

# **PRIVATE COPYING IN THE DIGITAL ENVIRONMENT**

An Interpretation of Article 5(2)(b) of the Directive 2001/29/EC of 22 May 2001  
on the harmonisation of certain aspects of copyright and related rights in the  
Information Society

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by

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## **ABSTRACT**

Digitalisation and the internet have enabled ordinary individuals to make copies of copyrighted content easily, costlessly and with no degradation in terms of quality. While digital private copying is permitted in Europe under Article 5(2)(b) of Directive 2001/29/EC, it represents a major challenge to the interests of the copyright owners and a thorny issue in the context of digital copyright. Despite the fact that all EU Member States, with the exception of Ireland and the UK, have incorporated a statutory limitation for acts of private copying in their national statutes, there is legal uncertainty as to the scope of this limitation. To be permitted, the use of copyrighted content ought to be private and non-commercial; these concepts, however, do not translate well in the digital environment. For instance, one can only wonder whether *facebook* friends qualify as a private circle and whether downloading works for free from file-sharing networks is a non-commercial act. This thesis provides answers to these questions and determines the actual scope of the private copying limitation.

Yet, perfectly lawful private uses of copyrighted content may have an aggregate impact on the interests of the rightholders in the digital environment, where these activities are more widespread. To deal with the digital impact of private copying, Directive 2001/29/EC sets forth a twofold approach; while private copying is premised on condition that the rightholders are compensated for the unauthorised uses of their works, at the same time, the application of technological protection measures is rigorously protected. We examine the efficacy of these approaches in dealing with digital private copying and their adequacy for policy reasons.

This thesis concludes that, even though private copying is permissible under the set of conditions laid down by Article 5(2)(b) of Directive 2001/29/EC, its legitimate exercise is jeopardised in the digital environment due to the fact that this limitation is not mandatory. This means that the ability of end users to make private copies may be either technologically or contractually restricted. Yet, the private copying limitation is a manifestation of the fundamental right to privacy, which prevails over copyright enforcement. We therefore urge for an explicit declaration of the imperative status of the private copying limitation against technological or contractual constraints.

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I certify that the work presented in this thesis is my own unless otherwise referenced.

Signature.....

Date.....

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## ABBREVIATIONS

<b>AG</b>	Advocate General
<b>ALAI</b>	Association Littéraire et Artistique Internationale
<b>CD</b>	Compact Disc
<b>CD-ROM</b>	Compact Disk – Read Only Memory
<b>CDPA</b>	Copyright, Designs and Patents Act 1988
<b>CW</b>	Copyright World
<b>DMCA</b>	Digital Millennium Copyright Act
<b>DRM</b>	Digital Rights Management
<b>DVD</b>	Digital Video Disc
<b>EC</b>	European Communities
<b>EC Treaty</b>	Treaty Establishing the European Community
<b>ECJ</b>	European Court of Justice
<b>EEA</b>	European Economic Area
<b>EIPR</b>	European Intellectual Property Review
<b>Ent.L.R.</b>	Entertainment Law Review
<b>EU</b>	European Union
<b>IIC</b>	International Review of Intellectual Property and Competition Law
<b>IJL&amp;IT</b>	International Journal of Law and Information Technology
<b>IP</b>	Internet Protocol
<b>IPRs</b>	Intellectual Property Rights
<b>ISP</b>	Internet Service Provider
<b>LAB</b>	Legal Advisory Board of the European Commission
<b>MP3</b>	MPEG-1 Audio Layer 3 (digital audio encoding standard)
<b>OJ</b>	Official Journal
<b>P2P</b>	Peer-to-peer
<b>PC</b>	Personal Computer
<b>PETs</b>	Privacy-Enhancing Technologies

<b>RIAA</b>	Recording Industry Association of America
<b>RIDA</b>	Revue Internationale du Droit d'Auteur
<b>RAM</b>	Random Access Memory
<b>RMI</b>	Rights Management Information
<b>TPM</b>	Technological Protection Measure
<b>TRIPS</b>	Agreement on Trade Related Aspects of IPRs
<b>UK</b>	United Kingdom
<b>US</b>	United States of America
<b>VHR</b>	Video Cassette Recorder
<b>WCT</b>	WIPO Copyright Treaty
<b>WIPO</b>	World Intellectual Property Organisation
<b>WTO</b>	World Trade Organisation
<b>WPPT</b>	WIPO Performances and Phonograms Treaty
<b>UNESCO</b>	United Nations Educational, Scientific and Cultural Organisation

## INTRODUCTION

Digitalisation and the internet have enabled ordinary individuals to make easily and without significant cost copies of works with no degradation in terms of quality. While acts of private non-commercial copying were feasible in the analogue environment too, the risk of copyright infringements on the internet has increased. This is not only due to the possibility of making perfect copies but also due to the fact that the distribution of these copies has become as easy to accomplish as copying itself. One can only wonder whether the copyright industries would be so much concerned about the perfect replication of copies if end users were not able to distribute these copies to others, essentially for free. Due to this unprecedented risk of piracy and large-scale unauthorised use, the copyright industries tend to translate every unauthorised use as piracy<sup>1</sup> and have started suing individual end users, especially those engaged in the online sharing of copyrighted content. And while much has happened since the first Court decision on file-sharing in 2001,<sup>2</sup> one issue remains constant: the contested legitimacy of private copying in the digital environment.

Yet, from its very origin, copyright has withstood, and been shaped by, the test of time and subversive technology. Despite the fact that the emergence of new technologies tends to undermine the order established by copyright, copyright laws on a worldwide basis consent that there is a copyright-free zone in which individuals may make private use of copyrighted content without being liable for copyright infringement.<sup>3</sup> This free zone is maintained by the fair-use doctrine in the United States,<sup>4</sup> the fair-dealing provisions in the common-law world<sup>5</sup>

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<sup>1</sup> J. Litman, 'The Demonization of Piracy', *Tenth Conference on Computers, Freedom & Privacy*, April 6, 2000, p. 7-8; D. Panethiere, *The Persistence of Piracy: The Consequences for Creativity, for Culture, and for Sustainable Development*, The Global Alliance for Cultural Diversity, Unesco, 2005, p. 11.

<sup>2</sup> *A&M Records Inc v Napster Inc*, 239 F. 3d 1004 (2001) (9<sup>th</sup> Cir (US)).

<sup>3</sup> M.A. Hamilton, 'Impact of the TRIPs Agreement on Specific Disciplines: Copyrightable Literary and Artistic Works: Article: The TRIPs Agreement: Imperialistic, Outdated, and Overprotective', 29 *Vand.J.Transnat'l L.*, 1996, p. 613, at 622-633.

<sup>4</sup> Section 107 of title 17 of the US Code. Section 107 lays down four factors to be considered in determining whether or not a particular use is fair:

1. *The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes*
2. *The nature of the copyrighted work*
3. *The amount and substantiality of the portion used in relation to the copyrighted work as a whole*
4. *The effect of the use upon the potential market for, or value of, the copyrighted work.*

<sup>5</sup> In Australia, the grounds for fair dealing are research and study (section 40 *Copyright Act* 1968 (Cth)), review and criticism (s41), reporting the news (s42), legal advice (s43), parody and satire (s41A) See the Australian Copyright Act 1968 (as amended).

In the UK, the Copyright, Designs and Patents Act 1988 (CDPA), defines fair dealing as "private study and criticism and review and news reporting" (s. 29, 30) Although not actually defined as a fair dealing, copyright in

and the specific private-copying limitation in Europe.<sup>6</sup> In essence, all these legal instruments are derogations from the legal protection afforded to the rightholders through copyright law and permit end users to make lawful private use of copyrighted content on the basis of public-policy reasons or fundamental freedoms, such as the right to privacy.

The European private copying limitation has been introduced into the *aquis communautaire* by Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the Information Society.<sup>7</sup> This Directive, which implemented the 1996 WIPO Internet Treaties<sup>8</sup> into Community law, is meant to provide a harmonised legal framework at pan-European level with a view to update the protection of copyright and related rights for the needs of the digital environment. Yet, it exceeds the legal protection afforded by the WIPO Treaties by laying down a series of copyright limitations that restrict the scope of exclusive rights to the benefit of copyright users, including a limitation on private non-commercial copying. Article 5(2)(b) of Directive 2001/29/EC urges Member States to

*‘provide for exceptions or limitations to the reproduction right [...] in respect of reproductions made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures [...] to the work or other subject-matter concerned.’*

Even though Article 5(2)(b) of Directive 2001/29/EC has evolved on a national organic basis, it has not been fully harmonised throughout the European Union. While the great majority of EU Member States have incorporated a private copying limitation into their national statutes,<sup>9</sup>

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works is also not infringed by the incidental inclusion in an artistic work, sound recording, film, broadcast or cable programme.

<sup>6</sup> Article 5(2)(b) of Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the Information Society, OJ L 167, 22.6.2001, p. 10. The full text of this Directive can be found at Annex I at the end of this thesis. Also see the national laws which have thereof implemented this article, in Appendix II at the end of the thesis.

<sup>7</sup> The legal basis of Directive 2001/29/EC is Article 249 of the Treaty establishing the European Community (EC Treaty), 1997, and Article 55 EC (right of establishment), Article 47(2) ECT (freedom of services) and Article 95 ECT (establishment and functioning of the Internal Market).

Directive 2001/29/EC commences the phase of second generation Directives, under which the approach towards harmonisation appears more horizontal. Directive 2001/29/EC aims at introducing provisions applicable to all copyright subject-matters and to all categories of European rightholders. Directive 2004/48/EC deals with the whole range of intellectual property rights. See Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004), OJ L 195, 2.6.2004, p. 16–25.

See in this respect M. L. Montagnani & M. Borghi, ‘Promises and Pitfalls of the European Copyright Law Harmonisation Process’, in D. Ward (ed.), *The European Union and the Culture Industries: Regulation and the Public Interest*, Ashgate, 2008, pp. 213-240, at p. 222.

<sup>8</sup> WIPO Copyright Treaty (WCT) adopted by the Diplomatic Conference on December 20, 1996, CRNR/DC/94; WIPO Performances and Phonograms Treaty (WPPT) adopted by the Diplomatic Conference on December 20, 1996, CRNR/DC/95.

<sup>9</sup> Note, however, that the Irish and UK statutes contain a limited private copying provision for time-shifting purposes; this covers the recording of broadcasts for later perusal. Copyright, Designs and Patents Act 1988 of

their private-copying regimes remain largely diverse.<sup>10</sup> This lack of harmonisation is mainly due to the fact that Article 5(2)(b) was not mandatory for Member States to implement<sup>11</sup> and due to the deficient guidance as to the interpretation of its constituents. As a result, what is understood as permissible private copying differs substantially amongst Member States. This has become source of legal uncertainty throughout Europe since activities which are exempted from infringement in one State are not in another. As a result, end users may find themselves liable at one State for an activity that is perfectly permissible in another. At the same time, no level playing field is created for the copyright holders. This was, however, one of the main objectives of Directive 2001/29/EC which acknowledges in its fourth Recital that *‘[a] harmonised legal framework [...] will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors.’*<sup>12</sup>

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the UK, Section 70 (‘Recording for purposes of time-shifting’). Copyright and Related Rights Act 2000 of Ireland, Article 101 (‘Recording for purposes of time-shifting’); Copyright and Related Rights Act 2000 of Ireland, Article 204(4).

What is more, there have been discussions in the UK recently on the introduction of a full exemption to the reproduction right for format-shifting purposes, namely for copying content into other platforms without the seeking permission from the rightholders and with no obligation to pay remuneration. HM Treasury, *The Gowers Review of Intellectual Property*, November 2006, Recommendation 8, points 4.72-4-76; N. Rose, ‘An overview of the proposed introduction of a private copying exception into UK copyright law’, *Ent. L.R.*, 2008, 19(4), pp. 75-76; J. Espantaleon, ‘Does Private Copying need an Update in the UK?’, *J.I.P.L.P.*, 2008, 3(2), pp. 115-124, at 115; D. Bainbridge, ‘The Gowers Review of Intellectual Property’, *I.P. & I.T. Law*, 2006, 11(6), pp. 4-10, at 4; B. Hughes, ‘United Kingdom: copyrights - government consults on proposed amendments to copyright regime’, *W.C.R.R.*, 2008, 3(2), pp. 17-19, at 17; C. Angelopoulos, ‘Modern Intellectual Property Legislation: Warm for Reform’, *Ent.L.R.*, 19(2), 2008, 35-40, at pp. 39-40.

<sup>10</sup> Since Member States were free to choose amongst them, a ‘grandfather’ tendency has been observed during the implementation process. Indeed, most Member States preferred to leave their national laws as much intact as possible, this leading to a minimal degree of harmonisation throughout Europe. T. Heide, ‘The Approach to Innovation under the Proposed Copyright Directive: Time for Mandatory Exceptions?’, *IPQ*, 2000, No. 3, pp. 215-232, p. 228; L. Guibault, ‘The Nature and Scope of Limitations and Exceptions to Copyright and Neighbouring Rights with Regard to General Interest Missions for the Transmission of Knowledge: Prospects for their Adaptation to the Digital Environment’ *e-Copyright Bulletin*, Unesco, October – December 2003, p. 316-317; P.B. Hugenholtz, ‘Why the Copyright Directive is Unimportant, and Possibly Invalid’ *EIPR*, 2000, pp. 409-505, p. 499; T.C. Vinje, ‘Should we Begin Digging Copyright’s Grave’, *EIPR*, 2000, pp. 551-562, p. 551; G.P. Cornish, ‘Libraries and the Harmonisation of Copyright’, *EIPR*, 1998, pp. 241-243, p. 241; M. Hart, ‘The Proposed Directive for Copyright in the Information Society: Nice Rights, Shame about the Exceptions’, *EIPR*, 20(5), 1998, 169-171, at p. 169; R. Burrell & A. Coleman, *Copyright Exceptions: The Digital Impact*, Cambridge University Press, Cambridge, 2005, pp. 302-304. Note that Member States may have had the discretion to choose freely amongst optional exceptions and limitations but they had to comply with the Directive’s wording. See C. Schaal, ‘The Copyright Exceptions of Art. 5(2)(A) and (b) of the EU Directive 2001/29’, *Ent.L.Rev.*, 14(5), 2003, 117-121, at p. 117.

<sup>11</sup> See G. Westcamp, *The Implementation of Directive 2001/29/EC in the Member States, Part II*, Queen Mary Intellectual Property Research Institute, Centre for Commercial Law Studies, February 2007, pp. 12 and 84-87.

<sup>12</sup> In similar vein, Recital 6 of Directive 2001/29/EC states that *‘[w]ithout harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency. The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased transborder exploitation of intellectual property. This development will and should further*

What is more, the conceptual contours of the private copying limitation tend to be less sharp in the digital context. In particular, the private character and the non-commercial purpose of legitimate private copying, which serve as its permissible limits, do not translate well in the digital environment. An end user can, therefore, only wonder whether his *msn-messenger* contacts are a private circle and whether he engages in commercial acts of copying by downloading content for free from file-sharing networks. So, much as the meaning of ‘private’ and ‘non-commercial’ uses seems quite clear, they are vague concepts with no settled legal contour. In this confusion, the private copying limitation may be used as a defence to digital copyright piracy or as a means of burking digital private use, from a user or a rightholder perspective respectively.

Yet, fact remains that private non-commercial copying is permitted in Europe and uses falling under the description of Article 5(2)(b) of Directive 2001/29/EC are lawful. To compensate for losses of sales that the rightholders might encounter due to the aggregate impact of private copying, this article provides rightholders with an entitlement to fair compensation. This has been translated by most Member States as a levy payable to media and/or equipment to compensate rightholders for the harm they might suffer due to private copying. One could eagerly conclude that where an activity falls under the scope of Article 5(2)(b) and a levy is payable to the rightholders, a user right is created in respect of acts of private non-commercial use. Yet, this is not the case! Rather, judicial practice of the national courts is reluctant to accept the creation of such user right; in fact, there is a judicial trend holding that Article 5(2)(b), and the relevant national provisions implementing it, lay down a copyright limitation and not a right to the benefit of end users. As a result, the private copying limitation serves merely as a defence against allegations for copyright infringement despite the fact that it finds a strong justificatory basis on the right to privacy in terms that end users are free to consume copyrighted content without their privacy being violated, may that be the privacy of their home or their informational privacy.

In the confusion as to the legal nature of the private copying limitation, Directive 2001/29/EC does not declare the private copying limitation imperative against its contractual or technological restriction. Nonetheless, the imposition of restrictions on the ability to make private copies through licensing terms or through the application of technological protection measures has become feasible due to the emergence of copyright-protective technologies. Directive 2001/29/EC provides rigorous protection against the circumvention of such

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*increase. Significant legal differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights.’*

technologies under Article 6,<sup>13</sup> and merely suggests, but does not mandate, through its Article 6(4)(2) that Member States may adopt measures ensuring that end users shall benefit from the private copying limitation where their ability to make private copies is technologically prohibited. This article, however, is highly complex and its national implementation by Member States has been a mixed blessing at best. At the same time, the Directive remains silent as to the thorny issue of the intersection between the private copying limitation and its contractual restriction. Through its Article 6(4)(4), it gives pre-eminence to acts of private ordering, namely to contractual licenses made in the context of interactive on-demand services, without explicitly clarifying whether these licenses may foreclose the ability of end users to make private copies. While we consent that rightholders and users may freely negotiate the terms of licensing agreements to best fit their respective needs, most online contractual licenses are, in essence, standard-form contracts through which the rightholders unilaterally impose their terms. This however could endanger the exercise of the private copying limitation in the online environment where licensing tends to become the leading form of exploiting works.

We have, therefore, identified that one of the thorniest issues in the context of the private copying limitation is the fact that this limitation is not mandatory and, as a result, its exercise is not shielded against technological or contractual restrictions. So, even though private copying is permitted in Europe through the diverse national provisions implementing Article 5(2)(b) of Directive 2001/29/EC, it may be rendered moot by technological protection measures or contractual clauses. If the confines of copyright are not defined by the legislator but are at the disposal of the rightholders the legitimate exercise of the private copying limitation is rendered vulnerable against contractual or technological constraints. Yet, the application of technological protection measures and the attachment of contractual licenses over the use of copyrighted content are growing increasingly popular in the digital networked environment. Without having been declared imperative against its contractual or technological restriction, the legitimate exercise of the private copying limitation is endangered in this environment, regardless of the fact that this limitation demarcates a statutory area which the rightholders have no power to control through their respective rights.

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<sup>13</sup> Some commentators have interpreted this approach as seeking to gradually phase out levies. See N. Helberger et al., *Digital Rights Management and Consumer Acceptability: A Multi-Disciplinary Approach of Consumer Concerns and Expectations*, State-of-the-Art-Report, INDICARE, December 2004, p. 68; P.B. Hugenholtz, L. Guibault & S. Van Geffen, *The Future of Levies in a Digital Environment*, Institute for Information Law, IViR, 2003, at p. 34.

## Outline of the thesis

We consider that the interpretation of Article 5(2)(b) of Directive 2001/29/EC, which lays down the private copying limitation, is one of the hottest and highly-debated issues in the realm of digital copyright; not only is its scope legally uncertain in the digital environment but also the legitimate exercise of the private copying limitation is not sheltered against contractual or technological constraints. To address this issue, we need to determine the permissible limits of private copying and to evaluate the legislative approach adopted by Directive 2001/29/EC to deal with the digital impact of this phenomenon.

In the first part of this thesis we shall provide some interpretative guidelines on the meaning and scope of the private copying limitation of Article 5(2)(b) of Directive 2001/29/EC. For this article to apply, the use in question should be private and non-commercial. No guidance is however given as to how the concepts 'private' and 'non-commercial' should be interpreted in this context either by the Commission or the European Court of Justice. And while legal literature abounds with articles revolving around the issue of digital private copying, none of these articles provides a comprehensive overview of which acts are permitted under Article 5(2)(b) and which are not. As a result, our analysis is mainly driven by national legislations and case-law as well as the paradigm of the United States and Canada, where appropriate. We consider that determining the scope of the private and non-commercial nature of permissible private copying is essential since the traditional definitions of these concepts, which originate from the analogue world, do not translate well in the digital environment. Consider, for instance, a *facebook* user who uploads videoclips on his personal page for his 'friends' to watch. Since this concept of 'friendship' did not use to exist in the analogue world one can only wonder whether these 'friends' qualify as a private circle within the meaning and for the purposes of Article 5(2)(b). In the first chapter of the first part of the thesis our aim is to provide a comprehensive analysis of which uses qualify as private in the digital context and are, thereof, permitted, and which are not. To achieve this aim, we shall build a test in determining the conditions under which an audience qualifies as a private circle of recipients for the purposes of Article 5(2)(b).

In the second chapter of this part we attempt to determine the lack of commerciality in permissible private copying. Indeed, Article 5(2)(b) reads that private copying is permitted as long as it is not directed towards '*ends that are neither directly nor indirectly commercial*'. Since no definitions are given as to the meaning of non-commerciality, our guide shall be the national interpretation of this concept by legislators and the judiciary. We are concerned about adequacy of the non-commerciality requirement since most digital private uses are not

commercially motivated. For instance, in the *facebook* example given earlier, no profit motive can be established since the user uploads the videos essentially for free. Since digital copies are normally made to save the end user from buying the original, one can have serious doubts whether these kinds of uses can qualify as commercial or not. Does non-commerciality as stipulated under Article 5(2)(b) cover this type of uses as well? To get an answer to this question we need to subject digital private copying to the three-step test of Article 5(5) of Directive 2001/29/EC as a general restriction applicable to all copyright exceptions and limitations. To pass the scrutiny of this test, digital private copying (a) should qualify as a certain special case, (b) it should not come in conflict with a normal exploitation of a work and (c) it should not prejudice the legitimate interests of the rightholders. Since Article 5(5) addresses the test directly to the application of copyright limitations, it can be understood as setting the test at the disposal of the judiciary and, therefore, imposing an extra condition to the permissibility of these limitations, including the private copying limitation. In the first part of this thesis we shall therefore attempt to clarify the actual scope of the private copying limitation of Article 5(2)(b) vis-à-vis the digital networked environment.

In the second part of the thesis, we will examine and evaluate the efficacy of the legislative response to the impact of private copying in the digital environment, as envisioned by Directive 2001/29/EC. One can only wonder how this twofold legislative response which is both compensatory and technological can practically function. Since both levies and technology are recruited to deal with the digital impact of private copying, end users may find themselves in the difficult position of not being able to make private copies due to technological restrictions and, at the same time, being charged for this type of use, mainly because the private copying limitation lacks a mandatory character. Our aim in this second part of this thesis shall be to identify the appropriate method in dealing with digital private copying keeping in mind that the main problem associated with this phenomenon is its aggregate impact. As acknowledged by the Recording Industry Association of America (RIAA), *'[o]ne individual making one copy is not likely to cause significant harm, but millions doing the same would, and does, cause extraordinary harm. The internet complicates the situation further still, where a single person has the ability to trigger incalculable damage.'*<sup>14</sup> To deal with the impact of digital private copying, Article 5(2)(b) indicates that private copying is permitted on condition that the rightholders receive fair compensation that takes into account the application or non-application of technological protection measures. While levy schemes have been a successful approach in compensating the rightholders in respect of analogue private copying, some

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<sup>14</sup> <<http://www.riaa.com>>

scholars argue that levies shall be gradually phased-out in the digital environment due to the increasing popularity of applying technological protection measures.<sup>15</sup> Our examination in the first chapter of this part shall revolve around the viability and adequacy of private-copying levies in the digital context. Levies legitimise private copying on the basis that it is practically impossible to enforce copyright without encroaching upon end-user privacy and, at the same time, compensate the rightholders for the potential losses in sales that they encounter due to private copying. Whereas there are many policy reasons in defending their maintenance, the administration of the levy schemes remains inextricably territorial and national in scope. This could lead to distortions in the process of collecting and distributing the levies to the rightholders and, therefore, undermine the efficacy of the levy-based approach. We address this concern and urge for the harmonisation of the national practices applicable in respect of private-copying levies at pan-European level.

At the second chapter of this part, we will evaluate the technological approach to control private copying, as supported by Article 6 of Directive 2001/29/EC. The latter article transposes into Community law the relevant anti-circumvention provisions of the WIPO Treaties. In essence, it provides legal protection against the circumvention of technological mechanisms that may restrict or prevent the ability to copy or access works. The application of such mechanisms, however, could endanger the exercise of the private copying limitation of Article 5(2)(b)! Our main question shall be whether this limitation is enforceable against the application of such mechanisms. To answer this question, we shall analyse Article 6(4)(2) of Directive 2001/29/EC which attempts to ensure that the exercise of the private copying limitation shall not be hindered due its possible technological restriction. We shall illustrate that this article was not mandatory for Member States to implement and, as a result, its transposition into national laws did not yield an expected degree of uniformity. This has generated controversy as to whether the private copying limitation is enforceable against the application of technological protection measures. In this context, we have identified yet another issue that has not been settled by Directive 2001/29/EC. This is the relationship of the private copying limitation against its contractual restriction. Indeed, the digital environment has enabled the rightholders to impose unilateral clauses arranging the conditions under which a work may be used. For instance, they can attach a licence, such as a click-wrap licence, onto their works determining the conditions under which their works may be used. In this context, the ability to make private copies could be contractually waived. Our focus at this point shall be to determine the issue of the contractual overridability of the

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<sup>15</sup> See in general P.B. Hugenholtz, L. Guibault & S. Van Geffen, *The Future of Levies in a Digital Environment*, op.cit.

private copying limitation. Since Directive 2001/29/EC does not declare the private copying limitation imperative against its contractual restriction the viability of this limitation in the digital environment remains highly uncertain.

Throughout this thesis, our guide shall be the copyright balance, a balance that is meant to equilibrate the extent of legal protection afforded to the rightholders in a way that does not exceed the maximum benefit that such a protection has for society as a whole. This balance is affirmed to be one of the prime objectives of Directive 2001/29/EC; indicative in this respect is Recital 31, under which '*[a] fair balance of rights and interests between [...] the different categories of rightholders and users of protected subject-matter must be safeguarded.*' As a result, we will not take a strict position neither in favour of the rightholders nor of the end users. Note, however, that since Directive 2001/29/EC is dysfunctional in achieving a balanced protection for all copyright players, mainly because of the unrestrained prevalence of technological protection and the weak protection of copyright limitations, there shall be points in this thesis where our analysis shall be made from an end user perspective with a view to defend the preservation of an area of freedom for private use.

## Part I: The permissible limits of digital private copying under Article 5(2)(b) of Directive 2001/29/EC

Article 5(2)(b) of Directive 2001/29/EC stipulates that ‘*Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 [...] in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial [...].*’

While this article forms part of an exhaustive list of exceptions and limitations enumerated under Article 5 of Directive 2001/29/EC, as acknowledged by Recital 32 of the Directive,<sup>16</sup> its implementation by Member States was optional. This is affirmed by the wording of Article 5 which states that Member States *may* introduce these copyright exceptions and limitations into their national laws. As a result, Member States were not obliged to implement the entire list of optional exceptions and limitations but were free to pick and choose at will.

With the exception of the UK and Ireland,<sup>17</sup> all other EU Member States provide for a private copying limitation in their national statutes, either by statutorily introducing a new limitation in the process of implementing Directive 2001/29/EC into national law, or by retaining a relevant limitation that used to already exist into their national laws. Since the exceptions and limitations enumerated under Article 5 of Directive 2001/29/EC are a compilation of the main exceptions and limitations that used to pre-exist at national level, a ‘grandfather’ tendency has been observed during the implementation process. Indeed, most Member States preferred to leave their national laws as much intact as possible, this leading to a minimal degree of harmonisation throughout Europe.<sup>18</sup> Of course, as Schaal rightly points out, the Member States that chose to implement Article 5(2)(b) into national law had to comply with the Directive’s wording.<sup>19</sup> In most States, however, this did not happen. As a result, the national private-copying regimes remain largely diverse and what is understood as private

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<sup>16</sup> Recital 32 states that ‘[i]bis Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public.’

<sup>17</sup> Note, however, that the Irish and UK statutes contain a limited private copying provision for time-shifting purposes; this covers the recording of broadcasts for later perusal. Copyright, Designs and Patents Act 1988 of the UK, Section 70 (‘Recording for purposes of time-shifting’). Copyright and Related Rights Act 2000 of Ireland, Article 101 (‘Recording for purposes of time-shifting’); Copyright and Related Rights Act 2000 of Ireland, Article 204(4).

<sup>18</sup> T. Heide, ‘The Approach to Innovation under the Proposed Copyright Directive’, op. cit., pp. 215-232, p. 228; L. Guibault, ‘The Nature and Scope of Limitations and Exceptions to Copyright and Neighbouring Rights with Regard to General Interest Missions for the Transmission of Knowledge’, op. cit., p. 316-317; P. B. Hugenholtz, ‘Why the Copyright Directive is Unimportant, and Possibly Invalid’, op. cit., p. 499; T. C. Vinje, ‘Should we Begin Digging Copyright’s Grave’, op. cit., p. 551; G.P. Cornish, ‘Libraries and the Harmonisation of Copyright’, op. cit., p. 241; M. Hart, ‘The Proposed Directive for Copyright in the Information Society: Nice Rights, Shame about the Exceptions’, op. cit., at p. 169; R. Burrell & A. Coleman, *Copyright Exceptions: The Digital Impact*, op. cit., pp. 302-304.

<sup>19</sup> See C. Schaal, ‘The Copyright Exceptions of Art. 5(2)(a) and (b) of the EU Directive 2001/29’, op.cit., at p. 117.

copying differs substantially amongst Member States.<sup>20</sup> In this respect, the harmonisation process initiated by Directive 2001/29/EC falls into blunders. No level playing field is created for the rightholders who wish to market their works or other subject-matter throughout Europe and, at the same time, end users of one Member State may find themselves liable for copyright infringement for an activity that is perfectly permissible in another State of the Union.

