legal modification that would help overcome such territoriality would then

74. Mazzone, “Copyfraud”, 81 *N.Y.U. L. Rev.* (2006), 1026, available at <ssrn.com/abstract=787244> last visited, 15 Feb. 2020).

75. Dusollier, “A positive status for the public domain”, in Beldiman (Ed.), *Innovation, Competition, Collaboration* (Edward Elgar, 2015), pp. 135–168.

76. Hugenholtz, “The last frontier: Territoriality”, in Van Eechoud, Hugenholtz, Van Gompel, Guibault and Helberger (Eds.), *Harmonizing European Copyright Law*, (Kluwer Law International, 2009), p. 374.

77. Particularly for audiovisual works where media windows and the need for dubbing or subtitling would impede a pan-European online offer of movies. See KEA, *Multi-territory Licensing of Audiovisual Works in the European Union*, Study prepared for the European Commission (2010).

strengthen the construction of a digital single market where provision of copyright-cleared content on an EU level would become easier.

A second hurdle lies in the overall complexity of clearing copyright in some works, either due to the multiplicity of rightholders, or to their absence or inaction, with the unexpected outcome that works are not included in offers of valuable content, to the detriment of exploiters, rightholders and the public alike. The digital environment has particularly created services providing volumes of works, like music streaming or VOD services, multiplying the task of copyright clearance.

Tackling those two issues largely differs from the objectives of the 2001 Directive, which aimed mainly at securing the regulatory framework to face the Internet threat, by strengthening rights, limiting exceptions, or supporting the use of technological measures of protection. All those objectives were aimed at reassuring copyright owners. This new set of provisions rather looks at prospective exploiters or users of works, and the need to unleash new digital services for the satisfaction of consumers and the public. The CDSM Directive, with other legislative texts adopted in the same package, pursues that objective by a mix of measures mitigating the principle of territoriality and practical solutions facilitating copyright licensing. This is where the EU has opted for pragmatism in copyright law. The ultimate purpose is to craft an a-territorial and fluid digital space, though it could well hurt the copyright and related right owners who are inflexibly anchored to their territorial rights and practices.

3.1. *Attenuations of territoriality*

Different rules mitigating the principle of territoriality are scattered throughout the Directive. I have already underlined the localization of the educational use in the State where the educational establishment is established (Art. 5(3)), and cross-border uses of out-of-commerce works encouraged by Article 9. By defeating a complex determination of the territory in which the use should be authorized by licence or by an exception, such unique localization better secures the uses promoted by the EU legislature. The challenge of territoriality however still stands firm in copyright law, and the CDSM Directive has only addressed it on the margins. It is more directly targeted in other legislative pieces contained in the Digital Single Market Agenda, with diverging outcomes. The Regulation on portability,⁷⁸ adopted in 2017, obliges audiovisual media services or services providing works or other subject matter against payment, to enable access to their services for their subscribers who are temporarily in another Member State than their residence.

78. Regulation 2017/1128 on cross-border portability, cited *supra* note 3.

Consumers increasingly expect to be able to get access to the services to which they have subscribed to (e.g. Netflix, music streaming service, ...) wherever they travel in the EU, whereas the principle of territoriality would require such content providers to clear copyright and related rights for all territories where the service is received, even temporarily. In derogation from the strict compliance with a territorial regime of intellectual property, the Regulation states that for copyright reasons, the provision of the service is deemed to occur solely in the subscriber's country of residence, so EU consumers can watch their favourite shows, series, sports events or listen to music wherever they are in the Union, without their service needing to multiply copyright authorizations for each country.

The combination of Regulation and Directive organizing the accessibility of works for visually impaired persons also contains detailed provisions to enable cross-border distribution of and access to adapted works.⁷⁹

The most direct solution to – or attack on, as rightholders have claimed – the territoriality of copyright protection appears in the Directive dealing with online transmissions of broadcasting organizations,⁸⁰ adopted together with the CDSM Directive. The issue it aimed at addressing was the difficulty for broadcasters to get the proper copyright clearance in all countries where their programs could be made available to their European audience through their websites, particularly for a limited time after their first transmission.⁸¹ Services like Arte+7 or BBCPlayer that offer simulcasting or catch-up services, podcasts, limited re-transmissions or supplementary material, were concerned.

The proposal made in the draft Regulation was to determine that broadcasters would only need to clear copyright and related rights in the State where they are established, i.e. in the country of origin, to the extent that the content put online consists in broadcasts provided to the public simultaneously or within a limited period after the initial broadcast or in materials ancillary to that broadcast.⁸²

79. Directive (EU) 2017/1564 and Regulation (EU) 2017/1563, cited *supra* note 3.

80. Directive 2019/789 on certain online transmissions of broadcasting organizations, cited *supra* note 3. This Directive was first proposed in the form of a Regulation, see Proposal for a Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organizations and retransmissions of television and radio programmes, COM(2016)594 final – 2016/0284 (COD).

81. Whereas the Directive 93/83/EC on Cable and Satellite concentrated the copyright clearance for the satellite transmission of the programs in the sole country where the signals were sent to the satellite.

82. That proposal more or less transposed the regime of satellite distribution, based on the country of origin, provided for in the Satellite and Cable Directive of 1993, but for the digital environment.

The opposition of rightholders was uncompromising and mostly motivated by the legitimate purpose of preserving the territorial distribution of films and other audiovisual content, which would face unfair competition if broadcasters were allowed to make them available on their website throughout the whole of Europe, even before the film could be shown in theatres in some countries.⁸³ The final version of the text offers a very limited solution by applying the rule of country of origin, i.e. the limitation of the clearance of copyright in the sole country of establishment of the broadcaster, only to news and current affairs radio or TV programmes, or fully financed own productions of the broadcasting organization. Sports events are excluded from this derogation from the territoriality principle. It remains to be seen whether such a limited scope will significantly enhance availability of TV programs throughout the EU. It is probable that it would not. And the EU viewer might continue to see the following message “this content is not available in your country” when browsing the website of TV channels.

3.2. *Legal devices facilitating the making available of works*

Beyond the territorial fragmentation of copyright rules, potential users of creative content need to navigate the maze of copyright clearance where authorizations from different rightholders, for different rights, need to be ascertained. The complexity of such a task largely results in a poor development of lawful online services providing works such as music, films or TV programs. A few provisions in the CDSM Directive address this issue, albeit in a piecemeal and timid manner.

3.2.1. *The collective licensing with an extended effect*

Amongst the licensing regimes that Member States could decide to use to facilitate the re-use of out-of-commerce works is extended collective licensing. But such a scheme, imported from the Scandinavian legal tradition,⁸⁴ is more generally introduced in the CDSM Directive as a way to license exploitation of copyrighted works, for a broad range of uses, on some conditions. Where exploitation implies a massive use of works or other subject matter, the comprehensive identification of all rightholders to secure a proper copyright clearance might be a herculean task. When such use pursues a social value, extended collective licensing might be a practical way to ease the process, without the need to grant an exception to copyright.

83. The principle of territoriality is the basis for prefinancing movies in the EU and for their distribution, which explains the legitimate and strong opposition of the audiovisual industry.

84. Tryggvadóttir, *European Libraries and The Internet: Copyright and Extended Collective Licences*, (Intersentia, 2018).

Extended collective licensing or ECL could be defined as “the situation where a license agreement *freely negotiated* between a collective management organization and a user by legal provision is *extended* onto the works of rightholders who are not members of the CMO”.⁸⁵ ECL is only one variety of what Article 12 of the Directive calls “collective licensing with an extended effect”, a broader category embracing all practices in collective management, depending on different legal traditions, the purpose of which is to grant a licence that could extend to rightholders who are not members of the CMO and on behalf of which the latter could normally not intervene.⁸⁶ Examples of such devices are legal mandates or presumptions of representations.⁸⁷ In any case, the focus on ECL could also serve as an inspirational model for legal regimes where no such mechanism has existed so far, hence transplanting that legal tool, which provides “full legal certainty to users”,⁸⁸ throughout the EU.