Legal uncertainty was further accelerated by the fact that no guidance has been given as to the interpretation of the permissible limits of the private copying limitation as provided by Article 5(2)(b). In particular, the concepts ‘private’ and ‘non-commercial’ use, which are used to demarcate the scope of Article 5(2)(b), are not defined either by the Commission or the European Court of Justice. National judges are therefore left to determine their meaning on a case by case basis. This however has resulted in the issue of diverse rulings from one Member State to another in cases involving similar facts. This has become source of legal uncertainty throughout Europe and has engendered an ongoing controversy with regard to when the private copying limitation serves as a defence to digital copyright piracy. The lack of guidance as to how the concepts ‘private’ and ‘non-commercial’ have to be interpreted becomes even more problematic by the fact that these notions have lost much of their ‘traditional’ meaning through digitalisation. One can only wonder whether his *facebook* ‘friends’ qualify as a private circle and whether the music he uploads for free on a torrent is a commercial activity. As a result, the terms ‘private’ and ‘non-commercial’ do not translate well in the digital environment and, much as their meaning seems quite clear, they are vague concepts with no settled legal contour.

In this first part of the thesis we shall attempt to provide an interpretation of these terms with a view to determine which uses are permissible and which are not. We appraise that the permissible limits of the private copying limitation are in essence two, namely the ‘private’ and the ‘non-commercial’ character of the use. Article 5(2)(b) covers acts of *reproduction* made for the *private* use of natural persons. We consider that the reservation of the private copying limitation to acts of copying underscores the private character of permissible uses. In our view, copying *per se* is not infringing since, as Wistrand rightly acknowledges, it is only preparatory to the dissemination of works to the public.<sup>21</sup> One can only wonder whether the copyright industries would be so much concerned about unauthorised copying if the copies created were not somehow made available to the public. Yet, there is no clear definition of

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<sup>20</sup> See Annex II at the end of this thesis.

<sup>21</sup> H. Wistrand, *Les exceptions apportées aux droits de l'auteur sur ses œuvres*, Editions Montchrestien, Paris, 1968, p. 314.

what a 'private' use is for the purposes of copyright protection. And despite the fact that private copying has never been conceived as a purely solitary activity, there is no indication as to which circle of recipients qualifies as private. Our purpose shall be to determine which activities are covered by Article 5(2)(b) and to provide some meaningful interpretation to the term 'private' in the context of this article. In essence, we shall build a test for establishing which uses are private for the purposes of this article and which are not.

What is more, Article 5(2)(b) of Directive 2001/29/EC stipulates that reproductions for private use ought to be made for ends that are neither directly nor indirectly commercial. Since the notion of non-commerciality in this context is not clarified at EU level and may, therefore, receive diverse interpretations by national judges, our aim in the first section of the second chapter shall be to determine the characteristics of the uses that qualify as non-commercial and are, therefore, covered by Article 5(2)(b). Our guide shall be the national case-law on this issue as well as the rulings of Courts in the United States which shed some light on this issue. This analysis, however, will not be complete, in our view, if we do not subject digital private copying to the scrutiny of the three-step test of Article 5(5) of the Directive. This test, which is in essence an economic-prejudice test, is a criterion for determining the permissibility of copyright exceptions and limitations and a guideline for establishing their non-commercial nature. To be permitted under this test, digital private copying (a) should be a certain special case (b) which does not conflict with a normal exploitation of the work or other subject-matter and (c) does not unreasonably prejudice the legitimate interests of the rightholder. It is really doubtful whether digital private copying can comply with this test which finds its origin back to 1967 when the Berne Convention was revised,<sup>22</sup> a time that digital media and equipment did not use to exist.

First, however, we have to determine which activities are covered by Article 5(2)(b) and how their private character is established.

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<sup>22</sup> Berne Convention for the Protection of Literary and Artistic Works 1886 (1971 revision with 1979 amendments).

## **Chapter I: The private character of ‘copying for private use’ under Article 5(2)(b) of Directive 2001/29/EC**

To determine which activities are covered by Article 5(2)(b) of Directive 2001/29/EC, and which are not, first we need to identify them. Under this article, Member States may provide for an exception or limitation to the reproduction right in respect of ‘*reproductions on any medium made by a natural person for private use*’. In this respect, both acts of reproduction and acts of private use are permitted. We therefore need to examine what a reproduction and a private use is for the purposes of Directive 2001/29/EC.

### **Section 1: The activities covered by Article 5(2)(b) of Directive 2001/29/EC**

Article 5(2)(b) of Directive 2001/29/EC stipulates that permissible private copying covers acts of reproduction for private and non-commercial use. Indeed, it provides that

*‘Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 [...] in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor directly commercial [...].’*

This stipulation indicates that the private copying limitation organically applies as an exception to the reproduction right. Yet, in our view, copying for private use was never meant to cover only acts of reproduction. Indeed, despite the fact that permissible private copying under Directive 2001/29/EC is set as a limit to the reproduction right it may also affect other rights within the realm of copyright and related rights. It could, for instance, have an impact on performance rights. Consider an individual who copies a music CD to listen with his friends. Copying the CD affects the reproduction right and playing its contents before an audience is an act of performance. While Article 5(2)(b) of Directive 2001/29/EC indicates that private copying is a limitation to the reproduction right there is nowhere in Directive 2001/29/EC a mandate that private copying is a limit *only* to the reproduction right. This is illustrated by two facts. The first is that permissible private copying under Directive 2001/29/EC refers to acts of reproduction made for private use. Acts of use, however, have a broader scope than acts of reproduction and may include, for instance, acts of lending copies of works to friends. The second can be found at Article 5(4) of Directive 2001/29/EC which reads that

*‘[w]here the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.’*

This Article indicates that distributing copies within a private circle does not infringe copyright. For instance, an individual may make a copy of a DVD to give to a friend as a birthday present. In our view, however, Article 5(4) of Directive 2001/29/EC provides for a potential expansion to the scope of Article 5(2)(b) on private copying as regards works in tangible form. This is because Article 5(4) makes reference to the distribution right<sup>23</sup> but does not mention the right of communicating works<sup>24</sup> or making them available to the public.<sup>25</sup> In practical terms, this means that giving a hard copy of a work or other subject-matter is permitted but sharing the contents of that work with the same friend online is not. This creates a two-tier approach as regards the dissemination of copies within a private circle in terms that end users might not be able to ascertain which acts are permitted and which are not. We therefore consider that, depending on the national implementation of Directive 2001/29/EC, the private copying limitation may cover acts of reproduction or distribution within a private circle but should neither affect the communication right nor the right of making available of the contents of the exact same work.

As regards the scope of activities covered by Article 5(2)(b), we have identified two issues that need to be examined. We have seen that the private copying limitation is organically laid down as an exception or limitation to the reproduction right. As a result, the first issue that we shall consider is the relationship of the private copying limitation to the reproduction right as provided under Article 2 of Directive 2001/29/EC. We consider that it is essential to understand the context in which the private copying limitation applies since Article 5(2)(b) provides it as an *'exception or limitation to the reproduction right provided for in Article 2'*. To understand which activities are lawful and which are not we then shall discuss is the way by which acts of reproduction and acts of use are reconciled under the same provision. Permitting *reproductions* for private *use* is controversial, in our view, since the scope of acts of use is broader than that of acts of reproduction. One might use a book by copying it, lending it to friends, reading it or just storing it at his library. In this respect, acts of use are broader than copying.

### **1. Private copying in relation to the reproduction right**

With respect to reproductions for private use, lawmakers are faced with a dilemma. If they strictly conceive the reproduction right, the result would be massive copyright infringements. On the other hand, if they endorse provisions in favour of the users, such as copyright

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<sup>23</sup> Article 4 of Directive 2001/29/EC. For the full text, please consult Annex I at the end of this thesis.

<sup>24</sup> Article 3(1) of Directive 2001/29/EC, *ibid.*

<sup>25</sup> Article 3(2) of Directive 2001/29/EC, *ibid.*

exceptions and limitations, illegal reproductions shall be fewer but, at the same time, the rightholders run the risk of suffering legally accepted inroads into the normal exploitation of their works.<sup>26</sup> The approach adopted by Directive 2001/29/EC follows the second model. Copying for private use under Article 5(2)(b) of Directive 2001/29/EC is organically set as an exception to the reproduction right, provided under Article 2 of the Directive.

### **1.1. The reproduction right as the right to which the private copying limitation applies**

The private copying limitation that can be granted under Article 5(2)(b) of Directive 2001/29/EC applies, as we have seen, to acts of reproduction. We therefore need to explore what a reproduction is. Reproduction is defined under Article 2 of Directive 2001/29/EC as

*‘the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:*

*(a) for authors, of their works;*

*(b) for performers, of fixations of their performances;*

*(c) for phonogram producers, of their phonograms; (d) for the producers of the first fixations of films, in respect of the original and copies of their films; (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.’*

We need to examine two issues in respect of the reproduction right to which the private copying limitation applies. The first is the meaning and scope of the reproduction right under Article 2 of Directive 2001/29/EC so as to determine what an act of copying under this Directive is. This examination is essential in the delineation of the scope of the private copying limitation. The second issue relates to the status of the reproduction right in the digital environment. Since the private copying limitation applies to the reproduction right, developments that influence the reproduction right in this context will equally influence the private copying limitation. This is because acts of private copying are essentially acts of reproduction so if the concept of reproduction has eroded in the digital context equally eroded will be the concept of private copying.

#### **1.1.1. The scope of the reproduction right under Article 2 of Directive 2001/29/EC**

Article 2 of Directive 2001/29/EC does transpose into Community law the main international obligations arising from the 1996 WIPO Treaties, namely the WIPO Copyright Treaty

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<sup>26</sup> E. Ploman & C. L. Hamilton, *Copyright: Intellectual Property in the Information Age*, The International Institute of Communications, Routledge & Kegan Paul Ltd, 1980, at p. 197.

(WCT)<sup>27</sup> and the WIPO Performances and Phonograms Treaty (WPPT).<sup>28</sup> Article 1(4) of the WCT on the reproduction right maintains the provision of the Berne Convention,<sup>29</sup> namely Article 9(1).<sup>30</sup> The latter Article states that ‘[a]uthors of literary and artistic works [...] shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.’ Article 1(4) WCT grants a reproduction right to authors and the relevant provision of the WPPT affords this right to performers and producers of phonograms. In particular, Articles 7 and 11 of the WPPT provide performers and phonogram producers with the exclusive right of authorising the direct or indirect reproduction of their performances fixed in phonograms or their phonograms respectively, in any manner or form.

The reproduction right under Article 2 of Directive 2001/29/EC is widely defined. This broad definition is affirmed by Recital 21 of the preamble of the Directive. The Recital states that the Directive purports to define the scope of the acts covered by the reproduction right with regard to the different beneficiaries. What is more, it stresses the need to provide a broad definition of these acts so as to ensure legal certainty within the internal market. To this end, Article 2 of Directive 2001/29/EC benefits all categories of European rightholders<sup>31</sup> and

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<sup>27</sup> WIPO Copyright Treaty (WCT), op. cit.

<sup>28</sup> WIPO Performances and Phonograms Treaty (WPPT), op. cit.

<sup>29</sup> Article 1(4) of the WCT dictates that the Contracting Parties should ‘comply with Articles 1 to 21 and the Appendix of the Berne Convention.’ Note that, initially, the delegates at the WIPO Diplomatic Conference wanted to spell out more clearly the scope and reach of the reproduction right, and had proposed a specific Article on reproduction to be included within the WCT. See Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva, 1996, WIPO, Geneva 1999, Vol. I, p. 189 (This was to be Article 7(1) of the WCT). However, delegations did not reach a consensus and left things to be dealt under Article 9(1) of the Berne Convention for the Protection of Literary and Artistic Works 1886 (1971 revision with 1979 amendments).

<sup>30</sup> Berne Convention, op. cit.

<sup>31</sup> Article 2 of Directive 2001/29/EC grants the reproduction right to authors and to the four categories of European neighbouring rightholders, namely performers, phonogram producers, producers of the first fixation of films and broadcasting organisations. Note that Directive 2001/29/EC does not define these entities. Equally unclear are other European Directives on Intellectual Property that use the term ‘rightholders’. Article 3(1) of the Rental Right Directive [Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 376, 27.12.2006, pp. 28-35] that repealed Article 2(1) of an earlier form of the Directive [Council Directive 92/100/EEC of 19 November 1992 on rental and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346, 27.11.1992, pp. 61-66] lists authors, performers, phonogram producers and producers of the first fixation of films under the heading ‘rightholders’.

It is questionable whether the term ‘rightholder’ also refers to the licensees of the original rightholders. While this question does not have any serious practical consequences, there might be cases where it is important to decide whether it is only the original rightholder or also his licensees to be taken into account. This could be, for instance, the case in the distribution of fair compensation under the private copying limitation under Article 5(2)(b) of Directive 2001/29/EC. For a more detailed analysis, see St. Bechtold, ‘Information Society Directive’, in Th. Dreier, & P. B. Hugenholtz, *Concise European Copyright Law*, Kluwer Law International, 2006, pp. 343-403, at p. 361.

The protection afforded by Directive 2001/29/EC supersedes the protection afforded by the WIPO Treaties; whilst the WCT affords the reproduction right to authors and the WPPT performers and to phonogram producers, Directive 2001/29/EC extends the applicability of the right to all rightholders, including producers of the first fixations of films and broadcasting organisations. This is clearly an attempt to achieve better harmonisation within the internal market as regards the reproduction right since it enables the easier navigation

encompasses a multitude of activities. Indeed, Article 2 of Directive 2001/29/EC, covers every act of reproduction, irrespective of the duration of the copies produced (permanent/temporary reproduction), the portion of the work that has been reproduced (in whole or in part), the technology or medium used (wire or wireless medium, digital/analogue reproduction) and the course of the reproduction process (direct/indirect reproduction).

### Digital and analogue reproductions

Article 2 of Directive 2001/29/EC underscores that the reproduction right covers any copy of a work produced *by any means and in any form*. Emanating from the Berne Convention,<sup>32</sup> this stipulation affords protection to acts of reproduction irrespective of the technology used in the act of copying or the medium onto which copyrighted material is reproduced. This means that the reproduction right covers both analogue and digital forms of reproduction, may those take place by wire or wireless means. For instance, photocopying a book and burning an e-book onto a CD equally qualify as acts of reproduction. The application of the reproduction right in the digital environment is affirmed by the Agreed Statement concerning Article 1(4) of the WCT and the Agreed Statement concerning Articles 7, 11 and 16 of the WPPT.<sup>33</sup> Both these statements, which function as interpretative tools for the text of the relevant Treaties,<sup>34</sup> confirm that the reproduction right is fully applicable in the digital environment, in particular to the use of works and other subject-matter in digital form.

Since the reproduction right under Article 2 of Directive 2001/29/EC covers both analogue and digital copying, permissible private copying under Article 5(2)(b) of Directive 2001/29/EC may be either analogue or digital. The issue whether the private copying

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of the legislation by use of the smallest common denominator. See WIPO Copyright Treaty (WCT), op. cit.; WIPO Performances and Phonograms Treaty (WPPT), op. cit.

Since Article 2 of Directive 2001/29/EC grants the reproduction right to all categories of rightholders, the right is fully applicable with respect to all categories of copyrighted works and other subject-matter. Being an exception to the reproduction right, the private copying exception is, therefore, applicable with respect to all categories of works and other subject-matter.

<sup>32</sup> See Article 9(1) of the Berne Convention, op. cit..

<sup>33</sup> See Agreed Statement concerning Article 1(4) of the WIPO Copyright Treaty (WCT), op. cit.: *'the reproduction right, as set out in Article 9 of the Berne Convention, fully [applies] in the digital environment, in particular to the use of works in digital form'*; Also see the Agreed statement concerning Articles 7, 11 and 16 of WIPO Performances and Phonograms Treaty (WPPT), op. cit.: *'the reproduction right is fully applicable in the digital environment, in particular to the use of performances and phonograms in digital form.'*

<sup>34</sup> Note that both these Agreed Statements are used as interpretative tools for the text of the relevant Treaties by virtue of Article 31(2)(a) of the Vienna Convention on the Law of Treaties (Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331). See in this respect at S. Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, Standing Committee on Copyright and Related Rights, Ninth Session, Geneva, June 23-27, 2003, WIPO, SCCR/917, April 5, 2003, pp. 57-59. Note, however, that, unlike other Statements, the Agreed Statements 7 and 11 of the WPPT have not been unanimously adopted. By virtue of Article 31(2)(9) of the Vienna Convention on the Law of Treaties, such a statement does not have the interpretational value of Statements agreed unanimously. For an analysis see R.V.V. Ayyar, 'Interest or Right? The Process and Politics of a Diplomatic Conference on Copyright', *The Journal of World Intellectual Property*, 2005, Vol. 1, No. 1, pp. 3-35, at p. 32.

limitation should also apply in the digital environment was highly controversial during the drafting of Directive 2001/29/EC. The 1998 Commission's proposal, that precedes Directive 2001/29/EC, made reference to '*reproductions on audio, visual and audio-visual recording media.*'<sup>35</sup> While the European Parliament approved this proposal in 1999, it restricted its scope to cover '*reproductions on audio, visual and audio-visual analogue recording media.*'<sup>36</sup> The same restrictive wording has been maintained by the Commission in its 1999 proposal.<sup>37</sup> Even though the drafters of Directive 2001/29/EC originally intended to permit only analogue private copying, the Position of the Council in 2000 proposed the expansion of the scope of permissible copying to cover digital reproductions. Taking into account the convergence of digital media, the Council initiated the general '*on any medium*' phrase,<sup>38</sup> as articulated in the final form of Article 5(2)(b) of Directive 2001/29/EC. This phrase is technology-neutral and, in our view, it has the merit of minimising the risk of having to alter legislation as soon as new forms of reproducing works become feasible and available.

### **Permanent and temporary reproductions**

The reproduction right under Article 2 of Directive 2001/29/EC covers acts of permanent and temporary reproduction; this includes every reproduction made in the use and electronic storage of digital content. *Permanent* reproduction is the replication of a work into durable copies, including copies in a CD, DVD or CD-ROM format. For instance, scanning a work is a permanent reproduction. The same applies to the storage of a work or other subject-matter in a computer's hard-disk drive.<sup>39</sup>

On the internet, however, *not* all acts of reproduction have as a sole purpose or result to the creation of tangible permanent copies; rather, the function of networks is symbiotically related to the creation of immaterial temporary copies. *Temporary* copies are automatically stored in a

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<sup>35</sup> Proposal for a European Parliament and Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, COM/97/0628 final, COD 97/0359 \*/ , *Official Journal C* 108, 07.04.1998, p. 0006, at p. 0011.

<sup>36</sup> Legislative Resolution embodying Parliament's opinion on the Proposal for a European Parliament and Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, COM (97) 0628 C4-0079/98 97/0359 (COD) (Co-decision Procedure: First Reading), *Official Journal C* 150, 28.05.1999, p. 171, at 179.

<sup>37</sup> Amended Proposal for a European Parliament and Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, COM/99/0250 final – COD 97/0359\*, *Official Journal C* 180, 25.06.1999, p. 0006, at 0012.

<sup>38</sup> Council Position for adopting a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society of 28 September 2000, OJ C 344, 1.12.2000, p. 1.

<sup>39</sup> This is affirmed by the Agreed statements following the 1996 WIPO Treaties, op. cit. These statements hold that the storage of a protected work or other subject-matter in digital form in an electronic medium is an act of reproduction within the meaning of the reproduction right. See Agreed Statement concerning Article 1(4) of the WCT and Agreed statement concerning Articles 7, 11 and 16 of the WPPT.

computer's working memory and instantaneously erased by shutting down that computer. Temporary reproduction, which takes place only in the digital environment, is expressly incorporated within the scope of the reproduction right by virtue of Article 2 of the Directive. Mazziotti and Hugenholtz rightly observe that the reproduction right veers dangerously away from the legal notion of reproduction by wholly espousing its technical concept.<sup>40</sup> We agree that the *legal concept* of reproduction in copyright is not synonymous to the *technical process* of copy production; rather, it is a legal notion and, in particular, the core of a *legally prescribed right* directed towards the achievement of specific objectives,<sup>41</sup> such as the protection of the rightholders and their empowerment to control the exploitation of their works. As a result, we consider that what constitutes an act of reproduction in technical terms may not fall within the ambit of the reproduction right and may not amount to copyright infringement. To illustrate this point, we can refer to streaming, a common practice for using copyrighted content online. Unlike downloading, streaming does not involve the storage of the material on the computer's hard-disk drive before it can be used. Instead, the material is delivered on 'real time', as with television and radio broadcasts; a 'stream' of data is simultaneously received and converted into sound and picture. Sometimes, however, the data received in a given time-span may exceed the volume required. In this case, the excess data are 'buffered', *i.e.* they are temporarily stored in the RAM of the computer. One can only wonder whether 'buffers' qualify as acts of reproduction within the meaning of Article 2 of Directive 2001/29/EC and, therefore, whether streaming of copyrighted content is covered by Article 5(2)(b).

As Bechtold rightly observes, the mere existence of the exception of Article 5(1) on temporary copying suggests that Article 2 provides a very broad definition of the scope of the reproduction right.<sup>42</sup> Indeed, the exemption on temporary copies under Article 5(1) of Directive 2001/29/EC can serve as a tool for defining the reproduction right rather as an exception to this right. This exemption reads that

*'[t]emporary acts of reproduction [...] which are transient and incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be*

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<sup>40</sup> G. Mazziotti, *EU Digital Copyright Law and the End User*, Springer-Verlag Berlin Heidelberg, 2008, p. 61; P.B. Hugenholtz, 'Caching and Copyright: The Right of Temporary Copying' *EIPR* 2000, 22(10), pp. 482-493, at 485.

<sup>41</sup> P.B. Hugenholtz, *ibid.*, 485; P.B. Hugenholtz, 'Copyright Aspects of Caching', *Digital Intellectual Property Practice Economic Report (DIPPER)*, Final, 30.9.1999, p. 15-16; Legal Advisory Group (LAB), 'Reply to the Green Paper on Copyright and Related Rights in the Information Society', *Computer Law and Security Report*, May-June 1996, Vol. 12, Iss. 3, p. 142, at 148.

<sup>42</sup> St. Bechtold, 'Information Society Directive', in Th. Dreier, & P. B. Hugenholtz, *Concise European Copyright Law*, Kluwer Law International, 2006, pp. 343-403, at p. 358.

*made and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.'*

In our view, acts of short-lived copying are mere by-products of a technical communication process and, hence, should not qualify as acts of reproduction under Article 2 of Directive 2001/29/EC. This includes 'store-and-forward' mechanisms used in digital networks, copies made on internet routers or in proxy servers, caches<sup>43</sup> or web browsers.

Since private copying under Article 5(2)(b) of Directive 2001/29/EC requires an act of reproduction to take place within the meaning of Article 2 of Directive 2001/29/EC, the private copying limitation applies to both temporary and permanent reproductions. For instance, a user can either burn a music track onto a CD or can store this track on the RAM memory of his personal computer. Both these acts constitute acts of reproduction<sup>44</sup> and can equally benefit under the private copying limitation. The question arises as to whether storing copyrighted material on the RAM memory is exempted from infringement through Article 5(1) on temporary copies or through Article 5(2)(b) of Directive 2001/29/EC on private copies. We consider that the answer to this question depends on whether the copies are made as parts of a technological process or whether they are made with human intervention.<sup>45</sup> Transitory and unintentional copying that forms part of a technological process is covered by the exception under Article 5(1). By contrast, where temporary copies are made with the active participation of the user and all the conditions of Article 5(2)(b) are met, the latter Article shall apply.

### **Direct and indirect reproductions**

By virtue of Article 2 of Directive 2001/29/EC, the reproduction right further covers acts of direct and indirect reproduction. This emanates from Articles 7 and 11 of the WPPT.<sup>46</sup> *Direct*

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<sup>43</sup> Note, however, that in the Belgian *Copiepresse* case, the Court found that the copy of a webpage stored in the memory of Google's servers and, in addition, the display of a link enabling the cached copy to be accessed by the public was infringing both the reproduction right and the right of making works available to the public. While the Court refrained from ordering Google to remove the caches from its search engine, it ordered the removal of the links to those caches. This was because caching was viewed as an integral part of the technical process of indexing webpages. See *Google v. Copiepresse*, High Court of Brussels (TGI), 13.2.2007. For a comment of this case see P. Laurent, 'Brussels High Court Bans Google News', *C.L.S.R.*, 2007, Vol. 23, No. 1, pp. 82-85.

<sup>44</sup> In the US copies in RAM are considered to be reproductions. See *MAE v. Peake*, 991 F.2d 511, 9<sup>th</sup> Cir. 1993. For a discussion why copies in RAM should not be deemed 'copies' within the meaning and for the purposes of US copyright law, see P. Samuelson, 'The Copyright Grab', *Wired*, January 1996, at 134; J. Liu, 'Owing Digital Copies: Copyright Law and the Incidents of Copyright Ownership', 42 *Wm & Mary L. Rev.*, 2001, 1245, at 1255-1278.

<sup>45</sup> On how temporary copies qualify as transient or incidental see *Infopaq International A/S Danske Dagblades Forening*, Case C -5/08, 16.7.2009.

<sup>46</sup> WIPO Performances and Phonograms Treaty (WPPT), op. cit.; also see the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 'Rome Convention', October 26, 1961.

reproduction is the act of copying a work or other subject-matter instantaneously to the same or other format. *Indirect* reproduction requires some intermediary copying to take place, such as copying of a broadcast which includes a phonogram.<sup>47</sup> The private copying limitation covers both acts of direct and indirect reproduction. For instance, an internet user who downloads a film makes a copy of the film, the music contained in the film and the performances of the authors.<sup>48</sup> While a single act of reproduction is made, many different copyrights are implicated.

### **Partial and total reproductions**

What is more, the reproduction right in Article 2 of Directive 2001/29/EC encompasses every act of copying a work or other subject-matter in whole or in part. A work is reproduced *in whole* where that work is copied as an entity, *i.e.* all its constituents are subject to reproduction. For instance, mirroring, namely the exact replication of a webpage, constitutes an act of reproduction since it could be compared to printing from an economic perspective.<sup>49</sup> *Partial* reproduction refers to copying parts of a work or other subject-matter, no matter how small those parts are. This is particularly important vis-à-vis digital technology that has facilitated the extraction, copying and commercial use of protected material in advertising, multimedia and sampling. Partial reproduction could include copies occurring at routers in the internet or in music and video sampling.<sup>50</sup> It could also cover hyperlinks referring to a webpage in cases where these links cite an original title or an extract of an online transmitted work. While the actual provisioning of a hyperlink on one webpage to another does not amount to a reproduction of the latter webpage,<sup>51</sup> it may be infringing if the title or extract forming the hyperlink are original and therefore copyright-protected. The same applies to thumbnails, *i.e.*, the reproduction of small images on the internet,<sup>52</sup> and to the extraction of a single frame of a cinematographic work, irrespective of their substantially reduced size.<sup>53</sup>

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<sup>47</sup> European Commission, *Explanatory Memorandum to the Proposal for a European Parliament and Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, 10.12.1997, COM(97) 628 Final, p. 32.

<sup>48</sup> This is also the case as regards multimedia works.

<sup>49</sup> P.B. Hugenholtz, 'Caching and Copyright: The Right of Temporary Copying', *op. cit.*, at 483. Note, however, that the mirrored webpage has to be subject to copyright protection by meeting the originality threshold required under the national laws of Member States.

<sup>50</sup> Note that in this case the mandatory exception of Article 5(1) or other limitations found in Article 5 may apply.

<sup>51</sup> See *Handelsblatt Publishers Group v Paperboy*, [2005] ECDR 7. For an analysis of this case see B. Muller, 'The Legality of Deep-Links in Germany: Federal Supreme Court – Paperboy', *Comms. L.*, 2003, 8(5), 375-376; T. Funke, 'Deep Links are Compatible with German Copyright and Fair Trading Law', *ECLR*, 2003, 3(3), 333-341.

<sup>52</sup> The use of thumbnails was held to be infringing in Bielefeld Regional Court, 8.11.2005, JurPC Web-Dok, 106/2006; Regional Court of Hamburg, 5.9.2003, JurPC Web-Dok 146/2004. In *NVM c.s. v. Zoekallehuizen.nl*, however, a Dutch Court held that thumbnail images on a real estate website did not infringe the reproduction right due to their small size. See Court of Anhem, 16.3.2006, Ljn Av 5236. In similar vein, thumbnails used as

Since the reproduction right covers acts of reproduction both in whole and in part, the private copying limitation of Article 5(2)(b) of Directive 2001/29/EC applies to both complete and partial reproductions of works. For instance, a copier may equally benefit from the private copying limitation if she extracts some scenes of a film or downloads the whole film.

The broad scope of protection afforded by the reproduction right under Article 2 of Directive 2001/29/EC both as regards the beneficiaries and as to the scope of protection would *prima facie* indicate better protection of these beneficiaries. We consider however that this broad, perhaps over-stretched,<sup>54</sup> scope of the reproduction right was not necessarily adequate to fit the needs of the digital environment. While Directive 2001/29/EC was meant to harmonise copyright throughout the European Union<sup>55</sup> it has resulted to a higher level of protection rather than more aligned protection, as rightly pointed out by Montagnani and Borghi.<sup>56</sup> The digital environment differs from its analogue counterpart both as to its function and as to its implications on copyright. Yet, the definition of the reproduction right originates from the analogue world. Indeed the WCT, which is implemented by Directive 2001/29/EC, takes us back to the definition of the reproduction right provided by the Berne Convention, a text dated on 1886 and lastly updated on 1979!<sup>57</sup> As a result, the adequacy of the broadly defined reproduction right is questionable in the digital environment. We shall therefore turn our examination as to whether the reproduction right has eroded in the context of digital copyright and if this is the case, how this impacts the application of Article 5(2)(b) of Directive 2001/29/EC.

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hyperlinks were held not to violate copyright where the work had been first uploaded on the internet by the rightholders or with their consent. See Erfurt Regional Court, 15.3.2007, 3 O 1108/05 – Bildersuche Suchmaschine Haftung.

<sup>53</sup> *Spelling Goldberg Productions Inc v. BPC Publishing Ltd* [1981] RPC 280.

<sup>54</sup> J.H. Spoor, 'The Copyright Approach to Copying on the Internet: (Over)Stretching the Reproduction Right?', in P.B. Hugenholtz (ed.), *The Future of Copyright in a Digital Environment*, Kluwer Law International, 1996, pp. 67-79, at p. 78.

<sup>55</sup> More than one Recital in the preamble of the Directive indicate that more copyright protection is a self-evident good since rightholders and stimulates creativity. See for instance Recitals 1-11 to the Directive 2001/29/EC. In particular, Recital 9 of Directive 2001/29/EC states that '*[a]ny harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.*'

<sup>56</sup> See M. L. Montagnani & M. Borghi, 'Promises and Pitfalls of the European Copyright Law Harmonisation Process', op. cit., at p. 229 *et seq.* Also see G. Tritton, *Intellectual Property in Europe*, Sweet & Maxwell, London, 2002, 2<sup>nd</sup> ed., p. 325. Tritton notices that harmonisation was not perhaps the sole goal of the harmonisation process.

<sup>57</sup> See Article 9(1) of the Berne Convention, op. cit., which reads that '*[a]uthors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.*'

### 1.1.2. The erosion of the reproduction right in the digital environment

We consider that since both the reproduction right and the private copying limitation involve an act of copying, they are interdependent.<sup>58</sup> In practical terms, this means that developments that influence the reproduction right will equally influence the private copying limitation of Article 5(2)(b) of Directive 2001/29/EC.

Throughout copyright history, the reproduction right has always been considered as the ‘core’ of copyright.<sup>59</sup> In fact, the very word ‘copyright’ indicates that the right to copy is a prime constituent in protecting works.<sup>60</sup> Indeed, the birth of copyright was in essence a response to the invention of the printing press;<sup>61</sup> it was only then that the creation of multiple and uniform copies that could be distributed to a mass market was made possible.<sup>62</sup> Prior to Gutenberg, there was no clear concept of ownership over written information.<sup>63</sup> Scribes produced a limited number of copies which were neither uniform nor error-free.<sup>64</sup> The revolution caused by the methods of copy production in the light of printing was, however, only the beginning. Copyright has withstood, and been shaped by, the test of time and technological

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<sup>58</sup> *Ashby v. White*, 87 Eng. Rep. 808, 812 (Q.B. 1702) (Holt, C. J.): ‘It is a vain thing to imagine right without an exception to a right; for the creation of a right and the creation of an exception are reciprocal.’

<sup>59</sup> Commission of the European Communities, *Green Paper, Copyright and Related Rights in the Information Society*, Brussels, 19 July 1995, COM(95) 382 Final, p. 49; Also J. Spoor, ‘The Copyright Approach towards Copying on the Internet: (Over)Stretching the Reproduction Right’, op. cit., at 78-79; E. Ploman & C. L. Hamilton, *Copyright: Intellectual Property in the Information Age*, op. cit., at p. 161; R.V.V. Ayyar, ‘Interest or Right?’, op. cit., at p. 29.

The view that the reproduction right is the ‘core of copyright’ is no longer supported by everyone. On the internet, copies are no more than haphazard manifestations of works being transmitted in immaterial form over wired or wireless channels. See E. Dommering, ‘Copyright being Washed Away through the Electronic Sieve, Some Thoughts on the Impeding Copyright Crisis’, in P.B. Hugenholtz (ed.), *The Future of Copyright in a Digital Environment*, Kluwer Law International, 1996, p. 1, at 7. Equating copyright with the exclusive right to reproduce a work is oversimplifying matters: P.B. Hugenholtz, ‘Copyright Aspects of Caching’, op. cit., pp. 14-15; E. Miller & J. Feigenbaum, ‘Taking the Copy Out of Copyright’, in T. Sander (ed.) *Security and Privacy in Digital Rights Management*, Lecture Notes in Computer Science, Springer Berlin/Heidelberg, Volume 2320, 2002, pp. 233-244, p. 233 *et seq.*

<sup>60</sup> Contra: E. Miller & J. Feigenbaum, *ibid.*, p. 233 *et seq.*

<sup>61</sup> For instance, the development of the printing press in the mid 1400’s has spawned the introduction of printing privileges around Europe. See the Italian Johannes of Speyer’s Printing Monopoly (1469), in L. Bently & M. Kretschmer (eds.), *Primary Sources on Copyright (1450-1900)*, available online at [www.copyrighthistory.org](http://www.copyrighthistory.org); the Italian Marco Antonio Sabellico’s Printing Privilege (1486), in L. Bently & M. Kretschmer (eds.), *Primary Sources on Copyright (1450-1900)*, available online at [www.copyrighthistory.org](http://www.copyrighthistory.org); Aldus Manutius’s Warning against the Printers of Lyon (1503 - Italy), in L. Bently & M. Kretschmer (eds.), *Primary Sources on Copyright (1450-1900)*, available online at [www.copyrighthistory.org](http://www.copyrighthistory.org); Eloy d’Amerval’s privilege (1507 - France), in L. Bently & M. Kretschmer (eds.), *Primary Sources on Copyright (1450-1900)*, available online at [www.copyrighthistory.org](http://www.copyrighthistory.org); Basel Printers’ Statute (1531), in L. Bently & M. Kretschmer (eds.), *Primary Sources on Copyright (1450-1900)*, available online at [www.copyrighthistory.org](http://www.copyrighthistory.org). A more extensive list of all the printing privileges around Europe can be found at [www.copyrighthistory.org](http://www.copyrighthistory.org). See also the first fully-fledged copyright law, namely the UK Statute of Anne, 8 Anne, c. 19 (1709). The Statute of Anne established the author of a work as the owner of the right to copy that work. E. Katsh, *The Electronic Media and the Transformation of Law*, Oxford University Press, 1989, at pages 172-180; E. Eisenstein, *The Printing Press as an Agent of Change: Communications and Cultural Transformations in Early-Modern Europe*, Cambridge University Press, 1979, vol. 1, at 27-29, 36.

<sup>62</sup> E. Eisenstein, *ibid.*, at 80.

<sup>63</sup> E. Ploman & C. L. Hamilton, *Copyright: Intellectual Property in the Information Age*, op. cit., at p. 4.

<sup>64</sup> I. De Sola Pool, *On Free Speech in an Electronic Age: Technologies of Freedom*, Belknap Press, 1983, at p. 14.

advancement. During the late 1970's, photocopiers and video/tape recorders challenged the foundations of copyright systems since for the first time the creation of exact, albeit imperfect, copies by individual users was made possible.<sup>65</sup> Still, the analogue media for copy production had nothing to do with their digital counterparts. With the development of digital media in the late 1990's, copies met for the first time the same quality standards with originals and their creation became faster and easier. As Jones rightly observes, these new information technologies have outstripped traditional copyright and have challenged law and policy makers.<sup>66</sup> In our view, this is reflected both in the increased number of conflicts<sup>67</sup> and the need to adapt laws to the digital reality.<sup>68</sup> But has the reproduction right eroded over time and, if so, how has this happened?

To be protected in the analogue world, works needed to be 'original' and 'fixed in some material form'.<sup>69</sup> While the originality requirement remains unaltered in the digital environment, we consider that the fixation criterion needs closer examination. Since copyright protection is afforded to the expression of ideas rather than ideas themselves,<sup>70</sup> works have to be in some tangible form to be protected. To borrow the US definition of what constitutes a fixation in copyright, a work is fixed '*when its embodiment in a copy or phonorecord [...] is sufficiently*

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<sup>65</sup> *Sony Corp. of America v. Universal City Studios, Inc.* 464 U.S. 417 (1984), known as the 'Betamax' case. For an analysis see J. M. Feder, 'Is Betamax Obsolete: Sony Corp. of America v. Universal City Studios, Inc. in the Age of Napster', *Creighton Law Review*, 2003, 37, 859; W. Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors', 82 *Colum.L.Rev.*, 1982, p. 1600.

<sup>66</sup> L. Jones, 'An Artist's Entry in Cyberspace: Intellectual Property on the Internet', *EIPR*, 2000, pp. 79-92, at 79.

<sup>67</sup> V. Slind-Flor, 'High Tech, High Stakes', *National Law Journal*, 22 July 1991, at 1.

<sup>68</sup> E. Katsh & J. Rifkin, 'The New Media and a New Model of Conflict Resolution: Copying, Copyright, and Creating', 6 *Notre Dame J.L. Ethics & Pub. Pol'y*, 1992, 49-74, at 51.

<sup>69</sup> See Article 2(2) of the Berne Convention, op. cit.: '*It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form*'; this provision has been maintained by Article 3 of the WIPO Copyright Treaty (WCT), op. cit. The WPPT defines a 'fixation' to be '*the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device*'. See Article 2(c) of the WIPO Performances and Phonograms Treaty (WPPT).

Also see Article 9 of the Agreement on Trade Related Aspects of Intellectual Property Rights, 1994 (TRIPs): '*1. Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.*

*2. Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.*'

Also see s. 3 of the UK Copyright Act, Copyright, Designs, and Patents Act (CDPA) 1988, chapter 48, which stipulates that '*[c]opyright does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise*'.

Paragraph 102 of the United States Copyright Act, op. cit., dictates that '*[c]opyright protection subsists [...] in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.*'

<sup>70</sup> See Article 9(2) of TRIPs, op. cit.: '*Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.*' Also see R. Burrell & A. Coleman, *Copyright Exceptions: The Digital Impact*, op. cit., pp. 20-24; E. Samuels, 'The Idea-Expression Dichotomy in Copyright Law', 56 *Tenn.L.Rev.*, 1989, p. 321; A. Latreille, 'From Idea to Fixation: A View of Protected Works', in E. Derclaye (ed.), *Research Handbook on the Future of EU Copyright*, Edward Elgar Publishing Ltd, 2009, pp. 133-147.

*permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than a transitory duration.*<sup>71</sup> In the case of some works, their very existence implies tangibility. This applies to sound recordings, films and artistic works.<sup>72</sup> By contrast, dramatic, literary and musical works may exist without having been fixed in any material form. For instance, a music composer might devise a tune and accompany it with lyrics without recording it in some way. For copyright to subsist in this latter category of works, they have to be somehow recorded. The legal definitions of the fixation requirement are deliberately technologically neutral and can, hence, be read broadly<sup>73</sup> so that they will not be defeated by technological changes. Nonetheless, these definitions are not fully applicable in respect of digital works.

We consider that the inclusion of the physical object in the definition of a copy made more sense in the analogue context. For instance, grooves in digital records are a relatively permanent embodiment of a work; while they physically depict the work, they are not portable. This is not the case with digital bits. The latter are not physically bound to the medium onto which they are stored and, yet, they can be easily transferred from one storage device to another. As Dusollier rightly indicates, the digital age came with a separation of the intellectual object (work) from its physical embodiment (copy);<sup>74</sup> as a result, the definition of what constitutes an analogue ‘copy’ does not translate well as regards digital copies. Like vinyl records, digital files require an additional device so that the work can be perceived by users. For this to happen, the device loads the bits from the storage medium onto its own internal memory and converts the bits into the work that the bits represent. To play a digital audio file, a computer creates copies of the bits from the storage device and loads them into its internal memory, *i.e.* the RAM memory.<sup>75</sup> Digitalisation, namely the process of transposing the information contained in a work from analogue form into a binary code (0/1), is an act of

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<sup>71</sup> Paragraph 101 of the United States Copyright Act, *op. cit.* ‘*when its embodiment in a copy or phonorecord [...] is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.*’

<sup>72</sup> As Lawton LJ observed in *Merchandising Corp of America v. Harpbond*, [1983] FSR 32, a painting is not an idea: it is an object.

Adam Smith wrote with reference to performers that ‘*the work of all of them perishes in the very instant of its production.*’ See A. Smith, *The Wealth of Nations*, Penguin Classics, 1999, Books I-III, p.431.

<sup>73</sup> In the United States it has been held that this language is meant to ‘*encompass technological advances, such as those represented by [...] electronic devices*’; those could include computers, electronic readers and digital music players. See *Williams Electronics Inc. v. Artic International Inc.*, 685 2d 870, at 877 (3<sup>rd</sup> Cir. 1982).

<sup>74</sup> S. Dusollier, ‘Technology as an Imperative for Regulating Copyright: From the Public Exploitation to the Private Use of the Work’, *EIPR*, 27(6), 2005, 201-204, p. 201; N. Lucchi, ‘The Supremacy of Techno-Governance: Privatization of Digital Content and Consumer Protection in the Globalized Information Society’, *Int. J. of Law and Information Technology*, Vol. 15, No. 2, 2007, pp. 192-225, at 205-206.

<sup>75</sup> This memory is considered to be temporary since it is volatile and the data stored onto it are erased once the device is turned off. Given that a copy is a material object in which a work is fixed, the fixation criterion has a twofold role; it is a requirement for copyright protection and a precondition for establishing infringements against the reproduction right.

reproduction within the meaning of Article 2 of Directive 2001/29/EC.<sup>76</sup> For instance, a radio station that digitised musical works for radio transmissions was held to infringe the reproduction right in Austria.<sup>77</sup>

In our view, the fact that temporary acts of reproduction are reserved within the reproduction right of Article 2 of Directive 2001/29/EC amounts to a much empowered role of the reproduction right in the digital context.<sup>78</sup> While in the analogue world the creation of copies required time and effort and was generally imperfect, digital copies can be infinitely reproduced without special technical knowledge. For instance, most end users lack the necessary tools to reproduce a vinyl record. By contrast, speed and scale differentiate the digital context. Digitalisation has put the tools of large-scale copying into the hands of ordinary individuals who can easily and with minimum cost make copies and digitally distribute them at a ‘staggering’ scale, *i.e.* with little effort and sometimes without the end users being aware,<sup>79</sup> as is the case, for instance with caches.

We consider that the downstream effect of the reproduction right is also manifested through the ‘exhaustion’ doctrine. When works have been published on behalf of the rightholders, or with their consent, for instance by way of distribution to the public,<sup>80</sup> the owners’ right to control any further distribution, sale, hiring, or loan *of those exact same copies* is ‘exhausted’.<sup>81</sup> This is the core meaning of the ‘exhaustion’ doctrine as provided under Article 4(2) of Directive 2001/29/EC. In essence, the first sale or other transfer of ownership ‘exhausts’ the distribution right with a view to enhance the free movement of goods within the Community

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<sup>76</sup> M. Ficsor, ‘Collective Management of Copyright and Related Rights in the Digital, Networked Environment: Voluntary, Presumption-Based, Extended, Mandatory, Possible, Inevitable?’ in D. Gervais (ed.), *Collective Management of Copyright and Related Rights*, Kluwer Law International, 2006, pp. 37-83, p. 67.

<sup>77</sup> Austrian Supreme Court, 26.1.1999, MMP 1999, 352: ‘*Radio Melody II*’, file no. 4 ob 345/98h: A radio station which digitalised musical works for radio transmission was held to commit an act of reproduction which required the rightholder’s authorisation to be permitted. For an analysis of this case see A. Haller, ‘Digitalisation/Storage for Broadcasting Purposes Constitutes Reproduction’, *IRIS*, 1999, 4:6/8, pp. 1-2.

<sup>78</sup> The same applies as regards the protection afforded to computer programs and databases. See Article 4(a) of Council Directive 91/250/EC of 14 May 1991 on the legal protection of computer programs, *OJ* No. L 122/42. Also see Article 5(a) and 7(2) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, *OJ* No. L 77/20 of 27 March 1996.

Note, however, that Article 4(a) of the Computer Programs Directive does not guarantee a right to load, display or run a computer program unless these acts ‘necessitate such reproduction’. As a result, the determination of the scope of the reproduction right is left to national courts and legislators. See, for instance, the decision of the German Supreme Court (Bundesgerichtshof), Decision of 20 January 1994 (*Holzhandelsprogramm*), *Computer und Recht*, 1994, 275. Nonetheless, the question of whether running computer programs is an act of reproduction was left unanswered.

<sup>79</sup> *MGM Studios Inc. v. Grokster Ltd.*, 125 S.Ct. 2764, 2772 (2005).

<sup>80</sup> This is consistent with the jurisprudence of the ECJ. See Joint cases *Music-Vertrieb Membran v GEMA* and *K-Tel International v GEMA*, Cases C 55/80 and C 57/80, [1981] ECR 147; also see *Deutsche Grammophon v Metro*, Case C 78/1970, [1971] ECR 487.

<sup>81</sup> These criteria have been developed by the ECJ in *Laserdisken ApS v Kulturministeriet*, Case C-479/04, [2006] ECR 000, point 21.

as envisaged by the Treaty of Rome.<sup>82</sup> Exhaustion in copyright, the American counterpart of which is the ‘first-sale’ doctrine,<sup>83</sup> indicates that when a work is first sold, the ‘publisher’ relinquishes its control over the right of distribution. Once a copy is lawfully acquired, the buyer can freely destroy, lend or sell it in any way he chooses. Note, however, that the exhaustion of rights that follows the first sale or other unauthorised transfer of a work is applicable only to copies as commodities, *i.e.* tangible goods. Affirmative in this respect is Recital 29 of Directive 2001/29/EC. This Recital reads that

*‘The question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the rightholder. Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter which are services by nature. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides.’*

This means that the exhaustion doctrine ceases to apply as regards the dissemination of contents of works online. One can sell a music CD on an online auction, such as *e-bay*,<sup>84</sup> but cannot upload the contents of the exact same CD on a file-sharing server, even if there is no purpose of commercial gain. When works have been communicated or made available online, any subsequent re-use of those works is subject to the exclusive control of rightholders.<sup>85</sup>

This is because the exhaustion doctrine is severely eroded in the digital context;<sup>86</sup> it is impossible to dispose a digital file without implicating the reproduction right. While the transfer of a tangible copy affects only the right of distribution, the transmission of the contents of a work in digital form entails both an act of distribution and an act of reproduction. Consider an end user who wishes to transfer the ownership of a music track she

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<sup>82</sup> M. Flint, N. Fitzpartick & C. Thorne, *A User’s Guide to Copyright*, Tottel Publishing, 2006, at 7.04 and 14.06; On the theories of exhaustion and their applicability in the networked environment see P.B. Hugenholtz, ‘Adapting Copyright to the Information Superhighway’, in P.B. Hugenholtz (ed.), *The Future of Copyright in a Digital Environment*, Kluwer Law International, 1996, p. 81, at 95-98.

<sup>83</sup> The ‘first-sale’ doctrine is a limitation to copyright that was recognised by the U.S. Supreme Court in 1908 and subsequently codified in the Copyright Act of 1976, 17 U.S.C. § 109.

<sup>84</sup> <<http://www.ebay.com>>.

<sup>85</sup> This justifies the fact that the exhaustion doctrine does not apply to the rights of communicating and making works available to the public. See Article 3(3) of Directive 2001/29/EC. This position reflects consistent case-law of the ECJ. For instance, performing rights in a work are categorised as a ‘provision of services’ rather than provision of ‘goods’. See *SA Compagnie Générale pour la diffusion de la télévision, Coditel SA v Ciné Vog Films SA and others*, Case C-62/79, 18.3.1980, [1980] ECR 881.

<sup>86</sup> While as regards physical products, such as used books, reselling is a widely accepted user behaviour, reselling technologically-protected digital products is a relatively new aspect of the debate. See L. Niehüser, ‘The Right to Resell: Why eBay Finally Allows Secondary Markets for Digital Media?’, *INDICARE Monitor*, Vol. 1, No. 3, 2004, available online at <[http://www.indicare.org/tiki-read\\_article.php?articleId=33](http://www.indicare.org/tiki-read_article.php?articleId=33)>, lastly accessible on 9.9.2009.

downloaded online to a friend. Such transfer would only be valid if the storage medium on which the music track was first fixed was given to the new owner. If the track was fixed in the computer's RAM before stored onto a CD or a USB stick this transfer would be impossible due to the volatility of this type of memory.

## 1.2. Private copying as a limitation to the reproduction right

Private copying under Article 5(2)(b) of Directive 2001/29/EC is set within the context of exceptions and limitations to copyright protection. Exceptions and limitations to copyright refer to activities that derogate from the scope of copyright protection afforded by means of exclusive rights. We view these activities as infringing and yet non-infringing; while they *prima facie* violate rights, they are exempted from infringement either to resolve potential conflicts in the interests of the rightholders and the users, or to implement a particular aspect of public policy, such as fundamental freedoms, the regulation of industry practice or the correction of market failure.<sup>87</sup> In this light, we agree with Hugenholtz and Dreier that exceptions and limitations serve as a legislative tool for determining the scope of the exclusive rights of the rightholders;<sup>88</sup> they define copyright's inherent limits and ensure the unencumbered dissemination of new works and the preservation of a vigorous public domain.<sup>89</sup> In this respect, they confirm that copyright is a balancing act, one that equilibrates the interests of the rightholders and those of the users.

The private copying limitation of Article 5(2)(b) is such a confirmation. Nonetheless, neither its legal nature is settled vis-à-vis the digital environment nor its justificatory basis. This has become source of controversy amongst the interested parties and while the copyright industries view this limitation as a defence to digital copyright infringements, end users and

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<sup>87</sup> P.B. Hugenholtz, 'Fierce Creatures, Copyright Exemptions: Towards Extinction?', keynote speech, *IFLA/IMPRIAMATUR Conference, Rights, Limitations and Exceptions: Striking a Proper Balance*, Amsterdam, October 30-31, 1997, p. 18 and 11-12; L. Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright*, Kluwer Law International, 2002, pp. 28; L. Guibault, 'Limitations Found Outside Copyright Law', *ALAI Study Days: Les Frontières du droit d'auteur: ses limites et exceptions*, 14-17 September 1998, Australian Copyright Council, Cambridge, 1999, p. 43; Legal Advisory Group (LAB), 'Reply to the Green Paper on Copyright and Related Rights in the Information Society', op. cit., at 148-149; S. Dusollier, Y. Pouillet & M. Buydens, 'Copyright and Access to Information in the Digital Environment', *Copyright Bulletin*, Vol. XXXIV, No. 4, 2000, pp. 4-36, at p. 13; P. T. Keyde, 'Simplification of the Exceptions to the Exclusive Rights Comprising Copyright', 9 *J.L. & Inf. Sci.*, 1998, pp. 77-92, at p. 78 (on the preservation of informational freedoms through the application of 'fundamental exceptions'); A. Lucas, *Droit d'auteur et numérique*, Litec, Paris, 1998, p. 355; P.B. Hugenholtz, 'Adapting Copyright to the Information Superhighway', op. cit., at p. 94; N. Helberger & P.B. Hugenholtz, 'No Place like Home for Making a Copy: Private Copying in European Copyright Law', *Berkeley Tech. L. J.*, Vol. 22, 2007, pp. 1061-1098, at 1061.

<sup>88</sup> P. B. Hugenholtz, 'Fierce Creatures, Copyright Exemptions: Towards Extinction?', op. cit., p. 14; T. Dreier, 'Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?', in R. C. Dreyfuss, D. L. Zimmerman & H. First (eds.), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society*, Oxford University Press, Oxford, 2001, pp. 295-316, at 307; Legal Advisory Group (LAB), 'Reply to the Green Paper', op. cit., at 149.

<sup>89</sup> J. Litman, 'The Public Domain', *Emory Law Journal*, 39:4, 1990, pp. 965-1023, at 975.

consumer groups proclaim their ‘right’ to private copy.<sup>90</sup> What is more, in the analogue environment the private copying limitation was grounded as a manifestation of the right to privacy, in terms that copyright enforcement could not be exercised in violation of the privacy of end users. Since that the private copying limitation finds its origins back to the analogue environment one can only wonder whether its justificatory basis remains valid in the digital environment or not. Recital 31 of Directive 2001/29/EC acknowledges that *‘the existing exceptions and limitations [...] have to be reassessed in the light of the new electronic environment.’* No guidance is given, however, as to the legal nature and the *raison-d’être* of the private copying limitation. Below, we will examine both these issues with a view to clarify how Article 5(2)(b) of Directive 2001/29/EC functions within the system of European copyright law and in relation to the reproduction right.

### **1.2.1. The legal nature of private copying under Article 5(2)(b) of Directive 2001/29/EC**

The legal nature of the private copying limitation is not explicitly determined and, as the Commission acknowledges, Member States have adopted diverse approaches on this issue.<sup>91</sup> These diverse approaches create legal uncertainty to both end users and rightholders and while some consumer groups claim their ‘right’ to private copy,<sup>92</sup> the copyright industry files lawsuits against individual end users for exercising this ‘right’.

Article 5(2) EUCD urges Member States to *‘provide for exceptions or limitations to the reproduction right provided for in Article 2.’* We consider, and agree with Arthur on this point that the latter phrase can be read as going further and creating a ‘carve-out’ from the reproduction right.<sup>93</sup> The exceptions and limitations to this right are provided for a series of cases listed under Article 5(2) EUCD. One of these cases is enumerated under the second paragraph of this Article and refers to private copying. To determine the legal nature of the private copying limitation of Article 5(2)(b) EUCD, we need to examine the framework in which private

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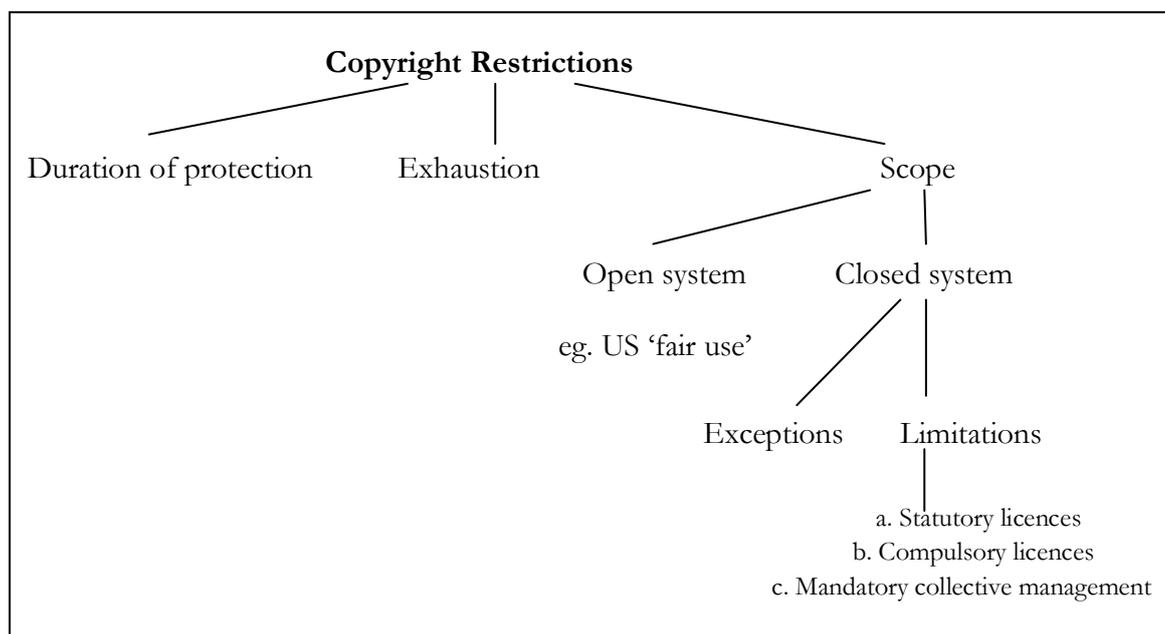
<sup>90</sup> C. Geiger, ‘Right to Copy v Three-Step Test: The Future of the Private Copy Exception in the Digital Environment’, 1 *Comp.L.Rev.Int. (Cri)* 7, 2005, pp. 7-13, at p. 7; C Geiger, ‘The Private Copy Exception: An Area of Freedom (Temporarily) Preserved in the Digital Environment’, 37 *IIC*, 2006, p. 74.

<sup>91</sup> Commission of the European Communities, ‘Report to the Council, the European Parliament and the Economic and Social Committee on the application of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society’, Commission *Staff Working Document*, Brussels, 30.11.2007, SEC(2007) 1556, at p. 4.

<sup>92</sup> C. Geiger, ‘Right to Copy v Three-Step Test’, op. cit., pp. 7-13, at p. 7; C Geiger, ‘The Private Copy Exception: An Area of Freedom (Temporarily) Preserved in the Digital Environment’, op. cit., p. 74.

<sup>93</sup> G. Arthur, ‘Private Use, Public Consequence?: The Future of the Private Copy Exception in Europe’, *CW*, 146, December 2004/ January 2005, 16-20, at p. 19. Arthur goes on to say that if a ‘carve-out’ really exists that space could be filled by a positive right to private copy.

copying is set, namely the framework of restrictions to copyright protection, as graphically presented below.