The introduction of ECL in the EU *acquis* does come with conditions and limitations, all aimed at protecting the interests of the rightholders so represented. First, the licence can only be granted by a CMO as defined in Article 3(a) of the Directive 2014/26/EU on collective management, thereby complying with its obligations of transparency and accountability. The scope of application is open to all types of uses but is restricted to uses on the territory of the Member State providing for such mechanism, and to well-defined areas of use where obtaining authorizations on an individual basis would be onerous and impractical.⁸⁹ It could for instance serve as a practical means to get the proper authorization for orphan works by other actors than CHIs. Being restricted to national territories,⁹⁰ the ECL tool is not aimed at facilitating a pan-European licensing of copyrighted works, but rather at making available better and flexible licensing devices to reduce transaction costs of rights clearance and copyright fragmentation,⁹¹ ultimately building a functioning copyright framework in line with the objectives of the Directive.⁹²

85. Riis and Schovsbo, “Extended collective licenses and the Nordic experience: It’s a hybrid but is it a Volvo or a Lemon?”, 33 *Colum. J.L. & Arts* (2010), 471.

86. See Art. 12(1).

87. Recital 46.

88. As recalled by Recital 45.

89. Art.12(2).

90. Art. 12 only applies to uses on the territory of Member States that implement such licensing schemes. See the beginning of Art. 12(1).

91. See Recital 45.

92. However, the Directive envisages the possible impact on rightholders who are nationals or residents of another State in Art. 12(6) and asks the Commission to lay down rules to give such mechanisms cross-border effect within the internal market by 2021 (which is a very optimistic date).

Other safeguards are listed in Article 12(3) and consist of a sufficient representativeness of the CMO in the relevant type of works and rights concerned by the licence,⁹³ a guarantee of equal treatment of all rightholders, irrespective of their membership of the CMO, a possibility to opt out at any time by non-members, the organization of appropriate publicity measures to inform the rightholders about the ECL mechanism, and the opt-out option. The possibility of opting-out of a system that deprives rightholders of individual management is crucial, as it restores the exclusivity of their property right, which is an essential feature of copyright and related rights.

3.2.2. *Other provisions*

Another example of simplification can be found in the regime of copyright clearance of out-of-commerce works, explained earlier, which relies on collective management as a measure to improve licensing practices.⁹⁴

The Directive on online transmission of broadcasts also provides that the rightholders have to exercise their rights of retransmission only through a collective management organization,⁹⁵ thus extending a rule existing in the Satellite and Cable Directive for cable retransmissions, to the online environment. The mandatory collective exercise of the right facilitates copyright clearance as operators retransmitting broadcasts need only to start negotiations with CMOs without identifying individual rightholders.

A last attempt at facilitating the development of a digital single market can be found in Article 13 of the Directive, on the availability of audiovisual works on video-on-demand platforms. In order to alleviate the difficulties in getting the proper authorization to exploit audiovisual works in VOD platforms and services, an impartial mediation channel will be put in place by Member States to assist the parties with their negotiations to reach an agreement.

The economic context of film exploitation is a particular case, as it strongly relies on territorial distribution and windows of exploitation (where release of the work on different media is organized in successive timeframes). The holder of rights in a film might be reluctant to grant a licence to put the film on a VOD platform if he/she fears that it could impair its exploitation on other channels or territories. The unintended effect could be that the lack of availability of films in VOD offers might induce viewers to shift to illegal download or streaming websites.

93. The conditions for such representativeness are described in Recital 48.

94. See Recital 30, insisting on the difficulty to obtain prior authorization by rightholders in the case of out-of-commerce works.

95. Art. 4 of Directive 2019/789.

Recommendations on such mediation systems are rather light in the EU text: they should remain voluntary, not affect the parties' contractual freedom, and have a limited financial and administrative burden.

4. A fairer market place

The last part of the Directive purports to redress some unfairness, or perceived as such, in the digital environment, generally induced by the strong economic position of some actors compared to the difficulty of copyright and related rights owners to get proper remuneration for the exploitation of their works or protected subject matter. This is where the most controversial provisions lie: the creation of a new right for press publishers (4.1) and the obligation on video sharing platforms to get a prior authorization to make works available (4.2). Another set of provisions, for the first time in the EU acquis, aim at strengthening the position of authors and performers in their contractual relationships with exploiters (4.3).

4.1. A new IP right for press publishers

4.1.1. Background

The enactment of a new neighbouring right in favour of press publishers was one of the most contentious points of the Directive. It was triggered by the long dispute between press publishers and news aggregators such as Google News, the latter being accused of exploiting the value of press publications without compensating the publishers. Confronted with their rapid decline in the digital age and with the competition from search engines providing snippets from media websites, press publishers have increasingly claimed that only such a specific right would help them defeat the US giant, by strengthening their negotiating power. Yet, in most countries, press publishers have acquired copyright from the journalists, which was the basis for their (often unsuccessful, despite some favourable court decisions) requests to Google to pay for its use of their digital editions. Some Member States intervened to impose remuneration schemes on Google and similar service providers under different modalities. Spain required news aggregators to pay for a licence to use news content; Germany enacted a specific neighbouring right for press publishers;⁹⁶ France set up a fund for press publications

96. It should be noted that such right has been struck down by the ECJ (Case C-299/17, *VG Media v. Google*, EU:C:2019:716), by default of notification to the Commission in accordance with Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (O.J. 1998,

financed by Google. In most cases, Google reacted to the legal imposition of a remuneration to be paid to press publishers for the hyperlinks and quotes they made of their articles, by simply stopping referencing them or by shutting down its service in that country, which paradoxically resulted in the national press publications disappearing from Google News and the readership of the original press websites declining.⁹⁷ The choice between being visible or giving a free licence to Google was excruciating and seemed unfair to most publishers, who turned to the EU legislature for adjustment.

The European Commission was happy to oblige, insisting on the need to sustain a “free and pluralist press”, “quality journalism and citizen’s access to information” and proposed the creation of a new IP right to the benefit of the press publishers.⁹⁸ It did not take stock of those failed national experiments, nor did it listen to the almost unanimous criticism from copyright experts and academics,⁹⁹ who denounced the uselessness of such a new right and its detrimental impact on freedom of information. Copyright in press articles did not enable publishers to be on solid ground against search engines that exploit their online news, why would a new right on press publications be more efficient? The argument that this right would help fight fake news is particularly ill-founded: there is nothing to ensure that a stronger economic position of traditional media, supported by the remuneration to be paid by search engines, would be sufficient to deter the circulation of fake news. Furthermore, unreliable publishers and dodgy media are more than willing to grant an authorization to Google news to freely reference their contents, which could paradoxically give fake news more online visibility.

As to the possibility that such a new right could compensate the losses suffered by the press sector in the digital transition, it is not the role of intellectual property to compensate for changes in the market brought by disruptive technologies, beyond its necessary adaptation to new forms of exploitation. Creating a tailored new IP right to maintain the status quo of some economic operators is not far from legislative rent-seeking. A too broad ambit for such a right also runs the risk of subjecting to authorization any re-use of digital news to the detriment of freedom of information.

L 204/37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (O.J. 1998, L 217/18).

97. The actual decline of visitors of news website is disputed. See Munter, “Google News shutdown in Spain was not as bad as Google would have you believe”, 14 Nov. 2019, available at <www.newsmediaalliance.org/google-news-shutdown-in-spain-not-as-bad-as-google-would-have-you-believe/> (last visited, 18 Feb. 2020).

98. See Recital 54.

99. European Copyright Society, *Opinion on proposed press publishers right*, Avril 2018, available at <europeancopyrightsocietydotorg.files.wordpress.com/2018/06/2018_european-copyright-societyopiniononpresspublishersright.pdf>

The real hurdle that press publishers face is the stronger economic position of Google and its unwillingness to depart from its opt-out policy, by which it proposes to press publishers reluctant to see their news aggregated by the search engines to insert metadata in their webpages not to be indexed. That power imbalance might not change much under the new Directive as demonstrated by the quick and rogue reaction of Google after the first transposition of the publishers' right in France. The search engine obliged press publishers to offer it a free and unremunerated licence. Should they refuse, it threatened the press publishers that it would not refer to their news any longer. Media companies took the case to the French competition authority, who decided in their favour in April 2020, by an interim decision, considering that by imposing an absence of remuneration for their exploitation, hence adopting a take-it-or-leave-it position, Google was abusing its dominant position.¹⁰⁰

4.1.2. *The regime of the news publishers' right*

The right granted to press publishers is a new species of neighbouring rights. Justified by the investment made by press undertakings, it could be thought as a variation of the rights granted to similar producers and distributors of content, like movie or phonogram producers. No right existed so far for publishers, whether in the press sector or in literary publishing. But only press publishers were candidates for this form of protection; the general publishers, satisfied with the enforcement of the copyright they generally acquire from the authors, declined the extension.

Article 15(1) provides publishers of press publications with the exclusive rights of reproduction and making available to the public as regards their publications. Press publications are defined in Article 2 by four elements: it is a collection composed mainly of literary works of a journalistic nature; it constitutes an individual item within a periodical or regularly updated publication; it provides the general public with information related to news or other topics; and it is published in any media under the initiative, editorial responsibility and control of a service provider. Examples could be daily newspapers, weekly or monthly magazines and news websites, including mostly literary works but also photographs and videos.¹⁰¹ It should be noted that the line between press publications and audiovisual media might be difficult to draw in some cases. Periodicals that are published for scientific or academic purposes, such as scientific journals, are explicitly excluded, as well

100. Autorité de la concurrence, Décision 20-MC-01, 9 April 2020, available at <www.autoritedelaconcurrence.fr>. In Germany a similar action against Google before the competition authorities failed (LG Berlin, 19 Feb. 2016, 92 O S/14 Kart, *GRUR-RR*, 2016, 426).

101. Recital 56.

as websites and blogs that provide information as part of an activity that is not carried out under the initiative, editorial responsibility and control of a news publisher. News publishers and news agencies are also covered when they publish press publications.¹⁰² The right is reserved to EU-based publishers but can be extended to non-EU publishers by national implementation.

Compared to copyright or other related rights of the *acquis*, the new right is limited in several respects. First it only applies to online uses of press publications. Reprinting or any other form of non-digital reproduction of a press article would still be authorized. It does not extend to private or non-commercial uses by individual users either. The restriction regarding individual users is quite narrow: non-commercial use of press publications by non-for-profit associations or other non-individual actors would infringe the new right. On the other hand, online sharing of press articles by individual users could be considered an infringement of copyright in such articles, where such exclusion does not exist. In addition, the right does not apply in respect of the use of mere facts, individual words, or very short extracts of a press publication.¹⁰³ The notion of “short extracts” is already announced to be one difficult point of the provision, with a probable reference to ECJ for interpretation.

More surprising is the indication that acts of hyperlinking would not require an authorization under the new related right. Technically speaking, what Google and similar services do is to refer to media articles by different techniques of hyperlinking, either via a simple underlined and clickable blue text, or via a so-called deep link where the text or image referred to are absorbed by the search engine page, while staying technically hosted by the original webpage. The Court of justice has treated all types of hyperlinking equally for the purposes of copyright, only making it an infringement to link to a content whose online availability has not been authorized by its copyright owner and the provider of the hyperlinks acts for profit.¹⁰⁴ So what would finally be covered by this new right? Or should we understand that by “acts of hyperlinking” the Directive excludes individual links to press articles, but not search engines operations? This remains unclear in the text of the Directive.

A final limitation is the duration of the right, which is only two years after the date of publication, thus making it the shortest right in the intellectual property bundle.

Article 15(2) addresses the possible overlap of the new right with copyright, which would generally also continue to exist in the press publications. The general principle is that the press publishers right shall in no way affect

102. See Recital 55 *in fine*.

103. A notion to be interpreted strictly according to Recital 58.

104. Case C-348/13, *BestWater International*, EU:C:2014:2315.

copyright. Therefore, that right should not be invoked against authors nor deprive them of the exploitation of their copyright. Freedoms that users enjoy from copyright exceptions or expiration should not be impeded by the exercise of the publishers' right either. The freedom of use of articles whose journalists have decided to disseminate under open access licensing is not explicitly mentioned though.

A final oddity of the interface with copyright is the requirement for press publishers to share the revenues yielded by this right with the authors of works incorporated in a press publication.¹⁰⁵ From a legal perspective, the legal cause of the revenue differs, and it makes no sense that a remuneration from a related right predicated on the need to recoup an investment would be partially divested to authors for their creation. Such a sharing of remuneration with authors might be extremely complex to organize, particularly when associated with remuneration that would be due to journalists for transfer of their copyright to publishers, or when applied to journalists under employment contract.

All things considered, the many limitations and uncertainties that this new right contains make its efficiency quite doubtful.

4.2. *Video-sharing platforms between licensing and filtering*

4.2.1. *Background: YouTube and the value gap*

Then comes Article 17 of the CDSM Directive, certainly its monster provision, both by its size and its hazardousness. During the whole process of adoption of the Directive, this was the focus of all attention, the provision everybody was talking about, even far beyond the EU copyright circles or aficionados.

The essential aim of Article 17 is to alleviate a perceived unfairness in exploitation of works on the Internet. The primary source for access to music for Europeans is not streaming services like Spotify or Deezer, though they are on the rise, but the video sharing platform YouTube,¹⁰⁶ where 300 hours of video are uploaded each minute.¹⁰⁷ Whereas the music streaming services get

105. Art. 15(5). Recital 59 further delineates the respective rights of authors and press publishers, intermingling contractual arrangements, national rules of ownership and employment contracts in a rather obscure way.

106. *Internet users' preferences for accessing content online*, Survey request by the European Commission, Flash Eurobarometer 437 (2016), p.10 (video- or music-sharing websites is the mode of access to music online for 31% of respondents, while professional music-streaming services count for 22%).

107. 1,300,000,000 persons use YouTube and almost 5 billion videos are watched on YouTube every single day. This is not to say that all those videos include copyrighted content or are uploaded without the authorization of the copyright owner. A large part of YouTube consists

licences and remunerate copyright and related rights owners, Google – which operates YouTube – remains in a hybrid position, sometimes remunerating authors through collective management organizations, sometimes offering monetization¹⁰⁸ to rights owners requesting to take down their content. Even though Google claims to pay copyright owners and the like over 1.5 billion euros annually through monetization and licences, this figure is challenged by the music industry. In any way, it amounts to only a small fraction of advertisement revenues of YouTube¹⁰⁹ and is deemed to be lower than the market rate for music, paid by other operators.¹¹⁰ While YouTube dominates the enjoyment of music by the public, it only contributes to a small portion of the streaming revenues transferred to the rightholders. According to the last report of the SNEP, representing the French music industry, Google only paid a share of 8.8 percent in the market of audio and video streaming (the total of Deezer, Spotify and Apple amounting to 76 percent) despite accounting for almost half of the time spent in listening to music.¹¹¹ This has been dubbed the “value gap” by the music industry and copyright owners.¹¹²

The key difference with the other channels where music is available is that the content accessible on YouTube and similar platforms is uploaded by users themselves and not by the platform operator. In addition, as users have become active contributors to the internet in what has been called the

in channels where creators and users upload their own content. It was estimated in 2018 that 47% of the YouTube audience is devoted to music (*Music Consumer Insight Report*, IFPI, 2018, available at <www.ifpi.org/downloads/Music-Consumer-Insight-Report-2018.pdf> (last visited, 17 Feb. 2020).

108. Monetization is the deal by which YouTube inserts advertisements at the beginning of videos and share the revenues with copyright owners. In that case YouTube earns revenues from content posted online by users.

109. Google’s annual advertising revenue generated from YouTube amounts to 15 billion US dollars for 2019.

110. For a comparison with remunerations transferred to creators from other operators such as music-streaming services or radio stations, see Farchy, *L’économie numérique de la distribution des oeuvres et le financement de la création*, Étude CSPLA (2016). That study acknowledges that it is based on incomplete figures from Google advertisements benefits, as the US company does not provide the details of the remuneration it transfers to copyright and related rights owners.

111. SNEP, *L’économie de la production musicale* (2019), 129–130, available at <snepmusique.com/wp-content/uploads/2019/09/GUIDEECOVersionWEB.pdf> (last visited, 17 Feb. 2020).

112. See the study commissioned by the international federation of societies of Authors and Composers, the CISAC, to demonstrate such “value gap”, Liebowitz, “Economic analysis of safe harbor provisions”, *CISAC* (2018), available at <www.cisac.org/CISAC-University/Library/Studies-Guides/Economic-Analysis-of-Safe-Harbour-Provisions> (last visited, 17 Feb. 2020).

“participative web 2.0”,¹¹³ videos appearing on sharing platforms are a mix of mere copies of existing videos and of content created by users themselves. Such user-generated content sometimes includes or transforms copyrighted works, such as music, movie clips, images, which raises a tricky question of delineation between copyright infringement and freedom of expression.