## Copyright Restrictions

We consider that there are three main types of restrictions of the exclusive rights in copyright. The first type includes restrictions as to the term of protection. In the European Union, this type of time restrictions is incorporated in Directive 93/98/EEC on the term of protection.<sup>94</sup> A second restriction is the ‘exhaustion’ doctrine,<sup>95</sup> known in the United States as the ‘first-sale’ doctrine,<sup>96</sup> and briefly examined earlier.<sup>97</sup> When works have been published on behalf of the rightholders, or with their consent, for instance by way of distribution to the public,<sup>98</sup> the owners’ right to control any further distribution, sale, hiring, or loan of those exact same

<sup>94</sup> Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights, OJ L 290, 24.11.1993, p. 9. Also see Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version), OJ L 372, 27.12.2006, p. 12–18. The harmonised terms of protection depend on the nature of the work in question but, as a basic rule of thumb, the term of protection for author’s rights runs for the life of the author plus 70 years after his death, irrespective of the date that the work has lawfully been made available to the public [Article 1]. Related rights are protected for 50 years starting from the event that triggered the term running, such as the date of the performance [Article 3]. When the protection of a work lapses this work normally ‘falls’ into the public domain for everyone to use. The American counterpart of the Duration Directive is Pu. L. 105-298, 27 October 1998, 112 Stat. 2829.

<sup>95</sup> Article 4(2) of Directive 2001/29/EC. Pursuant to Recital 29 of this Directive, the question of exhaustion does not arise in respect of online services.

<sup>96</sup> The ‘first-sale’ doctrine is a limitation to copyright that was recognised by the U.S. Supreme Court in 1908 and subsequently codified in the Copyright Act of 1976, op. cit., § 109.

<sup>97</sup> At pp. 26-29.

<sup>98</sup> This is consistent with the jurisprudence of the ECJ. See Joint cases *Music-Vertrieb Membran v GEMA* and *K-Tel International v GEMA*, op. cit., p. 147; also see *Deutsche Grammophon v Metro*, op. cit., 487.

copies is 'exhausted'.<sup>99</sup> The third type of restrictions to the exclusive rights in copyright includes scope restrictions. These restrictions are justified for reasons of social, cultural and educational policy and purport to protect the public interest, namely the welfare of the public.<sup>100</sup>

### Open/closed system of scope restrictions

As regards scope restrictions, there might be an open system, such as the US 'fair-use' doctrine,<sup>101</sup> or a closed regime of exceptions, such as those listed under Directive 2001/29/EC.<sup>102</sup> In copyright systems where exclusive rights are drafted in flexible and open terms, exceptions and limitations to these rights are strictly defined and closed.<sup>103</sup> For instance, the narrow definition of economic rights in the United States comes with an open defence on fair use. This defence leaves sufficient room for the Courts to interpret unauthorised uses as infringing or not based on a four-factor test which examines

*'1. the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes*

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<sup>99</sup> Those criteria have been developed by the ECJ in *Laserdisken ApS v Kulturministeriet*, op. cit., point 21.

<sup>100</sup> The public interest is mostly a matter of national policy: what is the public interest in one country may not be necessarily the same in another. G. Davies, *Copyright and the Public Interest*, Sweet & Maxwell, London, 2<sup>nd</sup> ed., 2002, p. 4; J. Phillips, 'The Berne Convention and the Public Interest', *EIPR*, 1987, p. 107, at 108; L. Guibault, 'The Nature and Scope of Limitations and Exceptions to Copyright and Neighbouring Rights with Regard to General Interest Missions for the Transmission of Knowledge: Prospects for their Adaptation to the Digital Environment', *e-Copyright Bulletin*, Unesco, October – December 2003, p. 2, at 4-5.

Failure to abide to the conditions set by these exceptions and limitations infringes copyright. This is, for instance, the case in France (see Y.-P. Gautier, *Propriété littéraire et artistique*, PUF, Paris, 3<sup>rd</sup> ed., 1999, p. 296), in the Netherlands (See Article 16h of Copyright Act of 1912 of the Netherlands as amended on July 6, 2004 and January 20, 2006; also see the Explanatory Memorandum concerning the Amendment of the Copyright Act of 1912 regarding reprographic reproductions, second Chamber, Session 2000-2001, 27, 617, No. 3, p. 19), and in Germany (see OLG Hamburg, 5 June 1969, (*Heintje*), in GRUR 1970/01, p. 38; OLG Hamburg, 27 September 1973, (*Gartentor*), in GRUR 1974/03, p. 165; in these cases subject to examination was the failure to pay a levy and the disregard of the obligation of acknowledging the author as requirements for the application of the copyright limitations in question).

<sup>101</sup> Section 107 of title 17 of the US Code, op. cit.

<sup>102</sup> The same applies for other Directives belonging to the *acquis communautaire*, such as the Directive 91/250/EC on the legal protection of computer programs and Directive 96/9/EC on the legal protection of databases, op. cit.

In essence, the distinction between open and closed systems of exceptions is a distinction between flexibility and certainty. See K. Weatherall & E. Hudson, *Response to the Issues Paper: Fair Use and Other Copyright Exceptions in the Digital Age*, Intellectual Property Research Institute of Australia (IPRIA) & Centre for Media and Communications Law (CMCL), The University of Melbourne, July 2005, pp. 23-25. The distinction between open and close systems of exceptions is also made in S. Dusollier, Y. Pouillet & M. Buydens, 'Copyright and Access to Information in the Digital Environment', op. cit., at pp. 9-10; S. Dusollier, 'Exceptions and Technological Measures in the European Copyright Directive of 2001: An Empty Promise', 34 *IIC*, 2003, 62-75, at 64; J. Spoor, 'General aspects of exceptions and limitations: general report', in L. Baulch, M. Green & M. Wyburn (eds.), *Les Frontières du droit d'auteur: ses limites et exceptions*, ALAI Study Days, 14-17 September 1998, Cambridge, Ed. Australian Copyright Council, 1999, p. 27.

<sup>103</sup> A. Strowel, *Droit d'auteur et copyright – Divergences et Convergences*, Bruylant & L.G.D.J., Paris, 1993, p. 144. Hugenholtz refers to this kind of exceptions and limitations as 'dedicated'. See P.B. Hugenholtz, 'Fierce Creatures, Copyright Exemptions: Towards Extinction?', op. cit., p. 5; P. Sirinelli, 'Exceptions et limites aux droits d'auteur et droits voisins', *Workshop on Implementation Issues of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)*, Geneva, 6-7 December 1999, pp. 1-48.

2. *the nature of the copyrighted work*
3. *the amount and substantiality of the portion used in relation to the copyrighted work as a whole*
4. *the effect of the use upon the potential market for, or value of, the copyrighted work.*<sup>104</sup>

By contrast, European copyright law defines exclusive rights broadly and then sets strictly defined and narrow in scope exceptions. For example, while the reproduction right of Article 2 of Directive 2001/29/EC encompasses a wide range of exploitation acts, as illustrated earlier in this thesis,<sup>105</sup> the exceptions and limitations applicable to this right form a series of specifically enumerated circumstances. In this light, while the exclusive rights are constructed as widely as possible, limitations are subject to restrictive interpretation and cannot be applied by way of analogy.<sup>106</sup>

### **Exceptions v. limitations**

The ‘exceptions and limitations’, to which the structure and official caption of Article 5 of Directive 2001/29/EC refer and within which the provision on private copying is included, form part of a closed system of scope restrictions to copyright. Spoor points out that while the terms ‘exception’<sup>107</sup> and ‘limitation’ are often used interchangeably by established national law, international Conventions and EC Directives, they are not identical.<sup>108</sup> We agree with this view. Indeed, many terms might be used to define copyright’s inherent limits, such as the terms ‘limitations’, ‘exceptions’, ‘exemptions’<sup>109</sup> and ‘restrictions’, and all will raise different connotations in the mind of the reader.<sup>110</sup> Guibault argues that while the term ‘exception’ is widely accepted and used in many international instruments,<sup>111</sup> the term ‘limitation’ has the

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<sup>104</sup> Section 107 of title 17 of the US Code, *op. cit.*; Also see A. Strowel, *Droit d’auteur et copyright – Divergences et Convergences*, *ibid.*, p. 144; A. Lucas, *Droit d’auteur et numérique*, *op. cit.*, p. 173.

<sup>105</sup> See p. 15 *et seq.*

<sup>106</sup> A. Lucas & H.-J. Lucas, *Traité de la Propriété Littéraire et Artistique*, 3<sup>rd</sup> Ed., Litec, Paris, 2004, at p. 253. For instance, in France and Germany, copyright exceptions and limitations are considered to be exhaustive and receive strict interpretation. See A. Lucas & H.-J. Lucas, *Traité de la Propriété Littéraire et Artistique*, at p. 287 (for France). A strict interpretation of fair-dealing exceptions in the UK was made in *Hyde Park v. Yelland* [2001], Ch. 143; *Ashdown v. Telegraph Group* [2001], Ch. 685. The restrictive interpretation of copyright limitations implies that the rightholders’ rights are have priority over these limitations. See R. Burrell & A. Coleman, *Copyright Exceptions: The Digital Impact*, *op. cit.*, p. 181.

<sup>107</sup> The term ‘exception’ connotes that this aspect of copyright remains outside the core of the system. See R. Burrell & A. Coleman, *ibid.*, pp. 182 and 279.

<sup>108</sup> On the legal nature of exceptions and limitations see L. Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright*, *op. cit.*, pp. 21-110; P. Sirinelli, ‘Exceptions et limites aux droit d’auteur et droits voisins’, *op. cit.*, at p. 3.

<sup>109</sup> There are some ‘full exemptions’ from the scope of the exclusive rights of the rightholders, such as the temporary copying exception of Article 5(1) of Directive 2001/29/EC. In this case, the exclusive rights are withdrawn without any compensation being paid to rightholders. In this respect, see L. Guibault, *Copyright Limitations and Contracts*, *ibid.*, pp. 20-22.

<sup>110</sup> J. H. Spoor, ‘General Aspects of Exceptions and Limitations: General Report’, *op. cit.*, at p. 29.

<sup>111</sup> Article 9 of the Berne Convention, *op. cit.*; Article 10 of the WIPO Copyright Treaty (WCT), *op. cit.*; Article 16 of the WIPO Performances and Phonograms Treaty (WPPT) *op. cit.*; Article 5 of Directive 2001/29/EC, *op. cit.*; Article 13 of the TRIPs Agreement, *op. cit.*

merit of being more neutral,<sup>112</sup> it can be understood as permitting certain activities that would otherwise infringe copyright. What is more, the term ‘limitation’ reflects more appropriately the concept of the ‘limits’ that determine the legal nature of legally guaranteed freedoms; Geiger rightly sees these ‘limits’ as tools in the determination of exclusive rights rather than as ‘exceptions’ to a rule.<sup>113</sup>

There is yet a more technical distinction between the terms ‘exception’ and ‘limitation’. Ricketson defines the term ‘limitation’ as the unauthorised use of the work under an indirect payment of equitable remuneration to the rightholders, while the term ‘exception’ allows the ‘free’ use of the work with no payment of remuneration.<sup>114</sup> This distinction is in line with Geiger’s view. Indeed, if limitations are derogations from exclusive rights under an obligation to remunerate the rightholders they merely limit the scope of these rights. Exceptions on the other hand clearly depart from the scope of exclusive rights since they are free from an obligation to pay. Under Ricketson’s distinction, copying for caricature, parody and pastiche,<sup>115</sup> for instance, is an exception to copyright since its beneficiaries are not obliged to pay remuneration to the rightholders. By contrast, the unauthorised photocopying of documents under the reprography provision of Article 5(2)(a) of Directive 2001/29/EC is a limitation to the reproduction right on the basis that it is accompanied by an obligation to pay remuneration. Since private copying, by virtue of Article 5(2)(b) of Directive 2001/29/EC, is permitted ‘*on condition that the rightholders receive fair compensation*’ it constitutes a limitation to the reproduction right. We therefore accept that Article 5(2)(b) of Directive 2001/29/EC lays down a limitation to the reproduction right since it sets limits to this right under the payment of remuneration to the rightholders.

### **Statutory licences, compulsory licences or mandatory collective management?**

Copyright limitations can be further distinguished into three categories. The first includes statutory licences.<sup>116</sup> Under a statutory licence, copyrighted works can be used without

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<sup>112</sup> L. Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright*, op. cit., p. 16.

<sup>113</sup> See C. Geiger, ‘De la nature juridique des limites au droit d’auteur’, 13 *Prop. Intell.*, 2004, p. 882.

<sup>114</sup> S. Ricketson, ‘Exceptions and limitations to copyright’, *Les Frontières du droit d’auteur: ses limites et exceptions*, ALAI 2000, Nordic Study Days, 14-17 September 1998, Cambridge, Ed. Australian Copyright Council, 1999, at pp. 4-5. It follows that copyright limitations are remunerated and copyright exceptions are free from an obligation to compensate rightholders.

<sup>115</sup> See Article 5(3)(k) of Directive 2001/29/EC: ‘*Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 [in the case of] use for the purpose of caricature, parody or pastiche*’.

<sup>116</sup> L. Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright*, op. cit., pp. 22-25. The main difference between full exemptions and statutory licences refers to the conditions of their exercise. In both cases, the freedom to use works is subject to conditions, such as the levy payment or the attribution of the source. Failure to comply with these conditions in both full exemptions and statutory licenses means that the exceptions shall not apply.

authorial consent but against payment of remuneration.<sup>117</sup> Statutory licences are a compromise between the interests of the rightholders and the users for reasons of public policy which are not so paramount to occur on a remuneration-free basis,<sup>118</sup> or for the alleviation of market-failure symptoms.<sup>119</sup> For instance, the invention of video and tape recorders in the 1970's was considered to create a market failure that seriously affected the legitimate interests of the rightholders; as a result, certain exclusive rights were replaced by a right to equitable remuneration.<sup>120</sup> Statutory licences maintain the right to authorise and prohibit certain activities reserved by copyright and it is only the exercise of this right that is regulated.

A second category of copyright limitations are compulsory licences. Under this type of limitation, rightholders are obliged to grant individual licences, the conditions and the price of which are determined jointly with the user or fixed by authorities in occasions where no agreement can be reached. Compulsory licensing is a less frequent form of limitation that arose as a response to the increasing complexity of legal relations due to technological advances.<sup>121</sup> As opposed to statutory licensing, compulsory licensing creates an obligation on the rightholders to contract with users; it requires that end users get authorial consent. Well-known examples of compulsory licensing are those incorporated in the Berne Convention on the broadcasting of literary and artistic works and the recording of musical works.<sup>122</sup> Compulsory licences have not been popular in Europe due to the fact that they mostly reflect

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On the distinction between full exemptions and statutory licences see P. Ruddock, 'Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and other Exceptions in the Digital Age', *Issues Paper*, May 2005, available online at <<http://www.ag.gov.au>>, lastly accessible on 9.9.2009, pp. 1-52, at p. 8.

<sup>117</sup> The amount of this remuneration is fixed by the legislator or by some regulatory authority. See J. Elsner, *Urheberrecht und Berichterstattung*, Recht und neue Medien, April 1997, at p. 2.

<sup>118</sup> T. Neumann, *Urheberrecht und Schulgebrauch*, Nomos Verlagsgesellschaft, UFITA – Schriftreihe, Baden-Baden, 1994, p. 46.

<sup>119</sup> D.J.G. Visser, 'Copyright Exemptions Old and New', in P.B. Hugenholtz (ed.), *The Future of Copyright in a Digital Environment*, Kluwer Law International, The Hague, Information Law Series – 4, 1996, pp. 49-56, at p. 51.

<sup>120</sup> See S.M. Stewart & H. Sandison, *International Copyright and Neighbouring Rights*, Butterworths, London, 2<sup>nd</sup> ed., 1989, p. 84; Also see M. Kretschmer, 'The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments', in D. Vaver (ed.), *Intellectual Property Rights: Critical Concepts in Law*, Routledge, 2006, pp. 346-361, at 346; H. Cohen Jenoram, 'The Future of Copyright Collection Societies', *EIPR*, 2001, p. 134, at 137-138; N. Van Lingem, 'Collective Copyright Administration: Competition and Supervision', in J.J.C. Kabel (ed.), *Intellectual Property and Information Law: Essays in Honour of Herman Cohen Jenoram*, Kluwer Academic Publishers, 1998, p. 142, at 211; M. Ficsor, 'Collective Management of Copyright and Related Rights in the Digital, Networked Environment', op. cit., at p. 40.

<sup>121</sup> L. Guibault, *Copyright Limitations and Contracts*, op. cit., pp. 25-26.

<sup>122</sup> Article 11bis(2) and 13(1) of the Berne Convention, op. cit. In the United States making and distributing phonorecords of non-dramatic musical works, including digital phonorecord deliveries, is authorised under a compulsory licensing scheme. See the United States Copyright Act, op. cit. § 115; for an analysis of the compulsory licences under the Berne Convention, see S. Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, op. cit., pp. 28-33; R.V.V. Ayyar, 'Interest or Right?', op. cit., at p. 17.

the interests of the industry rather than those of the society as a whole,<sup>123</sup> this coming in contradiction with the author's right tradition.

The third type of copyright limitations is mandatory collective administration of rights.<sup>124</sup> This type of limitation requires that certain rights are exercised exclusively through a collecting society<sup>125</sup> in cases where the individual exploitation of works entails high transaction costs and the efficient clearance of rights is not possible. Mandatory collective licensing is based on the argument that rightholders would be better off with an effective right to compensation without individual exercise than with an individually exercised right that lacks real scope.<sup>126</sup> This is the case, for instance, of cable retransmission rights. Article 9(1) of Council Directive 93/83/EEC<sup>127</sup> obliges Member States to ensure that the rightholders' right for cable retransmissions is exercised only through a collecting society.<sup>128</sup> Interestingly, France has chosen the route of mandatory collective rights management as regards reprographic copying rather than imposing statutory licensing schemes such as those applicable in most EU Member States.<sup>129</sup>

We therefore conclude that the limitation of Article 5(2)(b) of Directive 2001/29/EC on private copying introduces a statutory licence. This is because the aforementioned Article permits acts of reproduction for private non-commercial use without authorial consent and on condition that a fair compensation is paid to the rightholders. In our view, the advantages from this regulatory option are three. The first is that private copying is made lawful for end users. The second is that rightholders receive fair compensation for the loss of legitimate sales caused due to private copying. The last one is that copyright law gains a greater credibility in terms of reflecting consumer practices. Nonetheless, this regulatory option also presents some

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<sup>123</sup> E. Del Bianco, *Le droit d'auteur et ses limites*, Nouvelle Bibliothèque de droit et jurisprudence, Lausanne, 1951, p. 168.

<sup>124</sup> L. Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright*, op. cit., pp. 26-27.

<sup>125</sup> J. A. L. Sterling, 'Creator's Right and the Bridge between Author's Right and Copyright', *IIC*, 1998, 29:3, pp. 302-308, at 358.

<sup>126</sup> A. Lucas, 'Aperçu rapide sur la loi n° 95-4 du 3 janvier 1995 relative à la gestion collective du droit de reproduction par reprographie', *Droit de l'informatique et des telecoms* 1996/4, pp. 75-78.

<sup>127</sup> 'Member States shall ensure that the right of copyright owners and holders or related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society.' Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993, p. 15-21.

<sup>128</sup> J. A. L. Sterling, 'Creator's Right and the Bridge between Author's Right and Copyright', op. cit., at 358.

<sup>129</sup> See Loi n° 95-4 du 3 janvier 1995, article 1, Journal Officiel du 4 e janvier 1995, adding article L 122-10 to the Intellectual Property Code. Note that before the introduction of reprography regimes, most Continental European Member States considered reprography to be an infringement. See, for instance, Decision of the German Supreme Court, of 24 June 1955 (*Photocopy*) in GRUR 1955, p. 544; Decision of the German Supreme Court, of 9 June 1983 (*Copy-shops*) in GRUR 1984, p. 54; *Affaire du C.N.R.S.*, Trib. Gr. Inst. Paris (3d ch. 1este sect.), RIDA 1974, p. 121; *Affaire Rannou-Graphie*, Cass. 1er civ., 7 March 1984, in RIDA 1984/121, p. 151.

disadvantages. Rightholders may seek to restrict copying by applying technological protection measures or by contracting directly with end users.<sup>130</sup>

### A user right?

One can still wonder, however, whether the private copying limitation of Article 5(2)(b) of Directive 2001/29/EC introduces a user right under which users can take legal action and claim the benefit of the limitation. In essence, the question is whether the private copying limitation provides immunity to users against being sued for infringement or if it is a positive right to make private copies.<sup>131</sup> As Goldstein rightly points out, the distinction between an exemption from infringement and a prohibition against suing for infringement is a fine, possibly invisible one.<sup>132</sup> Some copyright scholars, such as Lucas and Ficsor, argue that copyright limitations do not give rise to *rights* for the benefit of the user,<sup>133</sup> even if there is a theoretical basis for protecting users all over copyright protection.<sup>134</sup> To them, copyright limitations are mere concessions granted by the rightholders for certain uses and in no way give rise to rights to the benefit of the user; they cannot compare in nature with the rightholders' exclusive rights. Others, including Burrell and Coleman, stand in favour of creating an infrastructure protecting copyright limitations as user rights.<sup>135</sup> They suggest that

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<sup>130</sup> We examine these issues later in this thesis, at page 178 *et seq.*

<sup>131</sup> G. Arthur, 'Private Use, Public Consequence?', *op. cit.*, at p. 18.

<sup>132</sup> P. Goldstein, *Copyright's Highway: from Gutenberg to the Celestial Jukebox*, Hill & Wang, New York, 1994, at p. 163.

<sup>133</sup> J. Ginsburg & Y. Gaubiac, 'Private Copying in the Digital Environment', in J.J.C. Kabel & G.J.H.M. Mom, *Intellectual Property and Information Law, Essays in Honour of Herman Cohen Jenoram*, Kluwer Law International, Information Law Series – 6, 1998, pp. 149-155, at p. 155; A. Lucas, *Droit d'auteur et numérique*, *op. cit.*, p. 171 (arguing that copyright exceptions are mere concessions granted by the rightholders for certain uses); E. D. Hirsch Ballin, 'Author's Rights Compared with those of the Community', *RIDA*, 20, 1956, pp. 18-45, at p. 26 (arguing that that the 'public's right' to use or not to use a work does not compare in nature with the rightholders' rights arising from copyright law); M. Ficsor, 'Collective Management of Copyright and Related Rights in the Digital, Networked Environment', *op. cit.*, p. 62.

Contra: D. Vaver, *Copyright Law*, Irwin Law, 2000, at p. 190; R. Patterson & S. W. Lindberg, *The Nature of Copyright – A Law of Users' Rights*, The University of Georgia Press, Athens & London, 1991; R. Burrell & A. Coleman, *Copyright Exceptions: The Digital Impact*, *op. cit.*, pp. 279-280; T. Vinje, 'Copyright Imperilled', 4 *EIPR*, 1999, pp. 192-207, at p. 197; P. B. Hugenholtz, 'Fierce Creatures, Copyright Exemptions: Towards Extinction?', *op. cit.*; T. Riis & J. Schovsbo, 'User's Rights, Reconstructing Copyright Policy on Utilitarian Grounds', *EIPR*, 2007, 1; A. Ottolia, 'Preserving User's Rights in DRM: Dealing with "Judicial Particularism" in the Information Society', *IIC*, 2004, 491; Also see the Canadian case *CHH Canadian Ltd. V. Law Society of Upper Canada* [2004] SCC 13, *IIC* 705 (the Supreme Court of Canada held that copyright exceptions are user rights, see para. 48).

<sup>134</sup> J. Liu, 'Copyright Law's Theory of the Consumer', 44 *Boston College L. Rev.*, 2003, pp. 397-432, at 397; G. Lunney, 'Fair Use and Market Failure: Sony Revisited', 82 *B.U.L. Rev.*, 2002, p. 975, at 975; J. Litman, 'Lawful Personal Use', *Texas Law Review*, 2007, 85, pp. 1871-1920, at p. 1877; R. Patterson & S. W. Lindberg, *The Nature of Copyright – A Law of Users' Rights*, *ibid.*; R.S. Ku, 'The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology', *University of Chicago Law Review*, 2001, vol. 69, iss. 1, pp. 263-324, at p. 263.

The view that the primary purpose of copyright is to benefit the public has been commonplace for many years and has been affirmed at courts. Indicatively see *Mazer v. Stein*, 347 U.S. 201, 219, (1954); *USA v. Paramount Pictures*, 334 U.S. 131, (1948). Also see P. Goldstein, *Goldstein on Copyright*, Aspen Publishers/Wolters Kluwer Law & Business, 2007, 3<sup>rd</sup> ed., Looseleaf. pp. 3-9; R. Gorman, *Copyright Law*, Federal Judicial Law, 2006, 2<sup>nd</sup> ed., p.1.

<sup>135</sup> D. Vaver, *Copyright Law*, *op. cit.*, at p. 190; R. Burrell & A. Coleman, *Copyright Exceptions*, *op. cit.*, pp. 279-280; T. Vinje, 'Copyright Imperilled', *op. cit.*, pp. 192-207, at p. 197; P. B. Hugenholtz, 'Fierce Creatures, Copyright Exemptions: Towards Extinction?', *op. cit.*; T. Riis & J. Schovsbo, 'User's Rights, Reconstructing Copyright

this could possibly be made through a shift in terminology and, in particular, the replacement of the terms ‘exception’ and ‘limitation’ with that of ‘user rights’. In practical terms, treating copyright limitations as user rights would mean that they have a mandatory effect and cannot be contractually overridden.<sup>136</sup>

We consider that determining whether or not a user’s interest in making private copies might amount to a subjective right or not depends on the definition given to such rights. Dabin defines subjective rights as ‘*the prerogative, provided to a person by objective law and legally guaranteed, to freely dispose of a good which is deemed to belong to her, either as property or as her due.*’<sup>137</sup> In our view, while users do not have any legal power to require compliance with, or to prevent infringement against, their right to make private copies via litigation, they are statutorily permitted to carry out the acts falling under the scope of copyright exceptions and limitations. This means that users do not have a subjective right but rather a legitimate interest or, as Guibault fairly puts it, an objective right to private copy;<sup>138</sup> users cannot enforce the private copying limitation but at the same time rightholders are obliged not to ignore their ‘objective right’ to make private copies. We consider that since the private copying limitation is not a subjective right to be invoked against its potential contractual restriction it merely has a defensive character. Albeit highly symbolic, the explicit qualification of the private copying limitation as an objective right would have, in our view, significant practical consequences; the limitation would prevail over contractual agreements and could establish a right of action for the benefit of the users. Indeed, we consider that this limitation would only be given some substantive meaning if it was declared imperative against its contractual restriction, for

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Policy on Utilitarian Grounds’, op. cit., 1; Also see the Canadian case *CHH Canadian Ltd. V. Law Society of Upper Canada*, op. cit., at § 48); A. Ottolia, ‘Preserving User’s Rights in DRM’, op. cit., at p. 491.

<sup>136</sup> In France, the imperative character of copyright exceptions is deduced from the wording of Article L 122-5 of the CPI which stipulates that the author ‘cannot prohibit’ the acts there stated. See Code de la propriété intellectuelle, Première partie - La propriété littéraire et artistique. This position was affirmed by the Paris District Court, 10 Jan 2006, 13 RLDI 24, 2006. The Court in this case affirmed that the private copying limitation was ‘d’ordre public’, i.e. a matter of public policy, and was, hence, mandatory. Therefore, technical measures should not inhibit the ability to make copies of CD’s. Nonetheless, the French Supreme Court has since taken a different position (28 February 2006, 2006, D. 784).

In Belgium, the imperative character of copyright limitations is explicitly stipulated in Article 23bis of the Belgian Copyright Act of June 30, 1994, inserted by an Act of August 31, 1998 implementing the Database Directive into national law. The mandatory status of Belgian copyright limitations was maintained in the Act of May 22, 2005 (M.B., 27 May 2005, 24997). See M.-C. Janssens, ‘Implementation of the 2001 Copyright Directive in Belgium’, 37 *IIC*, 2006, p. 50.

<sup>137</sup> J. Dabin, *Le droit subjectif*, Dalloz, Paris, 1952, p. 105; on subjective rights and copyright exceptions also see L. Guibault, *Copyright Limitations and Contracts*, op. cit., p. 92.

<sup>138</sup> L. Guibault, *Copyright Limitations and Contracts*, *ibid.*, p. 95. Also see C. Geiger, ‘The Private Copy Exception: An Area of Freedom (Temporarily) Preserved in the Digital Environment’, op. cit., at 78.

For a distinction between rights and interests see A. Gervais, ‘Quelques réflexions à propos de la distinction des “droits” et “interest”’, *Mélanges en l’honneur de Paul Roubier*, *Dalloz*, 1961, p. 243.

instance, through a Recital indicating that any contractual derogation from this limitation is null and void.<sup>139</sup>

We conclude from the analysis above that Article 5(2)(b) of Directive 2001/29/EC on private copying lays down a scope limitation to the reproduction right in the form of a statutory licence incorporated in the closed system of EU copyright exceptions and limitations. Albeit not a fully-fledged user right, the private copying limitation functions as a defence against claims for copyright infringement; it is an objective right for the benefit of end users.

Below we will examine the policy reason on which the private copying limitation is premised. Since the private copying limitation originates from the analogue world one can only wonder whether its justificatory basis retains its validity in the digital context.

### **1.2.2. The *raison-d'être* of the private copying limitation of Article 5(2)(b) of Directive 2001/29/EC**

Our analysis indicates that the permissibility of private copying is based on different grounds in the European and American copyright tradition. In Europe, private copying is permitted due to the inability of controlling private copying without encroaching upon end-user privacy. In this light, the private copying limitation is premised on the fundamental right to privacy. Inherent in this approach is yet an additional rationale revolving around the convenience of the end users in using copyrighted content; private copying serves as a manifestation of user autonomy. By contrast, in the United States private copying is examined in economic terms and, in particular, through the spectrum of the market-failure doctrine. Market failure arises due to the high transaction costs required for the negotiation of individual licences between rightholders and users, and for enforcing copyrights.<sup>140</sup> Below we analyse both the European and American rationale justifying the permissibility of acts of private copying with a view to

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<sup>139</sup> This is, for instance, the case as regards other copyright limitations included in other Directives. We discuss this issue later, at p. 209 *et seq.*

<sup>140</sup> Some commentators argue that the presence of high transaction costs is only one example of market failure. See L. Pallas Loren, 'Redefining the Market Failure Approach to Fair Use in an Era of Copyright Protection Systems', 5 *Journal of Intellectual Property Law*, 1997, p. 1; W. J. Gordon, 'Market Failure and Intellectual Property: A Response to Professor Lunney', 82 *Boston U. L. Rev.*, 2002, p. 1031, at pp. 1031, 1037 and 1039; W. Gordon, 'Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives', in N. Elkin-Koren & N. Netanel (eds.), *Commodification of Information, Kluwer Law International*, The Hague, 2002, pp. 149-192, at 149; W. Gordon, 'Fair Use as Market Failure', *op. cit.*, p. 1600; B. Depoorter & F. Parisi, 'Fair Use and Copyright Protection: A Price Theory Explanation', 21 *International Review of Law and Economics*, 2002, pp. 453-473, p. 453. Others have argued that the non-excludability of intellectual goods undermines many of the economic assumptions on which the market failure doctrine on copyright is premised. See G. Lunney, 'Fair Use and Market Failure', *op. cit.*, p. 975; L. Guibault, *Copyright Limitations and Contracts*, *op. cit.*, pp. 86-87.

ascertain whether the US market-failure doctrine has influenced the European legislator in introducing Article 5(2)(b).

### 1.2.1.1. Privacy protection and private copying

Being a ‘doctrine of public places’,<sup>141</sup> copyright has never been about the control of private uses;<sup>142</sup> rightholders have never held absolute control over the protection of their works. Albeit practically unfeasible in the analogue world,<sup>143</sup> control over access and use has also been undesirable for privacy reasons.<sup>144</sup> Insofar as the private use was not infringing, consumption of a work in the domestic realm fell outside the regulatory scope of copyright.<sup>145</sup> At least in part, this reflected the right to privacy, the latter being a fundamental right in Europe since 1950 when the European Convention on Human Rights was signed.<sup>146</sup> To determine whether end users infringed copyright by making copies in private, rightholders would have to

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<sup>141</sup> P. Goldstein, *Copyright’s Highway*, op. cit., at p. 201; Also see H. Wistrand, *Les exceptions apportées aux droits de l’auteur sur ses œuvres*, op. cit., p. 313 (this means that reproductions and performances of works for private use can be made without authorial consent); S. Dusollier, ‘Technology as an Imperative for Regulating Copyright: From the Public Exploitation to the Private Use of the Work’, op. cit., p. 201.

<sup>142</sup> Indeed, fifty years ago copyright law rarely concerned itself with private non-commercial uses. See J. Litman, ‘Lawful Personal Use’, op. cit., at p. 1874; J. Litman, ‘The Exclusive Right to Read’, *Cardozo Arts & Entertainment L. J.*, 1994, 13, p. 29; P. Samuelson, ‘Copyright and Freedom of Expression in Historical Perspective’, 10 *J. Intell. Prop. L.*, 2003, p. 319.

<sup>143</sup> Market failure arguments on private copying were based on this unfeasibility of practical control over acts of copying realised in the private sphere. On the unfeasibility of monitoring private copying see P. B. Hugenholtz, ‘Fierce Creatures, Copyright Exemptions: Towards Extinction?’, op. cit., p. 11; J. Ginsburg & Y. Gaubiac, ‘Private Copying in the Digital Environment’, op. cit., at pp. 149-150; G. Davies, ‘Technical Devices as a Solution to Private Copying’ in I.A. Stamatoudi & P.C. Torremans, *Perspectives on Intellectual Property: Copyright in the New Digital Environment*, Sweet and Maxwell, 2002, 165-182, at 166.

<sup>144</sup> Such control was also unwanted because the prestige of rightholders would be affected if the rightholders intruded in the private sphere of users. See J. Ginsburg & Y. Gaubiac, ‘Private Copying in the Digital Environment’, op. cit., at p. 149; P. B. Hugenholtz, ‘Adapting Copyright to the Information Superhighway’, in P.B. Hugenholtz (ed.) *The Future of Copyright in a Digital Environment*, op. cit., at p. 94; C. Geiger, ‘Right to Copy v Three-Step Test: The Future of the Private Copy Exception in the Digital Environment’, op. cit., p. 9.

<sup>145</sup> *Gema v. Grundig* 1 ZR 8/54, 17 BGHZ 266, 271-2 [1955] GRUR 492.

<sup>146</sup> Art. 8 of the European Convention on Human Rights (ECHR) signed in Rome on 4.11.1950. This Article, which provides a ‘right to respect for private and family life’, reads as follows: ‘(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

Note that two years earlier the Universal Declaration of Human Rights (UDHR) protected the right to privacy. Article 12 of this Declaration states that ‘[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.’ See Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A of 10 December 1948.

The European Court of Human Rights in Strasbourg has developed a large body of jurisprudence defining this fundamental right to privacy. See *Menteş and Others v. Turkey*, judgment of 28 November 1997, Reports of Judgments and Decisions 1997 VIII, p. 2711, § 73; *Stjerna v. Finland*, judgment of 25 November 1994, Series A no. 299 B, p. 60, § 37; *López Ostra v. Spain*, judgment of 9 December 1994, Series A no. 303 C, p. 54, § 51; *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280 B, p. 53, § 24; *Płoski v. Poland*, no. 26761/95, § 32, 12 November 2002).

Also see the Privacy Directive, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data, OJ L 281/31, 23.11.95.

physically enter, search and perhaps seize material in the users' homes. This would be highly intrusive and practically unenforceable. In the light of respect for privacy and family life, seizures and searches in the domestic realm were seen as unwanted<sup>147</sup> and copyright stopped where the private circle started.<sup>148</sup>

The concerns on privacy in relation to copyright were firstly expressed in the 1955 German *Grundig Reporter* case.<sup>149</sup> In this case, the German collecting society *GEMA* brought an action against a producer of tape recorders to enjoin that producer from selling recorders unless his customers were reminded of their copyright obligations.<sup>150</sup> While the Court granted *GEMA*'s demand on all claims, it did not oblige the producer to pay damages on the basis that 'no general principle in copyright law holds that a rightholder's claims should stop short of the private sphere of the individual.' To the Court, the rightholders had a right to remuneration for the exploitation of their works even in cases where a particular form of exploitation was not directly profitable.<sup>151</sup> A similar ruling was also issued in 1964 where the Supreme Court of Germany held that *GEMA* could not oblige providers of home-copying equipment to reveal their customers' identities for *GEMA* to verify whether these customers were infringing or not copyrights in works belonging to its repertoire.<sup>152</sup> Under the Court's reasoning, while home copying infringed copyright, such control measures would come in conflict with the inviolability of the home as guaranteed under Article 13 of the Basic Law of the Federal Republic of Germany (*Grundgesetz*).<sup>153</sup>

Since the privacy justification behind the private copying limitation originates from the analogue environment, one can question whether it maintains its relevance in the digital

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<sup>147</sup> Note, however, that the Enforcement Directive lays down a series of enforcement procedures, including the seizure of goods suspected of infringing intellectual property rights. See Article 9 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004), OJ L 195, 2.6.2004, p. 16–25.

<sup>148</sup> H. Wistrand, *Les exceptions apportées aux droits de l'auteur sur ses œuvres*, op. cit., p. 312.

<sup>149</sup> *Grundig Reporter*, BGH, decision of 18 May 1955 – Aktz: I ZR 8/54, in GRUR 10/1955.

Similar concerns were expressed in the Irish case *EMI Records (Ireland) Ltd, Sony BMG Music Entertainment (Ireland) Ltd, Universal Music (Ireland) Ltd, Warner Music Ireland Ltd v. Eirecom Ltd, BT Telecommunications Ireland Ltd*, The High Court of Dublin, HC (Irl), 8.5.2005.

<sup>150</sup> *Grundig Reporter*, op. cit., at 492.

<sup>151</sup> See H. Wistrand, *Les exceptions apportées aux droits de l'auteur sur ses œuvres*, op. cit., p. 368; D.J.G. Visser, 'Copyright Exemptions Old and New' op. cit., at p. 49.

<sup>152</sup> *Personalansweise*, BGH, 29 May 1964 – Aktz: Ib ZR 4/63, in GRUR 02/1965, p. 104. For a commentary on this decision see K.J. Koelman & L. Bygrave, 'Privacy, Data Protection and Copyright: Their Interaction in the Context of Electronic Copyright Management Systems', in P.B. Hugenholtz (ed.), *Copyright and Electronic Commerce*, Kluwer Law International, The Hague, 2000, pp. 59-123, at p. 101; D. J. G. Visser, 'Copyright Exemptions Old and New', in P. B. Hugenholtz (ed.), *The Future of Copyright in a Digital Environment*, Kluwer Law International, The Hague, Information Law Series – 4, 1996, pp. 49-56, at p. 50.

<sup>153</sup> The first paragraph of this Article mandates that 'The home is inviolable.' See Basic Law of the Federal Republic of Germany (*Grundgesetz*), 23 May 1949 (first issue of the *Federal Law Gazette*, dated 23 May 1949), as amended up to and including 20 December 1993.

environment. To date, encryption technology enables copyright enforcement even in cases of mass distribution of online works through the collection, treatment and storage of end-user personal data. In practical terms, this means that the rightholders have the means to monitor the use made of their works through tracking devices and control such use through technological measures.<sup>154</sup> On the basis of these new monitoring techniques, the copyright industries are currently pushing for the increased enforcement of copyright on the Internet, in particular by trying to order Internet Service Providers (ISPs) to disclose the identity of end users engaged in peer-to-peer file-sharing. Such orders have been filed all over the globe, some of them being successful<sup>155</sup> and some not.<sup>156</sup> This has created controversy as to whether privacy protection should prevail over allegations for copyright infringement on the Internet.

The controversy on this issue in Europe was resolved by a 2008 ECJ ruling,<sup>157</sup> which clearly affirmed that the *acquis communautaire* does not compel ISPs to disclose the identities or other data of individuals alleged to infringe copyright. *Promusicae*, a Spanish non-profit collecting society, applied to the Spanish courts for an order that *Telefónica*, a Spanish ISP, should disclose the identities and residence of certain customers to whom it provided internet-access services, whose IP addresses and date and time of connection were known. According to *Promusicae*, these individuals were using the *KaZaA* file-sharing programme and were providing access, in shared files of personal computers, to music recordings in which members of *Promusicae* held the exploitation rights. It therefore sought the disclosure of the information in order to bring civil proceedings against the individuals concerned. *Telefónica* claimed that,

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<sup>154</sup> K.J. Koelman & L. Bygrave, 'Privacy, Data Protection and Copyright', op. cit., at p. 108. We examine this issue later in this thesis, at page 200 *et seq.*

<sup>155</sup> The issue of disclosure has been the subject of litigation recently and could be seen in cases like *Totalise Plc v Motley Fool Ltd* [2001] E.M.L.R. 29 QBD and *E-Silkroad Holdings Ltd v Icered.com Ltd* Unreported 2001. These cases are concerned with identifying the author of a defamatory statement posted on the internet. In both cases, the courts ordered disclosure of the identity of the statement maker.

In the US *Verizon* case, the Court ordered Verizon to disclose the names of the subscribers that RIAA alleged had been engaged in file-sharing. *Verizon Internet Services Inc. v. Recording Industry Association of America Inc.*, 240 F.Supp.2d 24 CD.C.D.C. 2003.

<sup>156</sup> In Canada see *BMG Canada Inc. v. John Doe*, 2004 FC 488 aff'd 2005 FCA 193 (CRIA made an application under the Rules of the Federal Court to compel 5 ISPs (Bell Canada, Rogers Communications, Shaw Communications, Telus, and Vidéotron) to divulge the account information of 29 IP addresses that were believed to have downloaded approximately 1,000 copyrighted music files through the KaZaA and iMesh file-sharing software. Both the Federal Court and the Federal Court of Appeals rejected CRIA's claims on revealing end-user identities).

<sup>157</sup> *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU* (C-275/06), European Court of Justice (Grand Chamber), [2008] E.C.D.R. 10. For a case comment on the *Promusicae* case, see L. Hetherington, 'Peer-to-peer file sharing - ISPs and disclosure of user identities', *Ent. L.R.* 2008, 19(4), 81-82; M.M. Frabboni, 'ISPs not to disclose the identity of their users: a green light for file-sharers?', *Ent. L.R.* 2008, 19(1), 19-20; in general see O.B. Vincents, 'When rights clash online: the tracking of P2P copyright infringements vs. the EC Personal Data Directive', *I.J.L. & I.T.* 2008, 16(3), 270-296.

under Spanish law,<sup>158</sup> an ISP can divulge such information only within the context of a criminal investigation, or only when a disclosure would be necessary in order to preserve public or national security. The Spanish court suspended the proceedings and sought guidance from the European Court of Justice on whether the Spanish law was actually compatible with Community law. In particular, the appeal court referred the question of whether Articles 15(2) and 18 of Directive 2000/31/EC,<sup>159</sup> Articles 8(1) and 8(2) of Directive 2001/29/EC,<sup>160</sup> Article 8 of Directive 2004/48/EC<sup>161</sup> and Article 17(2) and 47 of the Charter of fundamental rights

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<sup>158</sup> Article 12 of the Spanish Law on Information Society Services and Electronic Commerce (*Ley de Servicios de la Sociedad de la Información y de Comercio Electrónico*), June 27, 2002.

<sup>159</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178, 17.7.2000, p. 1–16:

Article 15(2): '*Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.*'

Article 18: '*Member States shall ensure that court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.*'

<sup>160</sup> Article 8 of Directive 2001/29/EC on sanctions and remedies reads: '*1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.*

*2. Each Member State shall take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2).*

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

<sup>161</sup> See Article 8 of Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004), Official Journal L 195 , 02/06/2004 P. 0016 – 0025: '*1. Member States shall ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided by the infringer and/or any other person who:*

*(a) was found in possession of the infringing goods on a commercial scale;*

*(b) was found to be using the infringing services on a commercial scale;*

*(c) was found to be providing on a commercial scale services used in infringing activities; or*

*(d) was indicated by the person referred to in point (a), (b) or (c) as being involved in the production, manufacture or distribution of the goods or the provision of the services.*

*2. The information referred to in paragraph 1 shall, as appropriate, comprise:*

*(a) the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers;*

*(b) information on the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question.*

*3. Paragraphs 1 and 2 shall apply without prejudice to other statutory provisions which:*

*(a) grant the rightholder rights to receive fuller information;*

*(b) govern the use in civil or criminal proceedings of the information communicated pursuant to this Article;*

*(c) govern responsibility for misuse of the right of information; or*

*(d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to his/her own participation or that of his/her close relatives in an infringement of an intellectual property right; or*

*(e) govern the protection of confidentiality of information sources or the processing of personal data.*

2000<sup>162</sup> permitted Member States to exclude the duty to make the data available in the context of civil proceedings.

The ECJ ran through all these provisions and subsequently concluded that none of them requires that a data-disclosure obligation should be included into national law. The Court highlighted the need to strike the right balance between the right to privacy and the rights arising through the protection of intellectual property. In line with the opinion of its Advocate General (AG),<sup>163</sup> the ECJ noted that Article 15(1) of Directive 2002/58/EC on privacy and electronic communications<sup>164</sup> allows Member States to derogate from the requirement imposed on them by Article 5 of that Directive,<sup>165</sup> to ensure the confidentiality of communications and related traffic-data transmitted via public communications networks and via publicly available electronic communications services, in certain circumstances. The Court upheld the position of its AG that none of those circumstances related to situations that called

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<sup>162</sup> Charter of Fundamental Rights of the European Union, (2000/C 364/01).

Article 17(2) of the Charter reads: *‘Intellectual property shall be protected.’*

Article 47: *‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.’*

*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.*

*Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*

<sup>163</sup> Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* (Opinion of Advocate General Kokott), July 18, 2007.

<sup>164</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), Official Journal L 201, 31/07/2002 P. 0037 – 0047. Article 15(1) reads: *‘Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1), (2), (3) and (4), and Article 9 of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive 95/46/EC. To this end, Member States may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph. All the measures referred to in this paragraph shall be in accordance with the general principles of Community law, including those referred to in Article 6(1) and (2) of the Treaty on European Union.’*

<sup>165</sup> Article 5 of Directive 2002/58/EC, *ibid*, reads: *‘1. Member States shall ensure the confidentiality of communications and the related traffic data by means of a public communications network and publicly available electronic communications services, through national legislation. In particular, they shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned, except when legally authorised to do so in accordance with Article 15(1). This paragraph shall not prevent technical storage which is necessary for the conveyance of a communication without prejudice to the principle of confidentiality.*

*2. Paragraph 1 shall not affect any legally authorised recording of communications and the related traffic data when carried out in the course of lawful business practice for the purpose of providing evidence of a commercial transaction or of any other business communication.*

*3. Member States shall ensure that the use of electronic communications networks to store information or to gain access to information stored in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned is provided with clear and comprehensive information in accordance with Directive 95/46/EC, inter alia about the purposes of the processing, and is offered the right to refuse such processing by the data controller. This shall not prevent any technical storage or access for the sole purpose of carrying out or facilitating the transmission of a communication over an electronic communications network, or as strictly necessary in order to provide an information society service explicitly requested by the subscriber or user.’*

for the bringing of civil proceedings. They concerned, firstly, national security, defence and public security, secondly, the prosecution of criminal offences, and thirdly, the unauthorised use of electronic communications systems as referred to in Article 13(1) of the Directive 95/46/EC.<sup>166</sup> As regards the meaning of ‘*unauthorised use of electronic communications*,’ the Court noted that this concerned uses that challenged the actual integrity or security of the system, such as activities of interception or surveillance of communications without consent; it did not relate to situations that might give rise to civil proceedings. The ECJ concluded that EU law did not preclude Member States from laying down an obligation to disclose personal data in the context of civil proceedings. However, it also stated that EU law cannot be interpreted in such a way as to compel Member States to lay down such rules.

In the meantime, several years after the *Promusicae* case was first brought to the Spanish court, Community law has changed. Article 5 of Directive 2006/24/EC<sup>167</sup> requires Member States to force ISPs to retain internet-subscriber details for a period of at least six months and a maximum of two years,<sup>168</sup> in order to ensure that those details are available for the prevention, investigation, detection and prosecution of criminal offences. Such data may only be disclosed to national authorities, according to this Directive and in accordance with the procedures set in place by national law, taking into account the relevant provisions arising from the *acquis communautaire*. An interesting question is whether data, which should be retained on the basis of the national laws implementing the Directive 2006/24/EC, can be disclosed to rightholders in the framework of civil proceedings against alleged copyright infringers. While, in our view, the text of the Directive does not allow for such a possibility, it is highly likely that the rightholders may not share this view and find in this Directive a new legislative basis for

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<sup>166</sup> Directive 95/46/EC on the protection of individuals with regard to the processing of personal data, op. cit.

<sup>167</sup> Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, Official Journal L 105 , 13/04/2006 P. 0054 – 0063. *Article 5 of this Directive reads: ‘1. Member States shall ensure that the following categories of data are retained under this Directive: [...]*

*(a)(2) concerning Internet access, Internet e-mail and Internet telephony:*

*(i) the user ID(s) allocated;*

*(ii) the user ID and telephone number allocated to any communication entering the public telephone network;*

*(iii) the name and address of the subscriber or registered user to whom an Internet Protocol (IP) address, user ID or telephone number was allocated at the time of the communication; [...]*

*(c) (2) concerning Internet access, Internet e-mail and Internet telephony:*

*(i) the date and time of the log-in and log-off of the Internet access service, based on a certain time zone, together with the IP address, whether dynamic or static, allocated by the Internet access service provider to a communication, and the user ID of the subscriber or registered user;*

*(ii) the date and time of the log-in and log-off of the Internet e-mail service or Internet telephony service, based on a certain time zone;*

*2. No data revealing the content of the communication may be retained pursuant to this Directive.’*

<sup>168</sup> See Article 6 of Directive 2006/24/EC, *ibid.*: ‘Member States shall ensure that the categories of data specified in Article 5 are retained for periods of not less than six months and not more than two years from the date of the communication.’

orders on data disclosure. And while some commentators, such as Sirinelli, no longer see the threat of invasion into the private sphere as an issue,<sup>169</sup> others stress the importance of anonymity, autonomy, and privacy in cyberspace.<sup>170</sup> We feel that monitoring techniques and orders to disclose end-user identities certainly raise privacy issues. Unless these issues are settled, either by explicit legislation or privacy-enhancing technologies, the private copying limitation retains a solid justificatory basis on grounds of informational privacy, which is as strong as it used to be in the analogue environment.

While we content that the main justification for the private copying limitation in Europe is, and ought to remain, the privacy of the end user, there is yet an additional rationale for private copying: lawful users have an implied right to enjoy the work in a manner convenient to them.<sup>171</sup> For instance, a lawful user of a DVD may make an extra copy for his holiday home, namely to format-shift his enjoyment of the work.<sup>172</sup> Of course, there is a general consensus that format and time shifting are not infringing.<sup>173</sup> Ginsburg and Gaubiac illustrate that the convenience rationale may be a manifestation of a broader principle of user autonomy.<sup>174</sup> We agree with them. Under this principle, end users should enjoy works or other subject-matter free of the author's surveillance. Indeed, the fact that permissible private copying under Article 5(2)(b) of Directive 2001/29/EC can be made without authorial consent indicates that

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<sup>169</sup> P. Sirinelli, 'Synthèse', in L. Baulch, M. Green & Wyburn (eds.), *ALAI Study Days – The Boundaries of Copyright: its proper limitations and exceptions*, Sydney, Australian Copyright Council, 1999, pp. 133-144, at 133.

<sup>170</sup> A. W. Branscomb, 'Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces', *The Yale Law Journal*, 1995/104, pp. 1639-1679, at p. 1639; J. Litman, 'The Exclusive Right to Read', *op. cit.*, p. 42; S. Dusollier, 'Incidences et réalités d'un droit de contrôler l'accès en droit européen', *Le droit d'auteur: un contrôle de l'accès aux œuvres?*, *Cahier du CRID (Bruylant)*, No. 18, 2000. J.E. Cohen, 'A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace', *Connecticut Law Review*, 1996, p. 981 *et seq.*

<sup>171</sup> J. Ginsburg & Y. Gaubiac, 'Private Copying in the Digital Environment', *op. cit.*, at p. 150.

<sup>172</sup> In the United States, format-shifting was held to be fair use as long as the members of the public who were taping the material have been 'invited to view it for free', when there was no commercial purpose involved and where the users erased the tapes after deferred viewing. See *Sony v. Universal City Studios*, 464 U.S. 417 (1984). The legitimacy of format-shifting was also upheld in *RIAA v. Diamond Multimedia Systems Inc.*, 180 F.3d 1072, 1999. In this case it was affirmed that format-shifting is 'paradigmatic noncommercial personal use'.

Note, however, that transformative format-shifting was held not to be a fair use. See *UMG Recordings, Inc. v. MP3.Com, Inc.*, 92 F.Supp.2d 349 S.D.N.Y., 2000. In this case, the major record companies in the US brought legal action against MP3.Com for the unauthorised uploading of 45,000 audio CDs onto file servers and for permitting users of their internet service to download these copies. The defendants invoked the 'Betamax' defence which stipulates that where a device may also involve substantial non-infringing uses there is no copyright infringement. The 'Betamax' defence was first developed in *Sony Corp. of America v. Universal City Studios, Inc.* 464 U.S. 417 (1984), known as the 'Betamax' case. The Court rejected this defence on the argument that transformative format-shifting is not fair use. *UMG Recordings, Inc. v. MP3.Com, Inc.*, *op. cit.*, at 351. For a criticism on this case see W.W. Fisher, *Promises to Keep: Technology, Law, and the Future of Entertainment*, Stanford University Press, Stanford, 2004, p. 102. In the United States time-shifting is fully exempted from infringement, *i.e.*, it is permitted without an obligation to compensate rightholders.

<sup>173</sup> K. Weatherall, 'A Comment on the Copyright Exceptions Review and Private Copying', *University of Melbourne Legal Studies Research Paper No. 135, IPRLA Working Paper No. 14/05*, 2005, p. 8.

<sup>174</sup> J. Ginsburg & Y. Gaubiac, 'Private Copying in the Digital Environment', *op. cit.*, at p. 150.

private copying is a free enjoyment of the work. By this, we do not mean to say that this enjoyment should also be free of some form of payment to copyright owners, such as through levies on copying media or equipment.<sup>175</sup> Yet, end users should be autonomous when consuming copyrighted content without their right to privacy being violated.

And while private copying in Europe is permitted on the basis of the right to privacy, may that be seen as inviolability of the home or informational privacy, US copyright law gives more weight to economic considerations.

### 1.2.1.2. Market failure and private copying

The ‘market failure’ rationale behind private copying is largely driven by economic-theory considerations<sup>176</sup> and is reflected in the United States system of fair use.<sup>177</sup> To be permitted in the US, private copying has to pass the scrutiny of the fair-use test since no explicit provision permitting private copying exists. This test is a set of four criteria determining the legitimacy of every activity that may *prima facie* infringe copyright. Largely driven by market considerations, the test examines:

‘1. the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes

2. the nature of the copyrighted work

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<sup>175</sup> *Ibid.* We will examine levy schemes later in this thesis at p. 145 *et seq.*

<sup>176</sup> W. J. Gordon, ‘Fair Use and Market Failure’, *op. cit.*, at p. 1600; W. M. Landes & R. A. Posner, ‘An Economic Analysis of Copyright Law’, *Journal of Legal Studies*, 18, 1989, pp. 325-363, at p. 325; W. F. Patry & S. Perlmutter, ‘Fair Use Misconstrued: Profit, Presumptions and Parody’, *Cardozo Arts & Entertainment L. J.*, 11, 1993, pp. 667-719, p. 690; R. P. Adelstein & S. I. Peretz, ‘The Competition of Technologies in Markets for Ideas: Copyright and Fair Use in Evolutionary Perspective’, *International Review of Law and Economics*, 5, 1985, pp. 209-238, at p. 209; M. G. Anderson, P.F. Brown & A.P. Cores, ‘Market Substitution and Copyrights: Predicting Fair Use case law’, *Cardozo Arts and Ent. L. J.*, 10, 1993, pp. 33-50, p. 33; E. Mackaay, ‘Economic Incentives in Markets for Information and Innovation’, *Harvard J. of Law and Pub. Pol’y*, 13, 1990, pp. 867-909, at 867; T.I. Hardy, ‘Contracts, Copyright and Preemption in a Digital World’, *Richmond J. of Law and Technology*, 1, 1995, p. 2, at paragraph 17; R.P. Merges, ‘The End of Friction? Property Rights and Contract in the ‘Newtonian’ World of On-Line Commerce’, *Berkeley Technology L. J.*, 12, 1997, pp. 115-136, at 118; M.A. O’Rourke, ‘Copyright Preemption after the Pro-CD Case: A Market-Based Approach’, *Berkeley Technology L. J.*, 12, 1997, pp. 53-91, p. 53; N. Elkin-Koren, ‘Copyright Policy and the Limits of Freedom of Contract’, *Berkeley Technology L. J.*, 12, 1997, pp. 93-113, p. 104; J. E. Cohen, ‘Lochner in Cyberspace: The New Economic Orthodoxy of ‘Rights Management’’, *Michigan L. Rev.*, 2, 1997, pp. 462-563, pp. 468-480.

<sup>177</sup> Section 107 of title 17 of the US Code. Also see J. E. Cohen, *ibid.*, p. 472. Market failure considerations as regards the fair use doctrine have been affirmed in *American Geophysical Union, et al. v. Texaco Inc.*, 37 F.3d 881 (2<sup>nd</sup> Cir. 1994), *aff’d* 60 F.3d 913 (2<sup>nd</sup> Cir. 1995); and in *Princeton University Press v. Michigan Document Services Inc.*, 1996 U.S. LEXIS 7474 (6<sup>th</sup> Cir. 1996). In *American Geophysical*, the defendant, Texaco, enabled the making of systematic copies of scientific articles and made them available to scientists rather than paying license fees or acquiring additional subscriptions. To the Court of First Instance, the availability of a method to compensate rightholders for the use made of their works would reduce or even eliminate the justification behind the fair use defence. See 37 F.3d 881 (2<sup>nd</sup> Cir. 1994). The Court of Appeals confirmed the trial Court’s decision that held that Texaco’s copying harmed the value of the copyrights belonging to the plaintiff ‘primarily because of lost licensing revenue, and to a minor extent because of lost subscription revenue.’ To conclude, the Court of Appeals added that if Texaco wished to continue its copying activity it had to either use the licensing schemes of the Copyright Clearance Center or purchase additional subscriptions to the magazine. See 60 F.3d 913 (2<sup>d</sup> Cir. 1995).