That difference explains why Google and other similar sharing platforms benefit from the specific liability regime for hosting providers, set up by the e-commerce Directive of 2000 (hence before YouTube was even launched). Under that Directive, hosting providers benefit from a so-called safe harbour and are not liable except if they do not promptly remove the infringing content when they gain knowledge of its presence on their servers.

The EU legislature had several options to put this right, and one must say at the very outset that the definition of “right” here will greatly depend on which side of the debate you are on. A first option would have been to revise the regime of liability of the e-commerce Directive, in a way that distinguishes better between hosting providers that only provide for storage of web content, and service providers that benefit from, organize and make available content uploaded by internet users. The EU Commission was extremely wary not to reopen the Pandora’s box of the intermediaries’ liability regime and rejected that option.¹¹⁴ Another way could have been to organize, within that very regime, a specific system for secondary copyright liability incurred by video-sharing platforms, which was the initial solution suggested by the 2015 draft directive. Platforms would have been subjected to specific obligations to prevent the making available of creative content when notified by rightholders.

Urged by copyright owners to recognize that the activity of such platforms was in itself an act of communication of works to the public, the EU legislature opted for a more radical solution. The Directive considers the video-sharing platforms as primarily liable for copyright infringement when making available online content uploaded by their users with no authorization, hence requiring they get a copyright licence for all the content made available on their platform, irrespectively of their involvement in such upload. That obligation to get authorization and pay rightholders is associated to a liability mitigation mechanism¹¹⁵ for content for which the platforms did not get the necessary authorization. As a result, the final provision is a complex

113. Senffleben, “Bermuda Triangle: Licensing, filtering and privileging user-generated content under the New Directive on Copyright in the Digital Single Market”, (2019) EIPR, 480.

114. Not completely, as the Von der Leyen Commission has put a Digital Services Act on its agenda, which might end up revising the liability regime of internet platforms.

115. Husovec and Quintais, “How to license Article 17? Exploring the implementation options for the new EU Rules on Content-Sharing Platforms”, (2019) Working Paper, available at <papers.ssrn.com/sol3/papers.cfm?abstract_id=3463011> (last visited 17 Feb. 2020).

construction and the outcome of many political compromises.¹¹⁶ It relies on a triangular dimension, some say a Bermuda triangle,¹¹⁷ combining remuneration to rightholders, a liability regime for sharing platforms, and the preservation of the rights of users.

The outcry from all sides was loud, condemning a significant blow to online freedoms, some even forecasting the end of the internet as we know it. The journey to implementation might still be rather rough and challenging.

4.2.2. *Scope of application*

Article 17 applies to online content-sharing service providers (hereafter “OCSSP”), defined as “a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organizes and promotes for profit-making purposes”. To qualify as an OCSSP, the provider meets two conditions. Firstly the main purpose of the service is to give the public access to a large amount of works uploaded by users; secondly the contents offered to the public are organized and promoted for profit-making purposes. The reference to a “large amount” of copyrighted works is somewhat vague and indecisive. The determination as to whether a service is covered by the definition would be made on a case-by-case basis and rely on several elements, including the audience of the service and the number of protected works it gives access to.¹¹⁸ The requirement of “organization” and “promotion” of the content alludes to the presence of a search engine, categories of content, suggestions made by the platform based on former choices by the user, advertisements, and so on. Mere hosting providers that offer some space to host videos without any organization or exploitation for the profit of the platform itself, would not be included.

Services like YouTube or Dailymotion are certainly covered, as well as smaller video sharing platforms like Vimeo for instance, should the condition of organization and promotion be fulfilled. Recital 62 mentions that the service such platforms offer is designed to give access to works to the public “as part of their normal use”. It adds a more restrictive factor by indicating that it only targets “online services that play an important role on the online content market by competing with other online content services, such as online audio

116. The complexity and political compromises are reflected in the style of Art. 17, which is long and contains all the rules applicable, with the recitals only repeating what can be found in the articles themselves and not hiding supplementary precisions.

117. Senfleben, *op. cit. supra* note 113.

118. Recital 63.

and video streaming services, for the same audiences”, which is a vague criterion to distinguish between services.

The requirement of giving public access to a large amount of copyrighted works and their organization and promotion would also, in my view, exclude Facebook, Instagram and other social networks, where works can be uploaded by users but not further organized or promoted by the network itself, and that do not compete in any way with streaming services.

Other information services are excluded from the definition, as their main purpose is not to enable sharing of copyrighted content or to gain profit from it. The Directive mentions open source software development and sharing platforms, not-for-profit scientific or educational repositories, not-for-profit online encyclopaedias (e.g. Wikipedia),¹¹⁹ electronic communication services, providers of business-to-business cloud services and cloud services or online marketplaces.¹²⁰ That does not mean that if such services make available copyright-protected content online, they could not be directly liable for copyright infringement.

Another exclusion addresses “service providers the main purpose of which is to engage in or to facilitate copyright piracy”, which clearly targets operators like Pirate Bay or other websites making infringing content available. Here, the aim of exclusion is not to make those services escape their copyright liability, but to avoid the application of the liability mitigation system to their benefit. Their activities blatantly infringe copyright and they should endure the full consequence of their actions.

4.2.3. *An act of making available requiring proper authorization*

The key principle of Article 17 is to consider that the online content-sharing service provider is making works available to the public, an act for which an authorization by the copyright and related rights owners is required. Its first paragraph states that an OCSSP is making an act of communication to the public by giving access to works uploaded by its users, and shall therefore obtain an authorization from rightholders.

Sharing platforms were generally considered as not liable for any act of making available, as they were only hosting content made available by their users. However, some uncertainty persisted and questions have been recently referred to the ECJ to clarify the position of such services as to the right of communication to the public.¹²¹ Even before knowing the position of the ECJ

119. Art. 2(6) 2nd para.

120. Recital 62.

121. Questions have been referred by the German Federal Court of Justice (BGH). See Case C-682/18, *YouTube*, pending, O.J. 2019, C 82/2.

on those questions, Article 17 puts a significant dent into the principle of safe harbour that benefited most platforms operators so far.

I would be of the opinion that technicalities put aside, the service offered by YouTube and the like is an exploitation of creative works that should enter in the realm of copyright and lead to remuneration to creators and other rightholders.¹²² That being said, the pivotal intervention of users who are the only ones to decide what content is uploaded on the platform could have pleaded to require only a remuneration from OCSSPs. The CDSM Directive has made the tricky choice to subject them to the control of rights owners, based on their exclusive right of communication to the public, granting the latter a prior control over what could be uploaded on the platform, without the OCSSP being able to decide on what is uploaded.¹²³ This leads to an intricate system where sharing platforms will be responsible for everything that is uploaded, with a risk of turning them into edited services like TV channels or Netflix-type of services, where all content needs to be cleared beforehand. Indeed, if copyright owners now get the exclusive right to authorize or prohibit the communication of their works on YouTube and the like, it should logically result in those services curating what they would make available. Actually, the combination of that qualification as an act of communication¹²⁴ with a liability mitigation scheme makes it a bit more messy, as we will see.

In any case, the OCSSPs are now required to obtain an authorization from rightholders, including by entering into licence agreements, which gives the copyright and related rights owners some power to reclaim remuneration for the exploitation of the value of their creations by the platforms; this alleviates the existing disproportion between the benefits yielded by some online services and the absent or meagre compensation for the creator of such value.

122. Dusollier, *op. cit. supra* note 17, at 197.

123. Dusollier, “Intermédiaires et plateformes de l’Internet, cet éléphant dans le salon du droit d’auteur”, in Bensamoun (Ed.), *La réforme du droit d’auteur dans la société de l’information*, (Ed. Mare et Martin, 2018), p. 165–201.

124. I consider that Art. 17 provides some clarification as to the scope of the right of communication to the public, by including the online sharing of video. Others think that the Directive has created here a *sui generis* form of this right (see Husovec and Quintais, *op. cit. supra* note 115), with far-reaching consequences on the whole new regime to be applied to OCSSP. The formulation of Art. 17(1), which considers the activity of the platform as an act of communication, sounds indeed as an imposition of a legal standard to strictly defined activities. It would have been wiser, and more legally sound, to define or give an interpretation of the right of communication to the public in a way that clearly encompasses the sharing of works by those service providers. However, despite the hybrid creature of liability that the CDSM Directive has here crafted, it does not give birth to a completely new form of economic right, nor to a specific regime with rights and exceptions of its own. See also Recital 64 *in fine*: “This does not affect the concept of communication to the public or of making available to the public elsewhere under Union law, nor does it affect the possible application of Article 3(1) and (2) of Directive 2001/29/EC to other service providers using copyright-protected content.”