3. *the amount and substantiality of the portion used in relation to the copyrighted work as a whole*
4. *the effect of the use upon the potential market for, or value of, the copyrighted work.*'

The main argument behind the market-failure doctrine focuses on the high transaction costs required for the negotiation of individual licences between rightholders and users, and for enforcing copyrights.<sup>178</sup> Transaction costs are the costs incurred before, during, and after a transaction is complete. They include expenses in securing a trading partner, defining the product, negotiating a licence, and enforcing it.<sup>179</sup> The Chicago School of Economics has developed the theory that if high transaction costs did not exist on the market, rightholders would normally licence their rights to those who would make the optimal use of their works. Romer argues, and we agree, that the phenomenon of market failure is accelerated in the digital environment where works are public goods, namely they are non-excludable and non-rival.<sup>180</sup> Non-rival are the goods the consumption of which by one individual does not affect the consumption made by another. This happens when the consumption of additional units of a good occurs at zero or at very low marginal social cost. Note, however, that the direct individual negotiation between rightholders and users would be extremely difficult, if not impossible,<sup>181</sup> since where the transaction costs are prohibitively high rightholders are unable to enforce effectively their rights against unauthorised uses.<sup>182</sup> As Dusollier, Poulet and Buydens rightly point out, private copying in the US is a concession to the practical impossibility of enforcing copyright.<sup>183</sup> Yet, the view that private copying is a response to market failure is no longer shared by many copyright scholars.<sup>184</sup> This is due to the fact that

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<sup>178</sup> Some commentators argue that the presence of high transaction costs is only one example of market failure. See L. Pallas Loren, 'Redefining the Market Failure Approach to Fair Use in an Era of Copyright Protection Systems', op. cit., p. 1; W. J. Gordon, 'Market Failure and Intellectual Property', op. cit., pp. 1031, 1037 and 1039; W. Gordon, 'Excuse and Justification in the Law of Fair Use', op. cit., at 149; W. Gordon, 'Fair Use as Market Failure', op. cit. p. 1600; B. Depoorter & F. Parisi, 'Fair Use and Copyright Protection', op. cit., p. 453.

Others have argued that the non-excludability of intellectual goods undermines many of the economic assumptions on which the market failure doctrine on copyright is premised. See G. Lunney, 'Fair Use and Market Failure: *Sony* Revisited', op. cit., p. 975; L. Guibault, *Copyright Limitations and Contracts*, op. cit., pp. 86-87.

<sup>179</sup> L. Guibault, *ibid.*, p. 79.

<sup>180</sup> See P.M. Romer, 'Endogenous Technological Change', 98 *J.Pol.Econ.*, 1990, 571, at 573-574; also see Y. Benkler, 'A Political Economy of the Public Domain: Markets on Information Goods Versus the Marketplace of Ideas', in R. C. Dreyfuss, D. L. Zimmerman & H. First (eds.), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society*, Oxford University Press, Oxford, 2001, pp. 267-292, at 270-271 and footnote 9.

<sup>181</sup> The costs are prohibitively costly. See A. Strowel, *Droit d'auteur et copyright*, op. cit. p. 645.

<sup>182</sup> R. P. Adelstein & S. I. Peretz, 'The Competition of Technologies in Markets for Ideas', op. cit., at p. 211.

<sup>183</sup> S. Dusollier, Y. Poulet & M. Buydens, 'Copyright and Access to Information in the Digital Environment', op. cit., at p. 13. These authors indicate that much of the justificatory basis of the private copying limitation on market failure arguments vanishes due to the application of technological protection measures.

<sup>184</sup> J.C. Ginsburg, 'From Having Copies to Experiencing Works: The Development of an Access Right in US Copyright Law', in H. Hansen, U. S. *Intellectual Property Law and Policy*, Sweet & Maxwell, 2000, pp. 39-58, at p. 49; W.W. Fisher, 'Property and Contract on the Internet', *Chicago-Kent L. Rev.*, 73, 1998, pp. 1203-1256, at p. 1234; T.W. Bell, 'Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine', *North Carolina Law Review*, 76, 1998, pp. 557-619, at 560; T.I. Hardy, 'Contracts, Copyright and

the application of technological protection measures may enable the direct licensing of works to end users with minimal transaction costs.<sup>185</sup>

Even though some European scholars have analysed copyright law in economic terms,<sup>186</sup> continental European Courts and legislators have been so far reluctant to apply, interpret or modify copyright laws on the basis of such analysis. This is probably due to the different grounds on which European and American copyright law are premised; while European copyright is grounded on the author's personality right, under which copyright reflects the permanent bond between authors and their original creations,<sup>187</sup> the utilitarian argument underlying US copyright views copyright as a temporary monopoly conceded to authors as an incentive of innovation.<sup>188</sup>

We conclude from the aforementioned analysis that the permissibility of the private copying limitation of Article 5(2)(b) of Directive 2001/29/EC is based on the protection of the fundamental right to privacy, may that be conceived as the inviolability of the home or the informational privacy of end users. In our view, the private copying limitation is reflective of the hierarchy between copyright enforcement and fundamental freedoms: copyright enforcement ought to stop where the private sphere begins. The private copying limitation retains its justificatory basis in the digital environment where monitoring devices may still prejudice the privacy of end users and where the rightholders may request the disclosure of end-user identities through ISPs. By contrast, private copying in the United States is

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Preemption in a Digital World', op. cit., p. 2, at paragraph 17; R.P. Merges, 'The End of Friction?', op. cit., at 118; M.A. O'Rourke, 'Copyright Preemption after the Pro-CD Case', op. cit., p. 53; P. Goldstein, 'Copyright and its Substitutes', *Wisconsin L. Rev.*, 1997, pp. 865-871, at p. 867; J. Ginsburg & Y. Gaubiac, 'Private Copying in the Digital Environment', op. cit., at p. 152.

<sup>185</sup> This issue is examined later in this thesis, at p. 178 *et seq.*

<sup>186</sup> A. Strowel, *Droit d'auteur et copyright*, op. cit. p. 196; M. Lechmann, 'The Theory of Property Rights and the Protection of Intellectual and Industrial Property', *IIC*, 16, 1985, pp. 525-540, at p. 531.

<sup>187</sup> See D. Knowles, 'Hegel on Property and Personality', *The Philosophical Quarterly*, Vol. 33, No. 130, pp. 45-62; P. Drahos, *A Philosophy of Intellectual Property*, Darmouth Pub Co, 1996, see chapter 4.

<sup>188</sup> B. Pareckh, 'Bentham's Justification on the Principle of Utility', in B. Pareckh (ed.), *J. Bentham: Ten Critical Essays*, Frank Cass & Co Ltd., 1974, Chapter 5, pp. 96-119; W.C. Mitchell, 'Bentham's Felicific Calculus', in B. Pareckh (ed.), *J. Bentham: Ten Critical Essays*, Frank Cass & Co Ltd., 1974, Chapter 9, pp. 168-186; J. S. Mill, *On Liberty and Other Essays*, Oxford University Press, 1991, pp. 131-204; E. Hettinger, 'Justifying Intellectual Property', *Philosophy and Public Affairs*, Vol. 18, Iss. 1, pp. 31-52.

For an analysis of the distinction between utilitarian arguments and the natural law theory see U. Suthersanen, 'Towards an International Public Interest Rule? Human Rights and International Copyright Law', in J. Griffiths & U. Suthersanen (eds.), *Copyright and Free Speech: Comparative and International Analyses*, Oxford University Press, Oxford, 2005, pp. 97-124, at pp. 100-103; S. Dusollier, *Droit d'auteur et protection des œuvres dans l'univers numérique*, Larcier, Brussels, 2005, at 216 *et seq.*; G. Davies, *Copyright and the Public Interest*, op. cit., at p. 9 *et seq.*; A. Strowel, *Droit d'auteur et copyright*, op. cit., p. 174 *et seq.*; C. Geiger, *Droit d'auteur et droit du public à l'information, approche de droit comparé*, Litec, Paris, 2004, 22 *et seq.*; T. Dreier, 'Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?', op. cit., at 298-303.

considered to be a symptom of market failure; as a result, it may either be exempted from infringement or not depending on the application of the fair use four-factor test.<sup>189</sup>

The privacy rationale underlying private copying is so strong, in our opinion, that most uses of copyrighted content that take place within a private setting are permitted. Indicative in this respect is the very wording of Article 5(2)(b) of Directive 2001/29/EC, which permits acts of reproduction made for the ‘private use’ of natural persons. In our view, the fact that Article 5(2)(b) makes reference to ‘private use’ broadens the reach of this limitation to activities exceeding the scope of acts of reproduction. For instance, an individual may use a film DVD by making a copy for his holiday home, by lending this copy to his colleague from work or by watching it at home with friends. All the aforementioned examples of using copyrighted materials affect different rights under copyright: the reproduction right, the lending right and performance rights respectively. Below, we examine which acts of copyright use are covered by Article 5(2)(b) and are, hence, permitted.

## **2. The complexity of permitting *reproductions* for private *use* under Article 5(2)(b) of Directive 2001/29/EC**

Article 5(2)(b) of Directive 2001/29/EC permits reproductions made by a natural person for private use. In this, it requires two activities to take place. The first is an act of *reproduction*, namely the copying of a work or other subject-matter. The second is the *use* of the copy. One can only wonder whether this dual set of activities in the same copyright limitation creates any problems as to its scope. Our aim shall be to identify which uses are lawful under Article 5(2)(b) and which are not. First, we need to make a distinction between acts of reproduction and acts of use. We will then determine what is the impact of this distinction to the scope of the private copying limitation of Article 5(2)(b) of Directive 2001/29/EC.

### **2.1. The distinction between acts of reproduction and acts of use**

Rightholders are free to exploit their works or other subject-matter by way of a series of exclusive rights. Nonetheless, rights to use copyrighted content have never been within the reach of their control. In fact, rightholders were considered to be a perverse kind of owners; while they strongly welcomed access to, and use of, their works, they did not want this access or use to affect their control over those works.<sup>190</sup> Indeed, as opposed to patent law, copyright

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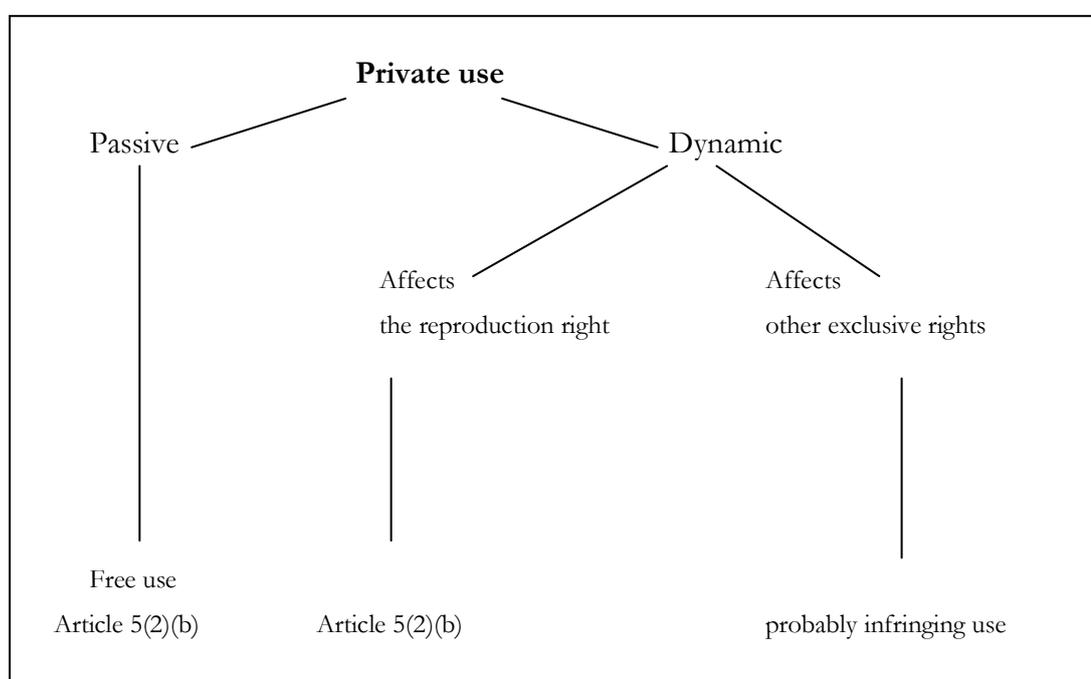
<sup>189</sup> Section 107 of title 17 of the US Code, *op. cit.*

<sup>190</sup> M.E. Cohn, ‘Literary Works: A Question of Ownership’, *Hollywood Quarterly*, Vol.2, No. 2, January 1947, 184-190, at p. 184.

law has stopped short from granting exclusive *use* rights;<sup>191</sup> it has not dealt with defining the scope of private use, the latter being considered to be a copyright-free zone. Since the concept of ‘private use’, however, is one of the main contours of Article 5(2)(b) we consider that an examination of its scope is essential in determining when acts of private copying are legitimate.

### 2.1.1. The meaning and scope of ‘private use’ under Article 5(2)(b) of Directive 2001/29/EC

Article 5(2)(b) of Directive 2001/29/EC indicates that reproductions made for ‘private use’ are permissible. The scope of acts of private ‘use’ is not defined in Directive 2001/29/EC.<sup>192</sup> We have, nonetheless, identified a classification for acts of private use and their legitimacy thereof, as presented in the graph below:



Practice indicates that there are two main types of private use; those would be passive and dynamic. Passive private use covers acts aimed towards the pure personal enjoyment of a work; in essence, it is the consumptive use of works or other subject-matter. For instance, an individual uses a book passively by reading it and a music track by listening to it.<sup>193</sup> As

<sup>191</sup> P. B. Hugenholtz, ‘Fierce Creatures, Copyright Exemptions: Towards Extinction?’, op. cit., p. 6; A. Latman, *Fair Use of Copyrighted Works*, Arthur Fisher Memorial Editions, Study No 14, 1955, at p. 5.

<sup>192</sup> See G. Arthur, ‘Private Use, Public Consequence?: The Future of the Private Copy Exception in Europe’, op. cit., at p. 18.

<sup>193</sup> See 1<sup>st</sup> Draft, Memorandum of Justice Stevens, *Sony v. Universal Studios*, No. 81-1687, circulated June 13, 1983, at 17-18.

indicated in the US *Sony* case, ‘it would plainly be unconstitutional to prohibit a person from singing a copyrighted song in the shower or jotting down a copyrighted poem he hears on the radio.’ Many scholars, such as Hugenholtz, convincingly demonstrate that that this type of use remains outside the scope of copyright protection.<sup>194</sup> While there is no explicit legal provision to make such an indication, we consider that the exemption of passive private use from copyright protection erodes from the very nature and subject-matter of copyright. To be meaningful, the creation and dissemination of a work requires someone to use this work either by reading it, listening to it, or viewing it.<sup>195</sup> The insight that passive private use ought to be unfettered is so obvious but it rarely shows in copyright laws, even though it has always been free in copyright history; as Gordon rightly points out, private use was an indispensable corollary to the bequest of the work to the public via publication.<sup>196</sup> For instance, the right to make and sell printed copies of a work did not extend into the user’s private sphere<sup>197</sup> neither during the eighteenth and nineteenth century nor until the adoption of the original text of the Berne Convention of 1886 which applied to editors and publishers rather than authors.<sup>198</sup> Passive personal usage remains therefore unregulated as a physical boundary of copyright protection, implicit in the copyright system and essential to its purpose.<sup>199</sup> As a result, some of the early copyright scholars, such as Kohler in Germany and Lepaulle in France, had viewed the statutory exemption of private use to be self-evident and, thus, pointless.<sup>200</sup>

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<sup>194</sup> P. B. Hugenholtz, ‘Adapting Copyright to the Information Superhighway’, op. cit., at p. 94; also see R. Patterson & S. W. Lindberg, *The Nature of Copyright – A Law of Users’ Rights*, op. cit., p. 193.

<sup>195</sup> J. Litman, ‘Lawful Personal Use’, op. cit., at p. 1879. As long as works had been previously made available to the public and there was no commercial motive behind private use, works were free to be read, be listened to or be viewed. L. Guibault, *Discussion Paper on the Question of Exemptions and Limitations on Copyright and Neighbouring Rights in the Digital Era*, Council of Europe Steering Committee on the Mass Media, Strasburg, 1 September 1998, MM-S-PR (98) 7 rev., p. 27; also see L. Guibault, *Copyright Limitations and Contracts*, op. cit., pp. 47-48; T. Dreier, ‘Contracting Out of Copyright in the Information Society: The Impact on Freedom of Exception’, in J. Griffiths & U. Suthersanen (eds.), *Copyright and Free Speech: Comparative and International Analyses*, Oxford University Press, Oxford, 2005, pp. 385-400, at p. 386.

<sup>196</sup> W. Gordon, ‘An Inquiry into the Merits of Copyright: the Challenges of Consistency, Consent, and Encouragement Theory’, 41 *Stanford L. Rev.*, 1989, 1343.

<sup>197</sup> A.-Ch. Renouard, *Traité des droits d’auteurs*, J. Renouard & Cie, Paris, 1838, vol. 1 & 2, t. 2, p. 10.

<sup>198</sup> P. Waukermans, *La Convention de Berne pour la protection des œuvres littéraires et artistiques*, Misch et Thron, Bruxelles, 1910, p. 81.

<sup>199</sup> G. Koumantos, ‘Εκτίμησις: Δικαστική Εκτίμησις και Αξιολογικές Κρίσεις εις το Δίκαιο της Πνευματικής Ιδιοκτησίας’ (Estimation: Judicial Estimation and Assessment Judgements in Author’s Right), *EEN* 33/1966, pp. 221-229, at 226-227; G. Koumantos, *Πνευματική Ιδιοκτησία* (Intellectual Property), Ant. N. Sakkoulas Publishers, Athens, 1995, 6<sup>th</sup> ed., p. 634.

<sup>200</sup> J. Kohler, *Urheberrecht an Schriftwerken and Verlagsrecht Stuttgart*, Verlag von Ferdinand Enke, 1907, p. 178; R.-P. Lepaulle, *Les Droits de l’auteur sur son oeuvre*, Paris, Librairie Dalloz, 1927, p. 7; F. Leinemann, *Die Sozialbindung des Geistigen Eigentums*, Baden Baden, Nomos, Verlagsgesellschaft, UFITTA-Schriftenreihe, 1998, p. 112; E. Del Bianco, *Le droit d’auteur et ses limites*, op. cit., p. 127.

To be infringing, a use had to be made in a manner exclusively reserved for rightholders. J. Kohler, *Urheberrecht*, op. cit. p. 178; H. Wistrand, *Les exceptions apportées aux droits de l’auteur sur ses œuvres*, op. cit., p. 312; Also see BGH, 24 June 1955 – Aktz: I ZR 88/54 in GRUR 11/1955, at p. 546.

With time, however, changes in technology urged for the explicit regulation of private use in terms of copyright protection<sup>201</sup> and, gradually, exceptions permitting private use started to appear on statutes.<sup>202</sup> Due to the development of new technologies, users became able to consume copyright *dynamically*, *i.e.* in a way that could potentially come in conflict with the legitimate interests of the copyright holders. These technologies include photocopiers, video and tape recorders, personal computers and smartphones. Dynamic private use is realised in a way that resembles an act reserved by copyright or, otherwise put, an exclusive right of exploitation. For instance, it may take place via an act of distribution, performance, lending or reproduction.<sup>203</sup> In our view, the fact that dynamic private use may impact on exclusive rights makes the legitimacy of this kind of use highly controversial; lending a film to a friend or performing music at a wedding party are forms of dynamic private use which could be held infringing under Court examination.<sup>204</sup> For instance, a French Court held that lending copies of works to third parties is unlawful, even where these parties may be the friends of the copier!<sup>205</sup> We therefore argue that dynamic private use is broader in scope than a mere act of

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<sup>201</sup> H. Wistrand, *ibid.*

<sup>202</sup> Some of the first continental European statutes with exceptions on reproductions made for the sole purpose of private practice, study or use are the Copyright Act of Germany in 1901 and of the Netherlands in 1912. Both these Acts include an exemption for reproducing works in a limited number of copies for the private use or study of the copier. It was always understood that these copies were not to be disseminated to the public in any way. For the German Copyright Act see BGH, 24 June 1955 – Aktz: I ZR 88/54, in *GRUR* 11/1955, at p. 547. Article 1 of the Dutch Copyright Act provided authors with the exclusive right to reproduce a work and communicate it to the public. At the same time, Article 12 of this Act expressly excluded from the scope of the right of public communication the acts of recitation, performance, or presentation of these works before friends and relatives, insofar as no payment was made to attend such an event. With respect to the reproduction right, the private use of works fell outside of the scope of this right and any restriction to such private use by the author would be of no effect. See more on this act at J. H. Spoor, *Scripta Manent – de reproductie in der auteursrecht*, H.D. Tjeenk Willink, Groningen, 1976, pp. 21, 29, 114.

In similar vein, Article 10 of the Swedish Copyright Act of 30 May 1919 stated that the right to reproduce a work without authorial consent represents a right founded on the very nature of copyright.

In the 1957, the French statute introduced a specific provision permitting copying for private use. Under Article 41 of this Act, authors may not prohibit private performances which take place free of charge and remain within the family circle, or reproductions for the private use of the copier and not destined for collective use. For an analysis of this Act see A. Lucas, *Droit d'auteur et numérique*, op. cit., p. 203; A. Lucas & H.-J. Lucas, *Traité de la Propriété Littéraire et Artistique*, op. cit., at p. 225.

Soon enough, most continental European countries incorporated such exceptions in their national copyright framework.

Note that the Study Group for the Berne Convention in 1967 affirmed that one of the most frequent exceptions recognised under continental European copyright laws was private use. See Records 1967, op. cit., Vol. 1, 112 (Doc. S/1).

<sup>203</sup> To Ginsburg, in the digital environment private use implicates copyright by entailing acts of reproduction. See J.C. Ginsburg, 'Copyright without Walls?: Speculations on Literary Property in the Library of the Future', *Representations* 42, Spring 1993, pp. 53-73, at p. 56.

<sup>204</sup> In the US, for instance, *Nintendo* sued the maker of the *Game Genie* which enabled users to modify the way that the Nintendo game was played. To base its claim, Nintendo argued that the Game Genie allowed consumers to make unauthorized derivative works by modifying the game's audiovisual display. See *Nintendo of America v. Lewis Galoob Toys*, 780 F.Supp. 1283 (N.D. Cal. 1991), affirmed by 964 F.2d 965 (9<sup>th</sup> Cir. 1992).

<sup>205</sup> CA Aix-en-Provence, 5<sup>th</sup> Division, 5.9.2007, 39 IIC, 2008, 622. In this case the private copying limitation could not apply. Also see C. Geiger, 'Legal or Illegal? That is the Question! Private Copying and Downloading on

reproduction since it may also implicate other activities, such as the performance, distribution or lending of works.

### 2.1.2. The broad scope of private use

As we have already seen earlier in this thesis,<sup>206</sup> private use may involve activities that resemble exclusive rights, such as the lending right or rights in performances. Consider, for instance, a user who makes a track-list to play at his birthday party. Playing that music in front of his guests is an act of performance.<sup>207</sup> Equally, lending a copy of that music list to a friend implicates the lending right<sup>208</sup> under copyright. One should not neglect, however, that with the exception of the reproduction right all other exclusive rights in copyright are addressed to a public. The Berne Convention, for instance, grants the rights of ‘public performance’, of ‘communication to the public’ and of ‘public recitation’.<sup>209</sup> Articles 6(1) and 8 of the WCT provide for the right of making a work available to the public. Articles 10 and 14 of the WPPT confer to performers and producers of phonograms respectively a right of making available their subject-matter to the public and Article 15 of the same Treaty makes reference to a right of communicating the relevant subject-matter to the public.<sup>210</sup> In similar vein, Directive 2001/29/EC provides a right of communicating works or, otherwise, making them available to the public<sup>211</sup> and a right of distribution to the public.<sup>212</sup> Since most rights in the copyright realm take effect when an act of exploitation is addressed to a public, we identify a free zone as regards the same activities that take place within a private circle. This means that a user can give a copy of a work to a friend but cannot distribute copies of that work to an audience that qualifies as public for copyright’s purposes.

In determining the relationship between dynamic private use and acts of reproduction, the file-sharing example, as a form of dynamic private use, might be useful. File-sharing via peer-to-peer networks entails a dual set of activities to take place, namely the downloading and uploading of files onto a shared directory. In copyright terms, downloading is translated into

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the Internet’, 5 *IIC*, 39, 2008, pp. 597-603, at p. 600 (commenting on the particularly restrictive approach taken which implies that the copier and the user ought to be identical).

<sup>206</sup> At pp. 50-51.

<sup>207</sup> Article 4 of the Rome Convention 1961, op. cit.

<sup>208</sup> In the EU, ‘lending’ is defined as the act of ‘making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public’. See Article 2(b) of Directive 92/100/EEC on rental right and lending right, op. cit.

<sup>209</sup> See Arts 11, 11bis, 11ter and 14 of the Berne Convention, op. cit.

<sup>210</sup> See K. Weatherall, ‘An end to private communications in copyright? The expansion of rights to communicate works to the public’ *EIPR*, 1999, p. 342, at 347; J.C. Ginsburg, ‘The (New?) Right of Making Available to the Public’, in D. Vaver & L. Bently (eds.) *Intellectual Property in the New Millennium*, Cambridge University Press 2004, pp. 234-248, at 236.

<sup>211</sup> Article 3 of Directive 2001/29/EC.

<sup>212</sup> Article 4 of Directive 2001/29/EC.

an act of reproduction and uploading into both an act of reproduction and an act of making available the file to the public. Both downloading and uploading constitute acts of dynamic private use. Judicial practice, however, indicates that not both these acts can be exempted from infringement on the basis of the private copying limitation. While downloading may be exempted,<sup>213</sup> the courts appear reluctant to accept the legitimacy of uploading protected content on online networks.<sup>214</sup> This means that dynamic private use which is realised via an act of reproduction may be permitted; nonetheless, it infringes copyright as soon as it affects other exclusive rights which are addressed to a public, such as the right of making works available to the public. In our view, the core essence of unauthorised reproduction lies in what it enables, *i.e.* the misuse or multiuse of works, rather than the process of reproduction as such. This can be illustrated by the fact that an act of reproduction cannot on its own be really meaningful unless the work is otherwise used, for instance, by being distributed.

## 2.2. The activities permitted under Article 5(2)(b) of Directive 2001/29/EC

As Hamilton rightly points out, copyright includes a ‘free zone’ in which individuals may make personal use of works without legal liability.<sup>215</sup> Nonetheless, the delineation of the borders of that zone creates controversy upon legal scholars and law makers.<sup>216</sup> This controversy is mainly generated by the difficulty in reaching the right balance between the interests of the rightholders and those of the users. If this free zone is too strictly defined, users will not be able to benefit from some perfectly legitimate uses. If, on the other hand, this zone is too

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<sup>213</sup> *Ministère Public, FNDF, SEV, Twentieth Century Fox et al. v. Aurélien D.T.*, Rodez District Court, Case 03001251, 13.11.2004; *Ministère Public, FNDF, SEV, Twentieth Century Fox et al. v. Aurélien D.T.*, Court of Appeals of Montpellier, 10.3.2005, 222 *Legipresse* 120, 2005, note by I. Wekstein; Tribunal de Grande Instance, Meaux, 21.4.2005; Tribunal de Grande Instance, Havre, 20.9.2005; Tribunal de Grande Instance, Châteauroux, 16.11.2005.

<sup>214</sup> Tribunal de Grande Instance, Toulouse 10.5.2005; Tribunal de Grande Instance, Créteil, 19.5.2005; Tribunal de Grande Instance, Lyon, 8.7.2005; Tribunal de Grande Instance, Bayonne 15.11.2005; Tribunal de Grande Instance, Châteauroux, 16.11.2005; ‘Netherlands: Internet – Piracy – The Home Copying Exception’, Case Comment, *Ent.L.Rev.*, 2009, 20(1), N. 3-4.

<sup>215</sup> M.A. Hamilton, ‘Impact of the TRIPs Agreement on Specific Disciplines’, *op. cit.*, at 622-633.

<sup>216</sup> For instance, Netanel argues that ‘courts have generally declined to find personal copying as infringing’. See N. W. Netanel, ‘Copyright and a Democratic Civil Society’, 105 *Yale L. J.*, 1996, 283, at pp. 299-301.

By contrast, Ginsburg holds that ‘U.S. and international copyright law have increasingly recognized that the author’s right to authorize, or at least be compensated for, the making of copies, extends [...] to end users who make individual copies for private consumption.’ See J.C. Ginsburg, ‘From Having Copies to Experiencing Works’, *op. cit.*, p. 46. Also see National Academy of Sciences, *The Digital Dilemma: Intellectual Property in the Information Age*, National Academy Press, Washington D.C., 2000, p. 129: ‘Perhaps the most contentious current copyright issue concerns the legality of private, non-commercial copying [...]. the extremes of the positions on this issue are well established and heavily subscribed to. Some rights holders seem to believe that all, or nearly all, unauthorised reproduction of their works, whether private or public, commercial or non-commercial, is an infringement. Many Members of the general public appear to believe that all or virtually all private, non-commercial copying of copyrighted works is lawful.’

broadly demarcated, the rightholders shall not be able to fully exploit their works or other subject-matter. As a result, the borders of lawful use are fuzzy as well as contested.<sup>217</sup>

To determine which activities are covered by Article 5(2)(b) and form a copyright-free zone, we need to examine which acts of private use fall within the scope of this Article and which do not. To examine this issue, we shall make a distinction between offline private uses of tangible copies, either digital or analogue, and online private uses of the contents of works. This distinction is necessary, in our opinion, in the light of some national private-copying limitations which explicitly exclude from permissibility acts of communicating and making works available online.