The authorization obtained by the platforms is said to cover the act of making available by the users who uploaded the content. Therefore those users, on condition “they are not acting on a commercial basis or where their activity does not generate significant revenues”,¹²⁵ would be exempted from copyright liability for such uploads. This could lead to difficulties for users who upload content on YouTube, for which the service has obtained an authorization, but who eventually gain significant revenues from such content due to a high number of views. At what stage do they themselves need to obtain a specific authorization from copyright owners?

Getting a licence might not be an easy task for OCSSP. In the logic of an exclusive right, the authorization needs to be obtained before engaging in the (otherwise infringing) activity. But the operator whose obligation is to get the licence is not the one engaging in the activity, and will not know before the video is uploaded by a user which content is subject to copyright or related rights and needs to be cleared. This raises a thorny conundrum: how to contact copyright owners to get the proper authorization for a content that could be identified only when put online, which will be infringing if no licence precedes its making available? In addition, most videos trigger discrete and overlapping rights, such as copyright, rights of phonogram or film producers, rights of performers, and involve different rightholders either managing their rights individually or collectively through CMOs. As a consequence, getting a licence for all works and subject matter that could be uploaded by users, for all rights involved and from all relevant rightholders, is a gigantic, if not impossible, task.¹²⁶ The legal instrument of extended collective licensing encouraged by the CDSM Directive in its Article 12, could to some extent facilitate the acquisition of an umbrella licence from CMOs, but would not solve all issues of fragmentation of rightholders and territorial management of rights.¹²⁷

As suggested before, it might have been simpler to require remuneration from video-sharing platforms under a remuneration right scheme instead of an exclusive right that confers on rightholders also the power to refuse to give consent.¹²⁸ Some rightholders, like film producers, who, for good reason, did not want to accept that their movies would be available on YouTube in their entirety, opposed a remuneration right. The same reservations could apply to owners of copyright in just released works, who would not like to suffer from

125. Art. 17(2).

126. Senftleben, “Content censorship and Council carelessness: Why the Parliament must safeguard the Open, Participative Web 2.0”, (2018) *Tijdschrift voor Auteurs-, Media- & Informatierecht*, at 141–142.

127. On that particular point, see Senftleben, *op. cit. supra* note 113.

128. Of the same opinion, see Angelopoulos and Quintais, “Fixing Copyright Reform”, 10 *J. Intell. Prop. Info. Tech. & Elec. Com. L.* (2019), 147.

the competition of free YouTube availability. One could have imagined allowing for an opt-out mechanism leaving some freedom to rightholders to have their content removed from such platforms. Opting-out from a legal licence, implied by a remuneration, is not usual in copyright law, but the CDSM Directive is not short of atypical legal mechanisms.

4.2.4. *Liability system*

Paragraphs 3 to 5 of Article 17 regulate the liability of OCSSP, should they have not obtained the required authorization to make protected works available, either due to the extremely difficult task of getting a licence or to the unwillingness of rightholders to grant a licence or to have their content on the platforms. Essentially it carves out a specific liability regime for OCSSP for their making available of protected works and subject matters¹²⁹ that derogates from the exemption laid down for hosting service providers in Article 14 of the e-commerce Directive. In order to avoid liability, video-sharing platforms need to demonstrate that they have complied with three cumulative obligations:

- (a) they have made best efforts to obtain an authorization,
- (b) they have made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information;
- (c) they have acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads.

Each obligation is contentious in its own way.

The first one requires the platform operators to seek authorizations for making works available, in a way repeating Article 17(1). The practical difficulties of getting copyright cleared for all content uploaded on the platform have already been underlined. Therefore the “best efforts” to get a licence should be interpreted reasonably, even though it could seem contradictory to the literal meaning of the provision. Arguably, demonstrating significant endeavours to contact rightholders of key categories of works, like CMOs or major rightholders managing rights in type of works or subject matter likely to be uploaded on the platform, and their willingness to enter into an agreement, should be deemed sufficient. In our view, it would be

129. Any other infringing activity or making available of another type of illegal content would still be governed by the e-commerce Directive.

impracticable to require a systematic monitoring and verification of all uploaded content to identify the works and rightholders.¹³⁰

The second obligation, i.e. the best efforts to prevent the availability of works when notified by the rightholders, is what has been equated to content filtering and has been overwhelmingly denounced by opponents to that provision in the debates surrounding the adoption of the Directive.¹³¹ OCSSPs have to prevent the upload of works and other subject matter when objected (and properly identified) by the rightholders. YouTube and other platforms already apply content recognition techniques that can automatically refuse the upload of registered creative works. What was a voluntary initiative of the Google service is now made into a legal obligation and extended to all operators to which Article 17 applies. The employment of automated filtering tools seems unescapable. It could be said that compared to a general filtering,¹³² only the works specified by rightholders ought to be made unavailable. Still, the effect on freedom of the users of the service will be significant. If a music producer signals to the platform that some musical work needs to be removed, by providing any relevant information such as the title or a musical score to enable its recognition by algorithms, it will be integrated into the recognition system and its upload, as well as any content including it in one way or another, would be rejected. This would only leave the user with the option to complain *ex post*, should its use of the music be legitimate.

Sentfleben underlines that “this approach entails a remarkable transformation of the function of copyright law. It becomes a central basis for content censorship in the online world”.¹³³ Others have said that the algorithmic regulation introduced by Article 17(4) flips copyright enforcement from a tool of removing online content when proven infringing, into a preventive bar on public circulation lacking the required rightholder’s authorization.¹³⁴ Actually this is what exclusivity of copyright is about, no public circulation of a work is admitted without the consent of the author. But what has been flipped though is the delegation of enforcement of copyright to the platforms themselves. This new form of private ordering is troublesome. OCSSPs are not independent and impartial authorities, as judges would be. Choosing between requests from copyright owners and the accessory sanction

130. *Contra*, Spindler, “The liability system of Art. 17 DSMD and national implementation: Contravening prohibition of general monitoring duties?”, 10 JIPITEC (2019).

131. The fact that Art. 17 imposes a filtering is disputed. The obligation could be mostly about analyzing metadata of uploaded files and not their contents.

132. That has been rejected by the ECJ in Case C-360/10, *Sabam v. Netlog*, EU:C:2012:85, para 45.

133. Sentfleben, *op. cit. supra* note 113, at 5.

134. Elkin-Koren, “Fair Use by Design”, 64 *UCLA Law Review* (2017), at 1093.

of liability and the demands of users for leaving their content visible on the platform, is not a balanced decision.

Such concerns about the impact on freedom of speech are genuine and have been largely voiced despite the many but clumsy safeguards that the rest of the Article provides and that we will address later. It also led the Polish Government to file an action for annulment of this provision due to its potential impact on freedom of expression.¹³⁵

The final obligation is similar to what existed already in the e-commerce Directive, i.e. a prompt removal of any infringing content upon notification by rightholders. However it extends to an obligation to ensure that such content is not uploaded again in the future, which puts some extra burden to operators. The notice-and-take-down becomes a notice-and-stay-down. Avoiding future uploads of the notified infringing content might lead to further scrutiny processes from OCSSPs, with a risk of general monitoring. The ECJ recently held, in a case involving an injunction against Facebook to take down some defamatory content, that a jurisdiction could order the host provider “to block access to information, the content of which is identical to the content previously declared to be illegal, or to remove that information, irrespective of who requested the storage of that information”,¹³⁶ without it being considered as the imposition of a general monitoring obligation. That decision opens the way to automated enforcement beyond the targeted preventive measures that were admitted so far, in order to prevent future uploads of specific works probably extending to different infringers.

In the assessment of the three obligations (getting a licence, ensuring the unavailability of works, and removing notified content), the type, the audience and the size of the service, the type of works or other subject matter uploaded by the users of the service, and the availability of suitable and effective means and their cost for service providers, need to be considered.¹³⁷ Additionally, Article 17(8) warns that the application of these duties “shall not lead to any general monitoring obligation”.

To counter the critique about the excessive burdens that the deployment of filtering techniques would have on small operators, Article 17(6) exempts services that have existed for less than 3 years and have an annual turnover below 10 million euros, from the obligation to prevent uploading of works signalled by rightholders, and from the obligation to prevent future uploads of

135. Case C-401/19, *Poland v. Parliament and Council*, pending (action brought on 24 May 2019). See also Targosz, “Poland’s Challenge to the DSM Directive – and the Battle Rages On ...”, available at <copyrightblog.kluweriplaw.com/2019/06/10/polands-challenge-to-the-dsm-directive-and-the-battle-rages-on/> (last visited, 17 Feb. 2020).