### **2.2.1. Offline private uses under of Article 5(2)(b) of Directive 2001/29/EC**

Having examined the main types of private use, we need to determine whether the private copying limitation of Article 5(2)(b) of Directive 2001/29/EC encompasses both passive and dynamic private use. First, we shall examine private uses taking place in the offline environment of either analogue or digital tangible copies of works. We consider that passive private use is certainly included within the scope of this limitation since the mere consumption of works by end users has always remained outside the scope of copyright protection.<sup>218</sup> A user may copy a work or other subject-matter to read or listen to alone or with an audience of his selection. The real question is, therefore, about dynamic private use. Article 5(2)(b) of Directive 2001/29/EC permits reproductions for private use. This can be read to mean that dynamic private uses in this context may only be made insofar as the only restricted act that is implicated is an act of reproduction. For instance, making a copy of an MP3 file for later perusal is not infringing. Yet, giving a copy of this MP3 file to a friend is an act of distribution. This distribution, however, is a way of using that work in a dynamic way. Can dynamic private use in the context of Article 5(2)(b) of Directive 2001/29/EC extend to cover restricted acts beyond the scope of the reproduction right, such as acts of distribution, lending, performance or other communication to an audience?

There is a large class of dynamic private uses that remain outside the scope of copyright and benefit under the private copying limitation of Article 5(2)(b) of Directive 2001/29/EC. These uses include private performances and displays, such as those taking place at a birthday

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<sup>217</sup> J. Litman, 'War Stories', 20 *Cardozo Arts & Entertainment L. J.*, 2002, 337, at 338-350; also see A. Latman, *Fair Use of Copyrighted Works*, op. cit., at p. 12; National Academy of Sciences, *The Digital Dilemma*, *ibid*, pp. 129-136; U.S. Congress, Office of Technology Assessment, *Copyright and Home Copying: Technology Challenges the Law*, Washington, DC: U.S. Government Printing Office, October 1989, OTA-CIT-422, pp. 5-14.

<sup>218</sup> P. B. Hugenholtz, 'Fierce Creatures, Copyright Exemptions: Towards Extinction?', op. cit., at p. 6.

party, and private acts of distribution. This is because, as we have already seen earlier,<sup>219</sup> the statutory definition of the relevant rights indicates that these acts should be made, or addressed to, a public so as to be protected under copyright.<sup>220</sup> The exact same acts that take place within the private sphere remain copyright-free and, to our view, they represent a perfectly permissible form of dynamic private use. In similar vein, permissible private uses also include acts of lending in private. This could apply, for example, to lending videogames to friends. Rightholders have no positive right under copyright that entitles them to control the aforementioned activities when the latter take place within the private sphere or in the domestic realm.

Affirmative of our argument that some offline private uses may implicate other rights in the copyright arena is Article 5(4) of Directive 2001/29/EC. This article reads that ‘*[w]here the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.*’ In our view, this Article is indicative of the European legislator’s intention to provide an extra regulatory prospect to national legislators, namely the extension of the private copying limitation of Article 5(2)(b) to acts of distribution.

We consider, however, that Article 5(4) of Directive 2001/29/EC provides for a potential expansion to the scope of Article 5(2)(b) as regards works in tangible form. This is because the distribution right of Article 4 applies to works as commodities. As we examined earlier in this thesis, the digital age came with a separation of the intellectual object (work) from its physical embodiment (copy),<sup>221</sup> in terms that works can be disseminated both as tangible goods and as contents thereof. Directive 2001/29/EC has responded to this reality by protecting the dissemination of works as tangible goods by the distribution right of Article 4 and the

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<sup>219</sup> At p. 52 *et seq.*

<sup>220</sup> The Berne Convention grants the rights of ‘*public* performance’, of ‘communication to the *public*’ and of ‘*public* recitation’. See Arts 11, 11bis, 11ter and 14 of the Berne Convention, *op. cit.*. Articles 6(1) and 8 of the WCT provide for the right of making a work available to the *public*. WIPO Copyright Treaty (WCT) adopted by the Diplomatic Conference on December 20, 1996, CRNR/DC/94; Articles 10 and 14 of the WPPT confer to performers and producers of phonograms respectively a right of making available their subject-matter to the *public* and Article 15 of the same Treaty makes reference to a right of communicating the relevant subject-matter to the *public*. See WIPO Performances and Phonograms Treaty (WPPT) adopted by the Diplomatic Conference on December 20, 1996, CRNR/DC/95.

Also see K. Weatherall, ‘An end to private communications in copyright? The expansion of rights to communicate works to the public’, *op. cit.*, at 347; J. Ginsburg, ‘The (New?) Right of Making Available to the Public’, *op. cit.*, at 236.

<sup>221</sup> At p. 22 *et seq.* Also see in this respect S. Dusollier, ‘Technology as an Imperative for Regulating Copyright: From the Public Exploitation to the Private Use of the Work’, *op. cit.*, p. 201; N. Lucchi, ‘The Supremacy of Techno-Governance: Privatization of Digital Content and Consumer Protection in the Globalized Information Society’, *op. cit.*, at 205-206.

dissemination of the contents themselves through Article 3 on the communication and making available right. As Gillen convincingly observes, the making available right is specifically directed at the unlawful uploading of copyrighted content on peer-to-peer networks.<sup>222</sup> The question therefore arises as to whether the communication and making available of contents of works is an act of ‘private use’ covered by Article 5(2)(b).

### **2.2.2. Online private uses under of Article 5(2)(b) of Directive 2001/29/EC**

The scope of online private uses appears *prima facie* to be more restricted. Of course, passive private uses are still permitted since they are merely consumptive despite the fact that they take place on the internet. For instance, a user can consult online news sites and watch *youtube* videoclips at the privacy of her home. Yet, things are more complicated in the field of dynamic private uses. Apart from Article 5(4) of the Directive, which as we illustrated earlier makes reference to the possible extension of the private copying limitation only as regards acts of distribution, one should not neglect the fact that Directive 2001/29/EC reserves a special Article to enumerate exceptions and limitations to the communication and making available rights. This is Article 5(3) of the Directive. Since a special list of exceptions to the communication and making available rights is laid down in Article 5(3), the private copying limitation cannot touch upon these rights, at least at first sight. This could practically mean that a user may avoid litigation for giving a film DVD to a friend but cannot upload the contents of that same film online so that his friend can track and download. Yet, this does not make sense. If acts of communicating and making available contents of works take place within a private circle they form part of dynamic private use which should be permitted. For instance, an individual that sends an MP3 file to a friend through *msn messenger* uploads this file on a private platform, or, in copyright terms, makes this work available to a recipient. The friend downloading the file makes a copy, namely carries out an act of reproduction. Since the act of making available was not addressed to a public, copyright was not infringed. In our opinion, therefore, acts of communicating and making works available are covered by the private copying limitation of Article 5(2)(b), insofar as they are addressed to a private circle of recipients.

Yet, some national laws explicitly exclude acts of communication and making works available to the public from the scope of the private copying limitation. For instance, the German Copyright Act stipulates that copies made for private purposes should not be made available

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<sup>222</sup> M. Gillen, ‘File Sharing and Individual Civil Liability in the United Kingdom: A Question of Substantial Abuse’, *Ent.L.Rev.*, 2006, 17, 7-14, at 12; H. K. Larusson, ‘Uncertainty in the Scope of Copyright: the Case of Illegal File-Sharing in the UK’, *EIPR*, 2009, 31(3), 124-134, at p. 125.

to the public or otherwise exploited. This initially precludes the use of such copies in file-sharing networks since members of such networks are considered to be a public for copyright purposes.<sup>223</sup> Explicit statutory mention against the act of making the copies available to the public is also found in the Italian and the Slovenian Copyright Acts. The Italian Act mandates that the private copying limitation *'does not apply to protected works and subject matter made available to the public in such a way that members of the public may access them from a place and at a time individually chosen by them [...]*.<sup>224</sup> The Slovenian statute indicates that *'[a] natural person shall be free to reproduce works [...] if the copies are not made available to the public.'*<sup>225</sup> Not all Member States, however, provide such explicit mention. There are occasions where the state of the private copy vis-à-vis online communications remains legally uncertain. This would be, for instance, the situation in Member States that stipulate that the use should be private and not directed towards any other purposes, without those purposes being statutorily specified.<sup>226</sup>

We consider that the explicit exclusion of acts of communicating and making works available to a public from the private copying limitation is enlightening since it forecloses in as much as possible potential legal uncertainties on this issue. Yet, even where acts of communication and making works available to the public are statutorily excluded from the scope of the private copying limitation, this is not to say that acts of communication or making works available within the private circle are not covered by this limitation. To our understanding, there is no substantial difference between giving a CD to a friend and sending to him the contents of the same CD through e-mail. We consider that the main reason behind the statutory exclusion of acts of communication and making available to the public from the private copying limitation in the aforementioned Member States is mainly due to the ease of transmitting copyrighted content over the internet; in our view, the controversy associated with digital copies is neither the fact that they are perfect substitutes for originals nor the ease required for their replication; it is the fact that those copies can simultaneously be transmitted online. We, therefore, consider that it is not really the digital copy that is feared; it is the outcome that might come with it that is welcomed with unease and confusion, an outcome under which the user may be

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<sup>223</sup> Article 53(5) of the German Law on Copyright and Neighbouring Rights, as amended in 2004: *'Copies may neither be disseminated nor used for public communication'*.

<sup>224</sup> Article 71 *sexties* (3) of the Italian Law for the Protection of Copyright and Neighbouring Rights (Law No. 633 of April 22, 1941, as last amended by Legislative Decree No. 68 of April 9, 2003).

<sup>225</sup> Article 50(2)(2) of the Slovenian Copyright and Related Rights Act, as amended on May 11, 2004, Official Gazette RS No. 43/04.

<sup>226</sup> Finland [Article 12 of the Copyright Act (Law No. 404, of July 8, 1961 as amended by Law No. 748, of October 9, 1998 and Law No. 821, of October 14, 2005)], Iceland (Ch. 6), Lithuania (Article 20 of Law amending the Law on Copyright and Related Rights, No. IX-1355, of March 5, 2003), Norway (Article 12), Sweden (Article 12 of Act on Copyright in Literary and Artistic Works, No. 1960:729, of December 30, 1960, as amended by Government Bill No. 2004/2005:110).

in a position to replace the rightholder and break the distribution chain by acting as an intermediary.<sup>227</sup> Nonetheless, users making dynamic private use in online networks are covered by Article 5(2)(b) of Directive 2001/29/EC.

Our aim at this section was to provide an overview of which activities are covered by Article 5(2)(b) of Directive 2001/29/EC and which are not. As we have seen, private copying is organically set as a limitation to the reproduction right defined in Article 2 of Directive 2001/29/EC. While Article 5(2)(b) may be seen to an extent as a user freedom, it does not form a subjective right to the benefit of end users; this means that it has a defensive character against allegations for infringement but is not a positive right that users can invoke against its possible contractual restriction. So, despite its strong justification on the right to privacy, Article 5(2)(b) merely provides a scope limitation to the reproduction right. This means that Article 5(2)(b) applies first and foremost to acts of reproduction. Being broadly defined by Directive 2001/29/EC, the reproduction right encompasses a multitude of activities, irrespective of the duration of the copies produced, the portion of the work that has been reproduced, the technology or medium used and the course of the reproduction process. In our view, the same ought to apply to the private copying limitation since we consider that a right and a limitation to this right are interdependent.

Yet, acts of reproduction are not the only activities covered by Article 5(2)(b). This article also permits acts of private use made by natural persons, without however defining the scope of private use. Our analysis indicates that there are two kinds of private use: passive and dynamic. Passive private use refers to the mere consumption of works and is a copyright-free zone; we have therefore concluded with certainty that it falls within the meaning of the private copying limitation of Article 5(2)(b). The issue of whether acts dynamic private use are covered by this article was more complex since this kind of use is not merely consumptive but takes place with activities resembling acts reserved by copyright; it reflects usage habits that may have an impact on exclusive rights. We have illustrated, however, that most rights in copyright are addressed to or involve a public in their statutory description in terms that a free zone of uses is created when such uses are made within a private circle. For instance, an act of public lending is infringing but acts of lending in private fall within the scope of dynamic private use. We conclude therefore that Article 5(2)(b) may also cover acts of dynamic private use. We

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<sup>227</sup> F. Macmillan, 'Commodification and Cultural Ownership', in J. Griffiths & U. Suthersanen (eds.), *Copyright and Free Speech: Comparative and International Analyses*, Oxford University Press, Oxford, pp. 35-65, at p. 48; D. Scolnik, 'Private Use out of Control: Disintermediation in the Music Business while the Bands Play on', 5 *Intell. Prop. L. Bull.*, 2000, pp. 13-34, at p. 13.

have observed that there is a tendency at national level to explicitly exclude from the scope of the private copying limitation acts of communicating and making works available to the public. This is probably due to the fact that, as opposed to distribution or lending, the communication and making available rights refer to the dissemination of the contents of works rather than to the distribution of tangible copies of those works. Nonetheless, we are of the view that dynamic private uses that have an impact on the communication and making available rights should be permitted as long as the dissemination of contents is made within a private circle, for instance, through e-mails.

Having determined which activities are legal and which are not under Article 5(2)(b) of Directive 2001/29/EC, it is essential to examine yet another condition upon which the application of this limitation is premised. That is the 'private' character of the use.

## Section 2: The meaning of the term ‘private’ in the context of Article 5(2)(b) of Directive 2001/29/EC

Whilst there is a consensus that private uses are exempted from infringement, there is no precise guidance as to what ‘private’ means in the context of Article 5(2)(b) of Directive 2001/29/EC; this notion is nowhere explicitly defined in the European and national legislations on copyright. As a result, legal uncertainty pertains as to which uses are permitted and which are not. We consider that this lack of an interpretative standard is problematic for two main reasons. First, national judges may confine to the term ‘private’ diverse interpretations, either broader or more restrictive. Indeed, Courts in Europe have issued conflicting rulings as to what a ‘private’ use is within the meaning of the private copying limitation. A group of four co-workers was considered a private circle of recipients in Belgium<sup>228</sup> whereas a taxi clientele -which cannot exceed the same number of people- was considered to be a ‘public’ for copyright’s purposes in Finland.<sup>229</sup> The second reason why an interpretative guide is necessary so as to determine which uses are private, and which are not, is digitalisation itself. The concept of ‘private’ use is currently in motion and social-networking sites illustrate this point. One can only speculate whether *facebook* ‘friends’ are a private circle so as to legitimately watch videoclips together and whether *msn-messenger* contacts are so privately connected to lawfully send each other e-books or mp3 files.

We consider that the determination of what is ‘private’ in the context of Article 5(2)(b) of Directive 2001/29/EC is one of the most important and difficult to answer questions. Below, we shall attempt to determine the criteria under which a use is ‘private’ and, therefore, covered by Article 5(2)(b). Our guide in this analysis shall be the national implementations of this Article and national case-law, in the variety of which we have identified some critical similarities. All of them oppose ‘private’ to ‘public’ uses and retain some space for some ‘personal’ uses, such as research and study. We shall attempt to define the scope of permissible private use by examining it in relation to these concepts. What is more, we have observed that national judges examine specific parameters when they are called to determine the ‘private’ character of a use. We will gather these parameters, turn them into criteria and build a test upon which to establish the private character of permissible private copying.

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<sup>228</sup> Unreported.

<sup>229</sup> Finnish case 2002:101, Supreme Court: *Teosto v A Taxi Driver* [2004] ECDR 3; R. Paanila & M. Leppa, ‘Finland: Copyright – Legislative Amendments and Recent Case Law’, *EIPR* 2003, 25(5), N68-70.

## 1. The scope of the term ‘private’

Judicial practice and national statutes often refer to ‘personal’ or ‘public’ uses, either by equating ‘private’ with ‘personal’ use<sup>230</sup> or by contradicting it with ‘public’ uses.<sup>231</sup> To define the scope of ‘private’ uses, we consider that their examination in comparison with personal and public uses is essential.

### 1.1. ‘Personal’ uses are included within the scope of ‘reproductions for private use’

In the many versions of Article 5(2)(b) of Directive 2001/29/EC that precede its final form, permissible copying was supposed to be made for personal use. The 1999 Legislative Resolution on the proposal for Directive 2001/29/EC provided for a limitation to acts of reproduction ‘*made by a natural person for private and purely personal use.*’<sup>232</sup> A slight amendment to this wording was initiated one month later in the 1999 amended Proposal for Directive 2001/29/EC. The latter Proposal indicated that the limitation of Article 5(2)(b) of Directive 2001/29/EC was to be permitted as long as copying was ‘*made by a natural person for private and strictly personal use.*’<sup>233</sup> This stipulation, however, which restricted the scope of permissible uses, was not maintained. The European Parliament<sup>234</sup> enlarged the scope of permissible copying by introducing an amendment which has been adopted by the Commission<sup>235</sup> and was used in the final version of Directive 2001/29/EC. This wording reads that permissible reproductions may be made ‘*by a natural person for private use.*’<sup>236</sup>

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<sup>230</sup> See Austria [Article 42(1) of the Austrian Federal Law on Copyright in Works of Literature and Art and on Related Rights (BGBl. No. 111/1936, as last amended [BGBl. I No. 25/1998], Czech Republic [Article 25(1) of Law No. 121/2000 Coll. of 7 April 2000 on Copyright, Rights Related to Copyright and on the Amendment of Certain Laws, as amended by Act of 21 January 2005, 81/2005], Denmark [Article 12(2)(v) of the Danish Consolidated Act on Copyright 2003, No. 164, of March 12, 2003], Latvia [Article 34 of the Latvian Copyright Law as last amended on April 22, 2004], Romania [Article 34(1) of Law no. 8/1996 on Copyright and Neighbouring Rights (*amended by* Law no. 285/2004, by EGO no 123/2005)].

<sup>231</sup> See for instance *Teosto v A Taxi Driver* [2004] ECDR 3; *Duck v. Bates* (1883-84) L.R. 13 Q.B.D. 843; *Harms (Incorporated) and Chappell & Co v. Martans Club, Ltd.* [1927] 1 Ch. 526; *Ernest Turner Electrical Instruments Ltd v. Performing Rights Society Ltd.*, [1943] Ch. 167.

<sup>232</sup> Legislative resolution embodying Parliament’s opinion on the Proposal for a European Parliament and Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, COM (97) 0628 C4-0079/98 97/0359 (COD) (Co-decision Procedure: First Reading), *Official Journal C* 150, 28.05.1999, p. 171, at 179.

<sup>233</sup> *Ibid.*

<sup>234</sup> European Parliament Legislative Resolution on the Council Common Position for Adopting a European Parliament and Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 9512/1/2000 – C5-0520/2000 – 1997/0359(COD), Co-decision Procedure: Second Reading, Minutes of 14.02.2001, A5-0043/2001, p. 2.

<sup>235</sup> Commission of the European Communities, Commission Opinion pursuant to Article 251(2)(c) of the EC Treaty, on the European Parliament’s Amendments to the Council’s Common Position regarding a Proposal for a Directive of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, Amending Proposal of the Commission pursuant to Article 250(2) of the EC Treaty, Brussels, 29.3.2001, COM(2001) 170 final, 1997/0359(COD), at p. 3.

<sup>236</sup> European Parliament Legislative Resolution, *supra* at footnote 234.

By referring to private rather than personal use, the European legislator meant to broaden the reach of the use to a circle of recipients rather than restricting its ambit to the personal sphere of the original copier. We consider that the EU legislator accepts that private use can be broader than a solitary activity taking place entirely on personal basis. Indeed, the requirement for the use to be private contains an undeniable reference to personal use. In our view, the scope of the term private is broader than that of the term personal;<sup>237</sup> this is because by definition the term private refers to a particular *person* or a *group*. By contrast, personal use is that made by one *person* only and, as Hamilton rightly points out, a realm where even the most rapacious rightholders have agreed that lawful uses are made.<sup>238</sup>

If private uses, however, are broader in scope than personal uses the circle the persons involved is practically enlarged. In this respect, a use made by an audience can still be private. This is affirmed by our analysis earlier in this thesis where we concluded that the scope of private use is broader than that of reproduction.<sup>239</sup> We can move this conclusion one step further and observe that, while there might be only one person to click the ‘record’ button, the same person might use the copy she made with an audience of her selection. This somehow draws a distinctive line between the copier and the users that may benefit from Article 5(2)(b). It is therefore essential to ascertain whether both the copier and the potential users are covered by this article. If this is the case, there is yet another issue that needs to be addressed, namely whether copying on behalf of end users is permitted as in the case of reprographic copying.

### 1.1.1. Identifying the beneficiaries of Article 5(2)(b): the copier and the users

Article 5(2)(b) of Directive 2001/29/EC stipulates that copying may be made ‘*by a natural person for private use*’. In our view, this stipulation, which has been adopted by most EU Member States,<sup>240</sup> indicates that the user and the copier need not be identical. This is because Article

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<sup>237</sup> Contra: G. Westcamp, *The Implementation of Directive 2001/29/EC in the Member States*, op. cit., p. 16

<sup>238</sup> M.A. Hamilton, ‘Impact of the TRIPs Agreement on Specific Disciplines’, op. cit., at 622-633.

<sup>239</sup> See p. 50 *et seq.*

<sup>240</sup> Article 41 of the Austrian copyright law affords the limitation on private copying to ‘any person’. Article 41 §4 states that ‘[e]stablishments which are open to the public and which collect works may, insofar as this is not done for profit make (1) a single copy of works for their position, (2) make single copies of works which have been made public, but may have not been published or which have been sold out.’ See Austrian Federal Law on Copyright in Works of Literature and Art and on Related Rights (BGBl. No. 111/1936, as last amended [BGBl. I No. 25/1998]; In Bulgaria, private reproductions may be made ‘*by a natural person*’. See Article 25(1)(2) of Law on Copyright and Neighbouring Rights, Published in State Gazette No. 56/1993, lastly amended on January 1, 2003; Article 30(2) of the Copyright Act of the Czech Republic states that copyright shall not be infringed ‘*by whoever*’ makes copies for his private use. See Article 30(2) of Law No. 121/2000 Coll. of 7 April 2000 on Copyright, Rights Related to Copyright and on the Amendment of Certain Laws, as amended by Act of 21 January 2005, 81/2005; Denmark, Finland and Sweden stipulate that permissible private copying may be made by ‘*anyone*’. See Article 12(1) of the Danish Consolidated Act on Copyright 2003, No. 164, of March 12, 2003. Also see Article 12 of the Finnish Copyright Act (Law No. 404, of July 8, 1961 as amended by Law No. 748, of October 9, 1998 and Law No. 821, of October 14, 2005). See Article

5(2)(b) neither reads that reproductions should be made by a natural person for *his or her* private use nor does it stipulate that permissible reproductions can be made for the copier's own personal use. The Commission observed that the wording of Article 5(2)(b) permits copying made '*for and on behalf of a natural person for private use.*'<sup>241</sup> To the Commission, the scope of permissible copying is broader than what appears in the final version of Directive 2001/29/EC since copying can be made 'for and on behalf' of a beneficiary. This means that the copier and the user need not be identical. This is also supported by a prior formulation of Article 5(2)(b) in the Common Position,<sup>242</sup> under which copying was permitted '*for the private use of a natural person*'; this could be interpreted to mean that a user could order a copy to be made for him or her so as to use it in private. Nonetheless, this wording was not maintained in Directive 2001/29/EC. Of course, the phrase '*by a natural person for private use*' that was preferred in the current form of Article 5(2)(b) indicates that the copier and the users need not

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12 of the Swedish Act on Copyright in Literary and Artistic Works, No. 1960:729, of December 30, 1960, as amended by Government Bill No. 2004/2005:110; in Estonia, the private copying limitation is afforded to natural persons only. See Article 18(1) of the Copyright Act of November 11, 1992 (RT 1992, 49, 615; consolidated text RT I 2000, 16, 109), entered into force on December 12, 1992, as lastly amended by the Act of 22.09.2004, entered into force 29.10.2004 – RT I 1999, 54, 580; L 122-5 of the French Code de la propriété intellectuelle (partie législative), Première partie - La propriété littéraire et artistique stipulates that permissible private copying is made '*for the private use of the copier*' and does not clarify whether the copier has to be a natural or a legal person. See Code de la Propriété Intellectuelle, Partie Législative, Premier Partie, La propriété littéraire et artistique, Le droit d'auteur, as amended by Law No. 2006-961 of August 1, 2006, J.O. No. 178, of August 3, 2006, p. 11529, and as lastly amended on April 1, 2008; Greece states that private copying is 'permissible' for a person without indicating whether this person ought to be a natural or a legal person. Nonetheless, Article 18 of the Greek Copyright Act specifies that '*[t]he term private use shall not include use by an enterprise, a service or an organisation.*' See Copyright Law 2121/3.3.1993 as amended by Law 3057/2002; in Hungary, the private copy limitation is afforded to 'anyone'. See Article 35 of Act No. LXXVI. of 1999 on Copyright, as amended by Act No. LXXVIII of 2001 and Act No. CII of 2004; Article 71 *sexties* (1) of the Italian Copyright Act provides the private copying limitation to '*a natural person*'. See Law on the Protection of Copyright and Neighbouring Rights (Law No. 633 of April 22, 1941, as last amended by Legislative Decree No. 68, of April 9, 2003); Articles 20(1) and 58(2) of the Lithuanian Copyright Law permit private copying '*for a natural person*'. See Law amending the Law on Copyright and Related Rights, No. IX-1355, of March 5, 2003; the same is provided in Luxembourg. Article 10(4) states that it is permissible to make private copies '*par une personne physique*'. See Law of April 18, 2001 on Copyright, Neighbouring Rights and Databases, as amended on April 18, 2004 (Memorial A, no. 61 du 29 avril 2004, pp. 942-948); Malta reserves the private copying limitation to natural persons only. See Article 9(1)(c) of the Copyright Act XIII of 2000, as amended by Acts VI of 2001 and IX of 2003, Government Gazette of Malta, No. 17467; In the Netherlands, the private copying limitation may apply for the benefit of '*the person who makes the copies or orders the copies to be made exclusively for himself.*' See Article 16b(1) of Copyright Act of 1912 of the Netherlands as amended on July 6, 2004 and January 20, 2006; Slovakia and Slovenia afford the private copy exception to natural persons only. See Article 24(1) of the Slovakian Copyright Law, Copyright Act No. 618/2003 of December 4, 2003 and Article 50(2) of the Slovenian Copyright Act, Copyright and Related Rights Act, as amended on May 11, 2004, Official Gazette RS No. 43/04.

<sup>241</sup> Commission of the European Communities, Commission Opinion pursuant to Article 251(2)(c) of the EC Treaty, on the European Parliament's Amendments to the Council's Common Position regarding a Proposal for a Directive of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, Amending Proposal of the Commission pursuant to Article 250(2) of the EC Treaty, Brussels, 29.3.2001, COM(2001) 170 final, 1997/0359(COD), at p. 3, point 3.2.

<sup>242</sup> Common Position (EC) No 48/2000 of 28 September 2000 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a Directive of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, Official Journal C 344, 01.12.2000, p. 0001-0022, at p. 0009.

be identical. And while the copier may be the single person pushing the ‘record’ button the users can be the people forming his private circle of family and social acquaintances. This conclusion is in accordance with our analysis earlier<sup>243</sup> that the scope of acts of reproduction is narrower than that of acts of use. For instance, an individual (the copier) can make a copy of a music track and then listen to it in his car with his family (the users) or at his holiday home with his family and guests (the users). Both the copier and the users in the aforementioned example can benefit from Article 5(2)(b) of Directive 2001/29/EC.

Since the users may be an enlarged circle of recipients and the copier a single person, the question arises as to whether Article 5(2)(b) can afford protection to more than one copiers. This could be, for example, the case where an individual lacking the technical equipment orders a copy to be made for him from someone else, as is the case in reprographic copying.<sup>244</sup> Lucas and Lucas identify three main types of copiers in the field of reprography. The first is the person who uses the technical equipment (‘physical copier’). The second is the person who orders the copy (‘intellectual copier’). The third is the person who receives payment for the copy (‘commercial copier’).<sup>245</sup> We find this threefold classification of copiers very useful to identify the beneficiaries of the private copying limitation. Of course, Directive 2001/29/EC leaves no room for commercial copiers. This is affirmed by the fact that Article 5(2)(b) excludes every form of commercial copying either directly or indirectly.<sup>246</sup> The question is therefore whether the physical and the intellectual copier need to be the same person to benefit from Article 5(2)(b) or whether both these types of copiers can be protected.

### 1.1.2. The uncertain case of third-party copying

It is questionable whether third parties (physical copiers) engaged to facilitate private copying on behalf of a beneficiary (intellectual copier) can invoke the private copying limitation of Article 5(2)(b) of Directive 2001/29/EC. While the ‘natural person’ requirement of Article 5(2)(b) of Directive 2001/29/EC<sup>247</sup> clearly excludes legal entities from protection, this does not exclude the possibility of copying upon request by a natural person for qualifying purposes. Consider, for instance, an individual who burns copyrighted content on CD’s on

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<sup>243</sup> See p. 50 *et seq.*

<sup>244</sup> Article 5(2)(a) of Directive 2001/29/EC.

<sup>245</sup> This threefold categorisation was made by Lucas and Lucas as regards reprography. A. Lucas & H.-J. Lucas, *Traité de la Propriété Littéraire et Artistique*, op. cit., at p. 250. See also *Rannou-Graphie*, Cassation Civile 1<sup>er</sup>, 7.3.1984, JCP, 1985 II 21351. This ruling was affirmed several times since. Court of Appeal, Paris, 25.6.1997: RIDA 1997, no. 1561; Court of Appeal, Toulouse, 25.5.1997: RIDA 1/1998, p. 323. Court of Appeal, Lyon 7.11.1958: RIDA 3/1957, p. 146 (*‘to escape punishment, the copies must be strictly reserved to the private use of the copier, whereas in this case the copier is a third party working effectively as an employee’*).

<sup>246</sup> The lack of commerciality in permissible private copying is examined later in this thesis, at p. 95 *et seq.*

<sup>247</sup> The ‘natural person’ requirement has been implemented by most EU Member States. See *supra*, footnote 241.

behalf of someone who lacks the necessary equipment but wishes to make private use of the copy.