136. Case C-18/18, *Glawischnig-Piesczek v. Facebook*, EU:C:2019:821, para 37.

137. Art. 17(5).

content that they have removed upon notification.¹³⁸ Despite its good intention, it would only benefit start-ups for three years whatever their size, benefits or financial means after that period.

4.2.5. *Users' rights and freedoms*

Attempts to preserve the exercise of rights and freedoms of users are to be found in the last paragraphs of Article 17. One of the biggest concerns of the new regime applicable to video-sharing platforms with its reinforced liability risk, is that they would be overzealous to prevent uploading or remove content already uploaded as soon as they are notified by rightholders to do so, not giving a chance to possibly legitimate content. A lot of content posted on YouTube and the like are not mere copies of copyrighted works, like film extracts, videos or music, but own creations by users, that might include protected images or sounds. The line between legitimate use of such works in user-generated content, i.e. content made, filmed or edited by users themselves, is sometimes very thin. While some videos are clearly parodies, others, including mash-ups or memes, might be more difficult to assess. An emblematic case, often used by opponents to Article 17, is a video of a toddler dancing to a Prince song that was taken down from YouTube for copyright infringement, which was, successfully, challenged by the mother who had uploaded the file.¹³⁹

Filtering by algorithmic recognition, as it is done now, would probably preclude some legitimate content, using copyrighted works under a valid exception or limitation. Automated algorithmic mechanisms are still largely incapable of assessing a possible fair use of creative content and will probably be indiscriminate and indifferent to context.¹⁴⁰ Requiring those filtering systems as a precondition to avoid liability will certainly induce platforms to put in place effective and not too costly tools that minimize the risk of liability, despite the proportionality objective. If putting online the latest video of a singer undoubtedly infringes copyright, sharing on YouTube a moment with friends in a public place where his music is played in the background will definitely be less prejudicial and its infringing nature more contested. An unsophisticated recognition tool will indiscriminately block both.

To counter the critique about this chilling effect, the CDSM Directive has elaborated a complex system whose chances of success are rather weak. First, Article 17(7) states as an overall principle that “the cooperation between

138. The obligation to avoid future uploads is restored if they have an average number of monthly unique visitors of more than 5 million.

139. *Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015).

140. Elkin-Koren, op. cit. *supra* note 134; *Contra* Burk, “Algorithmic Fair Use”, 86 *U. Chi. L. Rev.* (2019), 283.

online content-sharing service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation". This affirmation is paved with good intentions but lies in an inextricable tension within the liability regime that applies to OCSSP, as explained earlier. It follows by requiring Member States to ensure that users will be able to rely, when uploading content on such platforms, on the exceptions of quotation, criticism, review, as well as use for the purpose of caricature, parody or pastiche. The case for the exceptions listed in that paragraph is clear. Those are exceptions that usually legitimize re-use of works for expressive purposes.

It is important to note that, through that mention in Article 17(7), those particular exceptions are now conferred a special status, as Member States need to make them mandatory.¹⁴¹ But those exceptions were only optional so far, as provided for by the Infosoc Directive. Some countries do not have a parody exception or recognize parodying expressions through other legal instruments than a copyright exception. Does it transform them into mandatory exceptions? The provision carefully limits this sudden recognition to the case of uploading content on OCSSP.

What about other exceptions? Insertion of a copyrighted content in a video and its upload on a sharing platform might be done for research or be merely incidental, which is justified by some copyright laws. Article 17(9) specifies that "this Directive shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law".¹⁴² How does it give normative effect to such an affirmation?

A second gesture towards users' freedoms is the obligation imposed to OCSSP to "put in place an effective and expeditious complaint and redress mechanism that is available to users of their services in the event of disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them",¹⁴³ combined with the obligation for rightholders requesting the removal of some content to "duly justify the reasons for their requests".¹⁴⁴ It is also said that the processing of complaints should be swift ("without undue delay"¹⁴⁵) and that the removal decisions should be subject to human review.¹⁴⁶ Impartial out-of-court redress mechanisms, as well as

141. See Recital 70, which says this explicitly.

142. And it follows by imposing the obligation to avoid processing personal data and to be compliant with GDPR if doing so.

143. Art. 17(9), 1st para.

144. Art. 17(9), 2nd para.

145. A vague and rather empty notion though.

146. Which is a direct answer to the critique that algorithmic decisions would be incapable of distinguishing between an infringing copy and a parodying one.

judicial remedies, should also be made available to users. Such complaint mechanism already exists under US law for users whose content has been removed for copyright infringement. The rate of recourse thereto by users is overwhelmingly low compared to the number of notice-and-take-downs addressed to the platforms.¹⁴⁷ The US experience might warn against putting too much confidence in the effectiveness of such tools to restore users' rights.

There might still be some room for Member States to enhance preservation of users' freedoms in implementing Article 17. Some academics suggest for instance¹⁴⁸ that in order to minimize the risks of broad filtering and over-blocking, the application of preventive measures should be limited to *prima facie* copyright infringements, i.e. to uploads of materials identical or equivalent to the work for which rightholders have provided information. In other cases, the uploaded content should not be presumed to be infringing and more legal evidence should be provided by copyright owners to allow for its removal from the platform. This sounds as a reasonable way forward. Other practical measures might result from the stakeholders' dialogue, mandated by Article 17(10) of the Directive to come up with guidance on the application of the new regime for video-sharing platforms. Unfortunately, this dialogue, started in October 2019, has so far mostly offered a useless replay of the lobbying that accompanied the adoption of the Directive.

In conclusion on Article 17, from the exemption of liability that largely immunized them under the e-commerce Directive, the video-sharing platforms are now considered as carrying out acts of communication for the content uploaded by others. Consequently they face many duties: first, they need to get the proper authorization for such copyright-relevant activity, and by default they would be considered liable of a copyright infringement except if they have attempted, to the best of their efforts, to get such licence and to remove proactively and ex post protected content when requested by rightholders. That places platforms in a new role, predicated on their active intervention to police the media they make available. Entrusting economic operators with such an enforcement and regulatory task raises crucial questions for the freedoms of internet users, which the Directive only clumsily tackles. The battle might have been lost by the sharing platforms and users, but

147. Bar-Ziv and Elkin-Koren, "Behind the scenes of online copyright enforcement: Empirical evidence on Notice & Takedown", 50 *Conn. L. Rev.* (2018), 339; Urban, Karaganis, and Schofield, "Notice and Takedown in everyday practice", UC Berkeley Public Law Research Paper No. 2755628 (2017), 44, available at <papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628> (last visited, 17 Feb. 2020).

148. Quintais, Frosio, and Van Gompel, "Safeguarding user freedoms in implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics", (2019), available at <ssrn.com/abstract=3484968> (last visited, 17 Feb. 2020).

the implementation by Member States and its effect on online practices might still fuel a rampant war, where ultimately copyright owners might not be victorious.

4.3. *A better contractual protection of authors and performers*

4.3.1. *Background*

The Directive ends with a set of provisions that aim at directly enhancing the welfare and protection of creators and performers.¹⁴⁹ Repeatedly the European Union had considered that some regulation of authors' contracts or harmonization in that field, was not needed and was not an issue of the internal market, despite increasing counter-arguments by scholars.¹⁵⁰ Economic studies show an outrageous disparity between the earnings of authors, from winners-take-all stars and the rest of creators, as well as an unremitting precarity of creators and performers.¹⁵¹ European creators' median earnings are below the minimum income, and are partially supported by non-creative jobs.

National contractual protections, where they exist, ensure a better position of creators in negotiating their contracts, but sometimes fail to support them through their execution and enforcement, and mostly, do not help much in terms of ensuring an appropriate level of remuneration.¹⁵² It is well known that creators and performers, when negotiating and enforcing their contract with their publishers and producers, to whom they transfer their rights, are in a weaker bargaining position. They lack the financial means, the economic power and the legal expertise to get a fair deal. Despite the generally admitted principle of contractual freedom, such disbalance can be alleviated by mandating some mandatory provisions in the copyright contract, an interpretation in favour of the author and some obligations in charge of the economic operator benefiting from the transfer of the right.

Whereas the Commission laid down the first elements of a regulation of copyright contracts, the European Parliament should be congratulated in

149. Authors of computer programs are excluded from the application of Arts. 18 to 22. See Art. 23(2).

150. See e.g. Ker, Dusollier, Iglesias Portela and Smits, *Contractual arrangements applicable to creators: Law and practice of selected Member States* (European Parliament, 2014); IVIR, *Remuneration of authors and performers for the use of their works and the fixations of their performances* (European Commission, 2015).

151. CREATE, *UK Authors' earnings and contracts (2018): A survey of 50000 writers*, 2019, available at <www.create.ac.uk>; Report for the French Ministry of Culture, *L'auteur et l'acte de création*, 22 Jan. 2020.

152. For a comprehensive comparative analysis of national legal frameworks, see Ker, Dusollier, Iglesias Portela and Smits, op. cit. *supra* note 150.

securing this nascent construction and expanding it significantly. The protection finally enacted in the Directive comprises five tenets: 1) a principle of appropriate and proportionate remuneration, 2) an obligation of transparency imposed on the transferees and licensees, 3) a mechanism to adjust the remuneration agreed upon over time, 4) an alternative dispute resolution procedure and 4) an exit mechanism in the form of a right of revocation of the contract.¹⁵³

Authors and performers encounter difficulties throughout their contractual relationships with producers, publishers or other exploiters of their works, from the first contractual discussion and the negotiation and signing of the contract transferring or licensing their copyright in their work, to the management of their contractual relationship and the burdensome nature of exiting an unfair or unrewarding contract. Apart from the right to an appropriate remuneration, which is a substantive principle, all rules are *ex post*, granting protection once the contract has been signed. The Directive does not enter into the negotiation phase of the contract, compared to most national laws dealing with copyright contracts.¹⁵⁴

Curiously enough, this chapter on contractual protections is detached from any consideration of the digital environment, in contrast with the rest of the Directive that pertains in one way or another to the digital market. Its provisions would apply to all exploitations, analogue or digital, showing the desire to better protect creators. However, some issues particularly related to digital exploitation could have been purposefully addressed.

4.3.2. *A right to a fair remuneration*

Absent from the initial proposal for a directive, an obligation to provide an appropriate and proportionate remuneration came as a surprise, but a happy one, from the Parliament. Article 18 of the adopted Directive provides that “Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration”. The obligation to ensure a fair remuneration applies to authors and performers, both in licence contracts (i.e. authorizing a use of their work

153. For a comprehensive analysis of this chapter, see Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market, June 2020, available at <european-copyrightsocietydotorg.files.wordpress.com/2020/06/ecs_comment_art_18-22_contracts_20200611.pdf>.

154. National copyright laws generally impose a principle of a transfer or licence of copyright in writing, the precise determination of the scope of the transfer and of its remuneration, as well as regulation of dealings with future works or with rights in unknown forms of exploitation.

or performance) and in contracts by which they transfer economic rights to the other party.

“Appropriate and proportionate” is said to refer to the actual or potential economic value of the licensed or transferred rights. That remains rather vague and it might be an intricate task for the courts to define what is appropriate. It is only specified that the remuneration should take into account “the author’s or performer’s contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work”.¹⁵⁵ A remuneration proportional to the revenues engendered by the exploitation should be the rule, from which a lump sum payment can derogate in some cases. Recital 73 does not lay down any criteria to admit such a derogation, but admits that national transpositions could define sectoral specific cases where a lump sum could be applied. One should be aware that in some cases, a lump sum is better for the author or performer concerned due to transaction costs that a proportional share of the revenues could entail for a limited contribution, such as a minimal or technical contribution to a collective work, a small part in a film or a limited intervention as a studio musician in a recording session.

Member States should be allowed to use different mechanisms to achieve such fair remuneration, even beyond the contractual realm. One example could be an unwaivable right of remuneration that authors could directly claim *vis-à-vis* economic actors. Recital 73 refers also to collective bargaining, which has been deployed with satisfactory results for some sectors in France or Germany, where CMOs or representatives of creators have succeeded in negotiating framework contracts with defined remuneration schemes in some sectors. On the other side, the insistence on contractual freedom and a consideration of rights and interests of all parties involved, moves away from the objective of specifically protecting the weaker parties to copyright contracts, i.e. the individual authors and performers. Article 23(1) does not include the obligation to ensure a fair remuneration in the rights that cannot be contracted out. Nonetheless it should not be used as a justification to waive the right of creators and performers to claim such a remuneration.

4.3.3. *Transparency and reporting*

In order to ensure an effective control by creators and performers on the adequacy of their remuneration, Article 19 lays down an obligation of transparency on the revenues generated by the exploitation. It provides that authors and performers must receive, on a regular basis, and at least annually, up to date, relevant and comprehensive information on the exploitation of their works and performances, including on revenues generated and remuneration

155. Recital 73.

due. There is a fundamental tension in that provision between a requirement to get regular, relevant and comprehensive information and a principle of proportionality considering the specificities of each sector.¹⁵⁶ Implementation in Member States should be more specific in laying down the modalities of such an information obligation sector-by-sector. In doing so, they are free to accommodate the obligations of transparency to the specificities of types of creations and subject matter and sectors, for instance by limiting the types and level of information where it would entail a disproportionate administrative burden, or by suppressing it for insignificant contributions to a creation.¹⁵⁷ A role for collective bargaining is also recognized.¹⁵⁸

A remarkable addition is given in Article 19(2) which entitles the creators and performers to request the information they need about the exploitation of their rights to sublicensees if their direct contractual partner does not have all information. This radical derogation to the normally applicable principle of privity of the contract, will be useful for creators, particularly when the stronger economic exploiters of their works are not the producers or publishers with whom they contracted. Imagine a writer who only receives from her publisher some information about the volume of sales of her books, including the revenues generated by online e-books platforms, without any distinction as to the type of revenues. She might require supplementary information from the platform as to the number of books sold by the unit, or viewed in a subscription model, as well as to the revenues generated by advertising that could accompany models where her book is freely accessible on the platform. The author will not be capable of ascertaining the adequacy of the remuneration she receives without that comprehensive information – which subsequent economic operators, if not forced by the law to provide it, would prefer to retain. The obligations imposed by Article 19 are not overridable by contract.¹⁵⁹

4.3.4. *Contract adjustment mechanism*

When the remuneration agreed upon proves to be unfair in comparison to the revenues yielded by the exploitation, the CDSM Directive obliges that the contract is adjusted *ex post* to compensate the loss for creators and performers.

Article 20 entitles authors and performers or their representatives to claim additional, appropriate, and fair remuneration, when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or

156. See Art. 19(3) and Recital 77.

157. Art. 19(3) and (4).

158. Art. 19(5).

159. Art. 23(1).

performances. No contract could deprive authors and performers from the right of remuneration adjustment, according to Article 23(1).

The right to claim an additional remuneration aims at equating the remuneration actually perceived with the real economic value of the work and at countering the unpredictability of the creative market. The exploitation life of a work might reveal some surprises and unsuspected success might render the remuneration given to authors, completely unfair and disproportionately low. Some movie directors, at the outset of their career generally agree to receive a fixed amount as a remuneration supporting them during the making of the film. If not associated to the actual revenues of the film, they might end up in a very unjust situation. Some channels for exploitation might also have been considered as minimal when the contract was concluded and a small percentage agreed upon but later one of those channels might become essential and could justify a fairer participation of the author to the revenues.

Claiming such remuneration adjustment could however be risky for creators who expose themselves to be labelled as unreliable or belligerent partners, sometimes leading to being disfavoured or blacklisted in their sectors.¹⁶⁰ Aware of that risk, the Directive admits that the beneficiaries can be assisted by their representatives, e.g. CMO or unions. In addition, Article 21 imposes the setting up of alternative dispute resolution mechanisms, particularly to claim the benefit of the transparency and contract adjustment rights. Whereas it would not offer the perfect solution to the risk of blacklisting often encountered by authors who decide to complain, it might offer them a cheaper, less antagonistic and quicker resolution of their conflict, than bringing their case before courts.

4.3.5. *Right of revocation*

The most radical protection lies in Article 22 of the Directive. It grants authors and performers a right to revoke a contract transferring or licensing their rights if there is a lack of exploitation of the work or performance.

Revoking a copyright contract is a straightforward attack against the binding nature of the contract. It could prove necessary though, if the exploiter fails to deliver one essential object of the agreement: the actual exploitation of the work for which she has obtained the rights. Such a right to claim back the transferred rights if no or insufficient exploitation has been carried out exists in a few Member States. Introducing it at the EU level is a huge step towards a better protection of EU creators. The room for manoeuvre left to Member States in national implementation is rather wide though. Specific provisions may be provided for specific sectors and types of works and performances,

160. The risk of blacklisting is frequent in creative industries and stops many authors from complaining against their producer or publisher.

and for works composed of contributions by many.¹⁶¹ It could also be provided that the revocation only applies within a certain time frame or that authors and performers choose to terminate the exclusivity of the contract instead of revoking it in its totality.

The revocation can only apply after a reasonable period of time, to leave time for the contractant to undertake the exploitation. The “lack of exploitation” that triggers the possible application of the revocation right is not fully defined in the Directive. What would be a satisfactory level of exploitation? Is the publishing of a few copies of a book sufficient, despite the refusal of the publisher to proceed to a reprint? Is the publishing of a novel in hard copies enough, while the publisher does not engage in the publication in e-book format? Does the lack of exploitation of a novel in a movie adaptation or in merchandising, where there is a demand, amount to a lack of exploitation? Those questions are illustrative of the precisions the Member States might need to add to the principle of revocation, namely by determining a threshold of a reasonable exploitation, in quantity and in different modes of exploitation, to be achieved by the transferee or licensee.

Compared to the former provisions, the right of revocation can be set aside by contract,¹⁶² except if the Member State allows this contractual derogation only if based on a collective bargaining agreement.¹⁶³

5. Conclusion

At the end of our journey through the lengthy provisions of the CDSM Directive, we might be left with the impression of having only scratched its surface. The text has certainly still many secrets to deliver. On several points, its provisions remain elusive and ambiguous, and leave ample room for interpretation and questions to be decided by the ECJ, which might be the normal fate of any outcome of political compromise and a delicate balancing exercise.

The whole copyright package, including the CDSM Directive, has taken an important turn in law-making. Harmonization was transformed into a more direct regulatory intervention, in an attempt to shape and build an effective and fair digital single market. This is for the first time in copyright legislation, except for the more limited Orphan Works Directive of 2012. Nevertheless, it is still timid and might be impaired by the difficulties in implementation, both

161. Art. 22(2).

162. Art. 23(1).

163. Art. 22(5).

through national transpositions and its concrete putting into practice by stakeholders.

The exceptions were an issue for which expectations were high. It was time to renovate the list in the 2001 Directive and to allow for new worthy digital uses. Socially valuable exceptions, such as illustrations for teaching and some library uses, have been made mandatory for Member States. A new exception for text and data mining, including for purposes other than research, has been enacted. And the availability of out-of-commerce works has been facilitated and entrusted to cultural heritage institutions.

However, each provision authorizing those new beneficial uses is still conceived and written as an exception, with a number of strict conditions to comply with and not much room for interpretation or manoeuvre. Despite the call from many scholars to welcome a fair use like provision in the EU acquis,¹⁶⁴ that could, as in US copyright law, allow the judge to legitimize uses outside a closed list delineated by existing directives, or at least to allow for some interpretation by analogy,¹⁶⁵ using a copyright work, whatever its benefit for society, is still considered as infringing copyright, if not properly and precisely authorized by an exception. The rapid outdatedness of the list of exceptions that occurred with the Infosoc Directive could well happen again by want of more flexibility. Likewise, the ECJ has recently reaffirmed the impossibility for Member States to authorize uses beyond that limited list,¹⁶⁶ while recognizing that exceptions are *rights*, and not simple interests or privileges, to be balanced with the rights of authors and other rights owners.¹⁶⁷

The Directive also engages in facilitating exploitation of copyrighted works, by offering a few pragmatic solutions to the complexity of copyright clearance, whether by the tool of extended collective licensing, the mitigations of the territorial authorization for getting proper authorizations, or by a mediation process for VOD exploitation. But those provisions have generally a limited scope and the derogations to the principle of territoriality, that is still the main hurdle to a genuine digital single market, are minimal. Territoriality

164. Senfleben, "Bridging the differences between copyright's legal traditions: The emerging EC Fair Use Doctrine", 57 *J. Copyright Soc'y* (2010), 521; Geiger and Izyumenko, "Towards a European 'Fair Use' grounded in freedom of expression", 35 *American University International Law Review* (2019), 1–74, available at <ssrn.com/abstract=3379531> (last visited, 15 Feb. 2020).

165. Which was the solution proposed by the Wittem Code, an academic proposal of a EU Code of copyright law, available at <www.ivir.nl/copyrightcode/introduction/> (last visited 20 Feb. 2020).

166. Case C-476/17, *Pelham GmbH*, EU:C:2019:624, para 63; Case C-469/17, *Funke Medien*, EU:C:2019:623, para 62; Case C-516/17, *Spiegel Online*, EU:C:2019:625, para 47.

167. Case C-469/17, *Funke Medien*, para 70; Case C-516/17, *Spiegel Online*, para 54.

is only eroded at the margins and could still be the “last frontier”¹⁶⁸ to overcome in the next copyright reform.

The more fundamental and contested outcomes of the Directive lie in the achievement of fairer market. The new press publications right and the new regime of video-sharing platforms could have been the stumbling blocks of the whole legislative project. The objective of ensuring a better remuneration of rightholders where their content is exploited by internet services is certainly laudable. Yet, the compromises and bad choices made by the Directive lead to intricate provisions whose success might be illusory. This is clear for the press publications right, the utility and strength of which are disputable. Why would this new right, with a much more limited scope than copyright, succeed against Google where copyright itself, generally acquired by press publishers, has failed?

The infamous Article 17, combining an obligation to get a licence for any work uploaded on YouTube and the like, with a filtering system by default of such authorization, will certainly lead to more financial flows from those platforms to rightholders, despite the practical difficulties in getting such licences. But it could equally lead to disproportionate control over uploaded content and restrictions of freedom of expression and legitimate uses of copyrighted works. The solutions put in place to remedy such side effects are largely unconvincing.

Finally, contractual protection of the authors and performers is to be welcomed, as this come back to a primary objective of copyright, that of the protection of creators, which has been largely absent of the EU copyright *acquis* so far. The strong opposition of the cultural industries to such protective measures reminds one, however, of the extent of difficulties the creators might encounter in enforcing this.

A feeling of frustration remains. Despite its vast outreach and its attempts to restore some balance, either for valuable public and cultural uses or for creators, it definitely lacked ambition. The copyright reform that has dominated the EU debate in IP in the last five years, mostly proposes piecemeal solutions without daring to touch the copyright *acquis*, which remains fragmented and waiting for a more fundamental revision. Yet, the issues are profound. Recent decisions of the ECJ have interpreted the economic rights of authors, particularly the right of communication to the public, in ways that lead to an excessive ambit of control by rightholders and a tricky play with legal notions and the very logic of the whole regime of copyright. Under this case law, almost anyone participating, even very remotely, in a situation that had the effect of works being communicated,

168. Hugenholtz, “The last frontier: Territoriality”, *op. cit. supra* note 76.

might be found guilty of infringement.¹⁶⁹ The criteria of the new public and of the indispensable role played by the user, used by the EU judges, have obfuscated the application of copyright and arguably conflate the logics of property right and liability. That the Directive did not try to clarify this messy interpretation of the right of communication is a mystery and a regret.

There was a need to lift the legal uncertainty and propose a proper and sound concept of economic rights.¹⁷⁰ It is a pity that the EU legislature did not have the political will to engage or take up the challenge. The Directive on copyright in the digital single market fails to deliver on its promise of a more ambitious copyright reform. Another piece of legislation was just piled up to an already entangled puzzle of legal provisions. It was time to profoundly revise the *acquis*. Instead the construction of an effective single market in cultural and entertainment products and services, but equally importantly of a digital society where all have access to creative works, information and knowledge, and where creators get a fair remuneration, still relies on 27 different national copyright frameworks, partly outdated notions, intricate practical solutions, and unsolved issues.

169. See e.g. Case C-160/15, *GS Media*, EU:C:2016:644; Case C-527/15, *Stichting Brein v. Filmspeler*, EU:C:2017:300; Case C-610/15, *Stichting Brein v. Ziggo BV and XS4All Internet BV*, EU:C:2017:456.

170. On this point see Dusollier, *op. cit. supra* note 17, and the other contributions in the same publication.

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