The unclear formulation of Directive 2001/29/EC on this issue has led to a quite divergent approach amongst Member States. Some Member States explicitly exclude, or restrict the possibility of, copying by a third party on behalf of a beneficiary. This includes third-party copying or situations in which a legal entity provides services on the basis of remuneration. This type of copying is explicitly prohibited only in Hungary, the Copyright Act of which stipulates that *'[h]aving a work copied by someone else with computer or on electronic data carrier, even if this is done for private purpose, shall not be considered as falling within the scope of free use'*.<sup>248</sup> This clearly indicates that the only beneficiary of the private copying limitation in Hungary is the person pushing the 'record' button. Similarly, the Italian Copyright Act stipulates that permissible private copying of sound and video recordings *'shall not be carried out by a third party. The supply of services for the purpose of enabling the reproduction of phonograms and videograms by a natural person for personal use shall constitute an act of reproduction [...]*'.<sup>249</sup> The same applies in Norway and Sweden. In Norway, *'the [private copy] provision [...] shall not confer a right to engage outside assistance to a reproduction regarding (a) musical works, (b) cinematographic works, (c) sculpture, pictorial weavings and articles of artistic handicraft and applied art, or (d) the artistic reproduction of other works of art.'*<sup>250</sup> In Sweden, *'[the private copy exception does] not confer a right to engage, for private purposes, another person to (1) make copies of musical works or cinematographic works, (2) make utilitarian articles or sculptures, or (3) copy another person's work of fine art by means of artistic reproduction.'*<sup>251</sup> While we certainly consider that such explicit prohibition of third-party copying in the aforementioned States puts an end to potential conflicts and increases legal certainty, we find this approach too restrictive. Sometimes it is difficult to establish who pushed the 'record' button. Consider, for instance, an individual who pays a visit to his friend's house and during his stay there they download movies online. Does it really matter who was the one using the computer if at the end of the day they make two copies, one for each?

We cannot safely answer this question even in Member States which permit the engagement of a third party in copying on behalf of a beneficiary. This is because the approach that these States adopt restricts third-party copying only to certain categories of works. For instance, the Dutch Copyright Act reads that *'[i]t shall not be deemed an infringement of the copyright in a literary,*

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<sup>248</sup> Article 35(3) of the Act No LXXVI of 1999 on Copyright as amended in 2001.

<sup>249</sup> Article 71 *sexties* (2) of the Italian Law on the Protection of Copyright and Neighbouring Rights (Law No. 633 of April 22, 1941, as last amended by Legislative Decree No. 68, of April 9, 2003).

<sup>250</sup> Article 12 of the Act No 2 of 12 May 1961 relating to Copyright in Literary, Scientific and Artistic Works as last amended on 17 June 2005.

<sup>251</sup> Article 12 of the Act on Copyright in Literary and Artistic Works as amended up to July 1, 2005.

*scientific or artistic work to reproduce it [...] for the sole purpose of private practice, study or use of the person who [...] orders the copies to be made exclusively for himself.*<sup>252</sup> It is clear that this provision is limited as to the scope of works that may be copied. Similar restrictions as to the works that may be copied on behalf of a beneficiary by a third party also apply in the Czech Republic,<sup>253</sup> Finland,<sup>254</sup> Liechtenstein,<sup>255</sup> and Switzerland.<sup>256</sup> The legislators of the aforementioned States indicate that copying facilitated by a third party is permitted but this does not apply to all categories of works. Musical and cinematographic works are statutorily excluded from the relevant national provisions. In this respect, if an individual asks a friend to burn a film for him on a DVD carrier, neither the ‘physical’ nor the ‘intellectual’ copier can benefit under the private copying limitation, which has a limited practical applicability as regards cinematographic works. The Austrian Copyright Act illustrates this limited applicability of the private copying limitation as regards the order of copies by an intellectual copier. This Act stipulates that *‘[s]ingle copies of a work may also be made, free of charge and in order, for the personal use of another person. Such reproduction shall, however, be permissible even if made for payment (1) where reproduction is by reprography or a similar method; (2) where a work of literature or music is copied by hand.’*<sup>257</sup> In this respect, the Austrian Copyright Act permits reprographic and hand-made copying without leaving end users at liberty to make digital copies one for another. We consider that the position adopted by the aforementioned States creates a two-tier approach since there are works which can be legitimately produced by a third party and works which cannot. This approach increases legal uncertainty as regards end users and does not create a level playing field for all rightholders under the umbrella of copyright and related-rights protection.

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<sup>252</sup> Article 16(6)(1) of the Copyright Act of 1912 of the Netherlands as amended on July 6, 2004 and January 20, 2006.

<sup>253</sup> Article 30(3) of the Copyright Act of the Czech Republic (Law No. 121/2000 Coll. of 7 April 2000 on Copyright, Rights Related to Copyright and on the Amendment of Certain Laws, as amended by Act of 21 January 2005, 81/2005): *‘Copyright shall also not be infringed by whoever makes at the order of and for the personal use of the customer a print reproduction of the work on paper or other similar base using photography technique or other procedure with similar effect, on condition that the work is not a published musical work in score and that such person is paying in an orderly and timely manner the remuneration [...]’.*

<sup>254</sup> Article 12 of the Copyright Act (Law No 404 of July 8, 1961 as last amended by Law No 748 of October 9, 1998): *‘It is also permitted to engage an outsider to make copies which are intended for the private use of the party ordering the copies. [This] shall not apply to the reproduction of musical works, cinematographic works, useful articles or sculptures, or the copying of any other work of art by artistic reproduction.’*

<sup>255</sup> Article 22(2) of the Copyright Law of Liechtenstein as entered into force on July 23, 1999: *‘Persons entitled to make copies of a work for use for private purposes may also have them manufactured by other persons’.*

<sup>256</sup> Article 19(2) of the Swiss Federal Law of October 9, 1992 on Author’s Rights and Neighbouring Rights: *‘La personne qui est autorisée à reproduire des exemplaires d’une œuvre pour son usage privé peut aussi en charger un tiers [...]’.*

<sup>257</sup> Article 42a of the Federal Law on Copyright in Works of Literature and Art and on Related Rights (BGBl. No 111/1936, as last amended [BGBl. I No. 25/1998]).

Of course, the situation in Member States that do not explicitly deal with the issue is even more controversial. These Member States may face difficulties in determining the legitimacy of third-party copying situations. For instance, the Greek Copyright Act remains silent as to whether third parties may be engaged in facilitating copying on behalf of a beneficiary. At the same time, this Act does not clearly mandate that permissible private copying ought to be made by natural persons.<sup>258</sup> This could lead to an unprecedented expansion of the scope of the private limitation in terms that legal entities could benefit from this limitation. For instance, the Greek law gives room for a company to may make copies of copyrighted content to distribute to its employees for intra-company use.

Since national laws vary substantially on the issue of third-party copying, it is not easy to safely ascertain whether the private copying limitation applies to such situations. To our understanding, it is difficult to justify a condition under which a ‘private’ use is reserved only to the person pushing the ‘record’ button, namely the ‘physical’ copier. Under this approach, an individual (physical copier) copying a work for a friend (intellectual copier) upon request cannot benefit from the private copying limitation. At the same time, an individual making the copy himself by use of a friend’s equipment benefits. Such distinction in the protection afforded to the physical and intellectual copier would lead to preposterous results! What is more, it would be hard to apply in practice not only for its justificatory complexity but also for privacy reasons since identifying the physical and intellectual copier would probably require an intrusion into the private sphere.

In Germany, the legitimacy of third-party copying, and in particular of document-delivery services,<sup>259</sup> was one of the most controversial issues during the implementation of Directive

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<sup>258</sup> Article 18 of the Copyright Law 2121/1993 as amended by Law 3057/2002.

<sup>259</sup> Document delivery services may be offered by a variety of service providers, such as libraries, commercial document suppliers, database publishers, and the like. End users choose documents found in bibliographic databases, order them electronically, scan or copy them from digital files and in the end download them. See L. Guibault, ‘The Nature and Scope of Limitations and Exceptions to Copyright and Neighbouring Rights with Regard to General Interest Missions for the Transmission of Knowledge’, *op. cit.*, at p. 22; P.B. Hugenholtz & D.J.G. Visser, ‘Copyright problems of electronic document delivery’, *Luxembourg: Office for Official Publications of the EC*, 1995, p. 58.

Note that in the analogue environment, document delivery services were permitted either on the basis of the private copying limitation, as provided by the various Member States, or on the basis of specific library privileges. In the digital environment, however, there are two main types of ‘electronic’ document delivery services. The first involves ‘inter-library loans’, *i.e.*, the supply of digital reproductions. The second is the supply of remote access to digital collections. By virtue of the Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the Information Society, OJ L 167, 22.6.2001, electronic document delivery falls under the exclusive right of authors to communicate works to the public [Article 3(1)] and the right of other rightholders to make their protected subject-matter available to the public [Article 3(1)]. Article 5(2)(b) of Directive 2001/29/EC on private copying, however, is meant to set limits to the reproduction right. The online delivery of protected works and other subject-matter can, therefore, only benefit under Article 5(3)(n) of Directive 2001/29/EC as long as the reproductions are made for specific purposes, such as research and private study, as long as the works are strictly used for such purposes, and on condition that this use is available

2001/29/EC. The debate was as to whether public libraries can lawfully make copies on behalf of beneficiaries of the private copying limitation. Delegations reached a consensus on permitting this type of copying on condition that the services provided were non-commercial and the copies were made for private use.<sup>260</sup> This, however, covers only the delivery of copies made by way of fax and the mailing of tangible copies of works; it does not extend to other forms of electronic communication. Of course, some years before the implementation of Directive 2001/29/EC in Germany, the German Federal Supreme Court (*Bundesgerichtshof*) upheld the legitimacy of the electronic supply of copies from public libraries.<sup>261</sup> This case involved the online document-delivery service offered by the *Technical Information Library of Hannover (TIB)*, under which users could consult an on-line catalogue and send an e-mail to order copies. The Supreme Court pointed out that a modern and highly developed industrial nation, like Germany, depends on science and research and, therefore, needs a fully-developed, rapid, and economical information system. Interpreting the private copying limitation provided under Article 53(1) of the Copyright Act,<sup>262</sup> the Court noted that the subjection of the document-delivery services to the prior authorisation of the rightholders was not within the historical will of the legislator. The Court based this argument on Article 53(2)(4)(a) of the Copyright Act,<sup>263</sup> under which copying for individual scientific purposes was permitted, including their electronic transmission under the payment of reasonable remuneration to the rightholders.

A similar situation has also been raised in the UK *Sony v. Easyinternetcafé* case,<sup>264</sup> as regards the legitimacy of copying by third parties on behalf of beneficiaries. *Easyinternetcafé* offered a CD burning service at its Internet cafés under which customers could download files via one of its

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through dedicated terminals on the premises of such establishments. Article 5(3)(n) of Directive 2001/29/EC reads that ‘Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 [in the case of] use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections.’ See in this respect M. Ficsor, *The Law of Copyright and the Internet: the 1996 WIPO Treaties, their Interpretation and Implementation*, Oxford University Press, Oxford, 2002, p. 527. Ficsor argues that the availability through dedicated terminals requires the application of appropriate technological protection measures ensuring truly restricted availability.

<sup>260</sup> Article 53(1) of the German Copyright Act of 10.9.2003 and the same Article of the same Act of 26.10.2007 (‘second basket’).

<sup>261</sup> Case I ZR 118/96, *Bundesgerichtshof* (German Federal Supreme Court), 25.2.1999 [2000] E.C.C. 237 (‘*Kopienversanddienst*’).

<sup>262</sup> Article 53(1) of the German Copyright Act of 9.9.1965, as amended on 8.5.1998: ‘It shall be permissible to make single copies of a work for private use. A person authorized to make such copies may also cause such copies to be made by another person; however, this shall apply to the transfer of works to video or audio recording mediums and to the reproduction of works of fine art only if no payment is received therefor.’

<sup>263</sup> Article 53(2)(4)(a) of the German Copyright Act of 9.9.1965, as amended on 8.5.1998: ‘It shall be permissible to make or to cause to be made single copies of a work for other personal uses [...] in the case of small parts of published works or individual contributions that have been published in newspapers or periodicals.’

<sup>264</sup> *Sony Music Entertainment (UK) Limited and Others v. Easyinternetcafé Limited* [2003] EWHC 62 (Ch).

café's PCs. In return for payment of a £5 fee, staff at the café would save those files on a CD-R for the customer to take away. In determining, the legality of this CD-burning service, the UK High Court of Justice ruled that copying for commercial purposes is not a 'private and domestic' use as stipulated under section 70 of the CDPA 1988. If this type of copying was permitted commercial organisations could download any copyrighted file from the internet and sell it to customers upon a mere confirmation that the file would be used privately and domestically. To the Court, the interposition of third parties in the copying exercise is prohibited to the extent that these parties carry out a business operation for profit. This is incompatible with the requirement for private and domestic use.<sup>265</sup> The fact that the person for whom the copy is made is going to use the copy for private and domestic use was held not to be relevant. Where, however, no profit-making purpose is involved and therefore there is no commercial copier, the exception of s. 70 of the CDPA may apply.<sup>266</sup> The Court, therefore, expressed the view that copying for private and domestic use cannot be made by a legal entity, such as a commercial enterprise but it is permitted if carried out by natural persons.<sup>267</sup>

The silence of Directive 2001/29/EC and the subsequent divergent approaches adopted by the Member States as to the legitimacy of third-party copying create legal uncertainty with respect to the beneficiaries of the private copying limitation. Our examination of the national implementation of Article 5(2)(b) indicates that Member States are in their majority reluctant to accept the permissibility of third-party copying, and if they explicitly authorise it, they restrict its scope to very few categories of works, such as artistic and literary works. Of course, the Directive clearly stipulates that the beneficiaries of Article 5(2)(b) can only be natural persons. In this respect, it precludes the exercise of the private copying limitation by legal entities, such as commercial enterprises. This means that a legal entity cannot function legitimately either as a physical or as an intellectual copier; this privilege is reserved for natural persons only. In our view, when both the physical and intellectual copier are natural persons, and as long as all other conditions of Article 5(2)(b) are met, they can benefit from the private copying limitation of Article 5(2)(b).

We conclude from the aforementioned analysis that the beneficiaries of the private copying limitation can be both the person making the copy (copier) and the people forming the private

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<sup>265</sup> *Ibid.*, pp. 304-305, points 41 and 42.

<sup>266</sup> 'The making for private and domestic use of a recording of a broadcast or cable programme solely for the purpose of enabling it to be viewed or listened to at a more convenient time does not infringe any copyright in the broadcast or cable programme or in any work included in it': see s. 70 of the Copyright, Designs and Patents Act 1988, Ch. 48.

<sup>267</sup> For an analysis of this case, see D. Free & N. Garnett, 'The Home Copying Loophole Widens: *Sony & Others v. Easyinternetcafé*', *Entertainment Law*, Vol. 1, No. 2, summer 2003, pp. 84-89.

sphere of the copier (users). This means that the benefit of the private copying limitation is not restricted to the person pushing the ‘record’ button but can extend to a circle of users thereof. The real question is whether third parties (physical copier) may be engaged to make copies on behalf of a beneficiary for his private use (intellectual copier). National legislations on this issue have adopted diverse approaches but we cannot defend the validity of any of them. Of course, the Directive affords the benefit of the private copying limitation only to natural persons and, as a result, legal entities are not covered by this limitation. Indeed, if the private copying limitation protected legal entities against claims for infringement there would be a potential risk of the uses being made in public. For instance, a company making and distributing copies to its employees for intra-company use may reach a large circle of users. Public uses however are not covered by Article 5(2)(b). This prohibition emanates from this article’s requirement for the use to be private and from the distinction between private and public uses made by national legislators and judges. We examine this distinction exactly below.

## 1.2. The permissibility of uses involving an audience

Even though no direct distinction is made in Directive 2001/29/EC, national legislations and case-law of the Member States clearly differentiate ‘private’ from ‘public’ uses. And while private uses are permitted, uses that reach a public are clearly infringing. To define what a private audience is, it is essential to distinguish it from what constitutes a public audience. It shall be shown that since no numerical criterion applies as to this distinction, a grey zone of uses is created. This grey zone includes uses that can qualify neither as private nor as public. Imagine, for instance, a classmate reunion in which the former students can also invite their families. While performing music in this reunion may not be infringing in Hungary<sup>268</sup> it is highly likely that it will be held infringing in France.<sup>269</sup> When the use of a work is made by a group of people there is no distinctive line between what should be considered a private and what a public group of users. This controversy is accelerated vis-à-vis online uses. Consider, for instance, a *facebook* user who uploads a copyrighted music video on *facebook* so that all his ‘friends’ can watch. Is the group of ‘friends’ a private or a public group for the purposes of Article 5(2)(b) of Directive 2001/29/EC?

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<sup>268</sup> Article 38(f) of the Hungarian Copyright Act, Act No. LXXVI. of 1999 on Copyright, as amended by Act No. LXXVIII. of 2001 and Act No. CII of 2004: *‘[i]f the performance is not designed to earn or increase income even in an indirect manner and the participants do not receive remuneration, the works may be performed [...] for private use and at occasionally held private social gatherings.’*

<sup>269</sup> A reunion of a sports organisation for the purposes of a hockey tournament was to be in public since hockey players not belonging to this organisation could bring their families too. TI Reins, 26 Oct. 1960: *Gaz. Pal.* 1961, 1, p. 36; *RTD Com.* 1961, p. 89, comment by Desbois.

### 1.2.1. The meaning of the term ‘public’ in copyright law

The concept of the ‘public’ in copyright is mainly used with reference to exclusive rights. As we illustrated earlier in this thesis,<sup>270</sup> the definition of exclusive rights requires the element of a public; most exclusive rights in copyright, such as the right of communicating works to the public,<sup>271</sup> the right of making works available to the public<sup>272</sup> and the distribution right,<sup>273</sup> contain the concept of a public in their statutory description. Even the reproduction right contains a reference to a public, even though Article 2 of Directive 2001/29/EC does not incorporate the concept of the public directly; indeed, a copy is considered to be a reproduction when a material fixation of a work enables the work to be perceived.<sup>274</sup>

Albeit being a major constituent of the scope of the rights, the concept of the ‘public’ is not specifically defined under Community law. Whilst the term has been also used by the relevant international instruments, once again no explicit definition is provided.<sup>275</sup> Rather, its determination is left for interpretation at national level and is, accordingly, a matter of national legislation and case-law.<sup>276</sup> As a result, the term ‘public’ may receive diverse interpretations at

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<sup>270</sup> At p. 53 *et seq.*

<sup>271</sup> Article 3(1) of Directive 2001/29/EC: ‘Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.’

<sup>272</sup> Article 3(2) of Directive 2001/29/EC: ‘Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

(a) for performers, of fixations of their performances;

(b) for phonogram producers, of their phonograms;

(c) for the producers of the first fixations of films, of the original and copies of their films;

(d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.’

<sup>273</sup> Article 4 of Directive 2001/29/EC: ‘Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.’

<sup>274</sup> S. Dusollier, ‘Technology as an Imperative for Regulating Copyright: From the Public Exploitation to the Private Use of the Work’, *op. cit.*, p. 201.

<sup>275</sup> The Berne Convention grants the rights of ‘public performance’, of ‘communication to the public’ and of ‘public recitation’. See Arts 11, 11bis, 11ter and 14 of the Berne Convention for the Protection of Literary and Artistic Works 1886 (1971 revision with 1979 amendments). Articles 6(1) and 8 of the WCT provide for the right of making a work available to the public. See WIPO Copyright Treaty (WCT) adopted by the Diplomatic Conference on December 20, 1996, CRNR/DC/94; Articles 10 and 14 of the WPPT confer to performers and producers of phonograms respectively a right of making available their subject-matter to the public and Article 15 of the same Treaty makes reference to a right of communicating the relevant subject-matter to the public. See WIPO Performances and Phonograms Treaty (WPPT) adopted by the Diplomatic Conference on December 20, 1996, CRNR/DC/95; Also see K. Weatherall, ‘An end to private communications in copyright? The expansion of rights to communicate works to the public’, *op. cit.*, at 347; J. Ginsburg, ‘The (New?) Right of Making Available to the Public’ *op. cit.*, at 236.

<sup>276</sup> Commission of the European Communities, Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, SEC(2004) 995, 19.7.2004, at p. 15; *Contra*: Opinion of Advocate General Sharpston delivered on 13 July 2006 in *Sociedad General de Auditores y Editores de España (SGAE) v Rafael Hoteles SL*, Case C-306/05, point 44. To the AG, national legislation in this context is considered to be Directive 2001/29/EC rather than the national legislations of the various Member States. This emanates from the fact that signatory to the WIPO Internet Treaties is the European Community and not the individual EU

national level, either broader or narrower. This, however, has an impact on the delineation of the borders of permissible 'private' use, in terms that where 'public' uses are broadly defined the scope of 'private' uses is restricted and vice versa. We consider that this lack of harmonisation as regards the interpretative standards of the term public puts the efficacy of Directive 2001/29/EC into blunders. One has to keep in mind that the prime objective of this Directive is the harmonisation of national laws on copyright and related rights within the European Union. As acknowledged in Recital 6 of the Preamble to Directive 2001/29/EC, *'[w]ithout harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency.'*

In defining the right of communication to the public, the WIPO Guide and Glossary indicates that a public audience in the context of this right includes *'persons in general, that is, not restricted to specific individuals belonging to a private group.'*<sup>277</sup> In this sense, the term 'private' can be defined to mean a 'portion of the public'.<sup>278</sup> The WIPO definition connotes that a group of people may qualify as a private audience for the purposes of copyright protection. Nonetheless, the boundaries of such a group are not clearly demarcated. Indeed, the 1995 Green Paper acknowledges that the *'interested parties often feel that there is a need for a precise demarcation between communication to the public and private communication.'*<sup>279</sup> We feel that the same ought to apply with respect to all exclusive rights in the copyright arena. Certainly, there are indications that the scope of the term 'public' should be broadly interpreted, especially as regards the right of communicating works or other subject-matter to the public. Indicative in this respect is Directive 2001/29/EC,<sup>280</sup> the principal objective of which is to provide 'a high level of

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Member States. As a result, to the AG, interpretation at a national level refers to an interpretation at a Community level and case-law is that produced by the ECJ.

<sup>277</sup> WIPO, *Glossary of the Terms of the Law of Copyright and Neighbouring Rights*, WIPO, Geneva 1980, ISBN 92-805-0016-3, at 11 *bis*12.

<sup>278</sup> *Jennings v. Stephens* [1936] Ch. 469, at 476, affirmed in *Performing Rights Society v. Rangers FC Supporters Club* [1974] SC 49, at 63.

<sup>279</sup> Commission of the European Communities, *Green Paper: Copyright and Related Rights in the Information Society*, Brussels, 19.07.1995, COM(95) 382 final, at p. 26, point 59(5).

<sup>280</sup> Recitals 9 and 23 of Directive 2001/29/EC.

protection' of copyright and related rights.<sup>281</sup> As Recital 23 to the preamble of the Directive indicates, the right of communication to the public '*should be understood in a broad sense*'.<sup>282</sup>

Adhering to the interpretative standards of the WIPO Guide and Directive 2001/29/EC, the Commission adopts a broad definition of what constitutes the public. It considers that the public '*may be very small, consisting only of a few persons or sometimes only a possibility to access a work by individual members of the public*'.<sup>283</sup> Implicit in this definition is the view that any group of individuals, such as a family circle, could be economically significant.<sup>284</sup> Such broad interpretation of the term 'public', however, could lead to an unprecedented expansion of infringing uses, in our view. For instance, an *msn-messenger* user that posts a link to a *youtube* video on his status so that all his contacts can be directed there with a single mouse-click may be held to infringe copyright. This is because under the Commission's definition of the term 'public', this *msn-messenger* user offers the possibility to some individual members of the public, namely his msn contacts, to access the video.

We consider that such broad definition of the term 'public' cannot serve as a valid sorting tool in terms that almost every use made by an audience would qualify as public and be, thereof, infringing. This could shrink the potential of Article 5(2)(b) which certainly leaves some free air for private uses. As we have pointed out earlier in this thesis,<sup>285</sup> these private uses can be lawfully made by, or within, a circle of users and not by the copier alone. The fact, however, that the beneficiary of Article 5(2)(b) is not only the copier but also an 'audience' of his selection, enlarges the scope of lawful users while, at the same time, the term public is to be conceived broadly! And even though, as Weatherall rightly points out, the distinguishing line between private and public audiences appears increasingly imaginary,<sup>286</sup> there is no precise indication as to which audiences qualify as private and which as public within the meaning of

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<sup>281</sup> Recital 9 to Directive 2001/29/EC of 22 May 2001. This Recital reads that '*[a]ny harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.*'

<sup>282</sup> Recital 23 to Directive 2001/29/EC of 22 May 2001. This Recital reads that '*[t]his Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.*'

<sup>283</sup> Commission of the European Communities, Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, SEC(2004) 995, 19.7.2004, at p. 15.

<sup>284</sup> S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, Centre for Commercial Law Studies, Queen Mary College, Kluwer, 1987, at paragraph 8.71; J. Reinbothe & S. von Lewinski, *The WIPO Treaties 1996 – The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty – Commentary and Legal Analysis*, Butterworths, 2002, p. 24.

<sup>285</sup> At p. 62 *et seq.*

<sup>286</sup> K. Weatherall, 'An End to Private Communications in Copyright?', *op. cit.*, at 346.

copyright law. As a result, the legitimacy of uses made by an audience remains highly controversial.

### 1.2.2. The controversy on uses involving an audience

The absence of an interpretative guide as to which audiences are private and which are not creates controversy as to the exercise of the private copying limitation of Article 5(2)(b). An attempt to statutorily address this controversy was made explicitly only in Hungary, the Copyright Act of which specifies the scope of a private audience as regards performances. In particular, Article 38(f) of this Act stipulates that *'[i]f the performance is not designed to earn or increase income even in an indirect manner and the participants do not receive remuneration, the works may be performed [...] for private use and at occasionally held private social gatherings.'*<sup>287</sup> It further indicates that *'[a] party held by an economic organisation or a legal entity other than an economic organisation exclusively for its members, officers and employees shall be taken to be a private event.'*<sup>288</sup> In our view, the Hungarian legislators acknowledge that private use may be made within, or by, an audience and precisely lay down the limits of such an audience. To them, social gatherings and parties made by legal entities are an example of permissible private use. We consider this express indication very helpful since it puts an end to potential conflicts as to the legitimacy of uses made by a circle of users.

Indicative, yet more restrictive, is the position adopted by France<sup>289</sup> and Spain,<sup>290</sup> the Copyright Acts of which explicitly prohibit collective uses. Interestingly, these statutes do not refer to public but to collective uses. Certainly, public uses are not covered under the private copying limitation. At the same time, the mechanism of the private copying limitation ceases to function where the use touches upon collective aims.<sup>291</sup> But are collective uses an intermediate form of use, set somewhere between private and public uses? In our view, they are! They refer to uses made in the context of communicating works or otherwise making them available from a place and at a time individually chosen by end users. Indeed, since the making available right is specifically directed at the unlawful uploading of copyrighted content online, it is highly likely that the uploaded works shall reach a collectivity of individuals exceeding the familial circle, a circle which is considered to be private within the meaning of

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<sup>287</sup> Hungarian Copyright Act, Act No. LXXVI. of 1999 on Copyright, as amended by Act No. LXXVIII. of 2001 and Act No. CII of 2004.

<sup>288</sup> Articles 38(1)(f) and 38(4) of the Hungarian Copyright Act, *ibid*.

<sup>289</sup> Article L 122-5(2) of the French Code de la propriété intellectuelle (partie législative), Première partie - La propriété littéraire et artistique: *'Les copies ou reproductions strictement réservées à l'usage privé du copiste et non-destinées à une utilisation collective [...].'*

<sup>290</sup> Article 31(1)(2) of the Spanish Copyright Act, Law of 7 July 2006, BOE, No. 162, 8 July 2006: *'provided that the copy is not put to either collective or profit-making use.'*

<sup>291</sup> A. Lucas & H.-J. Lucas, *Traité de la Propriété Littéraire et Artistique*, op. cit., at p. 304.

the French Copyright Act. Indeed, the French legislation and case-law indicates that permissible uses should not exceed the strictly personal sphere of the copier<sup>292</sup> and his private circle, namely his close relations, such as his family.<sup>293</sup> Since the term ‘private’ is conceived as referring to a domain where collective uses do not have a place,<sup>294</sup> a copier that communicates or makes works available is not covered by the private copying limitation. Albeit not consistent, the French case-law is indicative in this respect by upholding the infringing nature of acts of uploading works online.<sup>295</sup>

Yet, the aforementioned indications do not suffice in establishing the private character of an audience for the purposes of Article 5(2)(b). They merely imply that uses made by an audience can be private or they cannot. In our view, there ought to be some criteria in determining the private character of uses made by, or within, an audience. Having gone through the national case-law on the private copying limitation we have identified that national courts examine diverse conditions to determine whether a use is private or not. Even though these conditions vary, and Courts do not go through each one of them every time they examine the legitimacy of private copying, we consider that they are valid criteria in establishing which uses are private or not. We have gathered these criteria and our aim exactly below is to build up a test upon which to premise the private character of permissible private copying.

## **2. A test in determining the private character of a use**

Judicial practice in Europe indicates that a distinction between ‘private’ and ‘public’ audiences cannot be made by use of a numerical criterion. For instance, a group of some hundreds of people have not been considered to constitute a public in some cases,<sup>296</sup> where in other cases

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<sup>292</sup> Court of Appeal, Lyon 7 Nov, 1958: RIDA 3/1957, p. 146 (*‘to escape punishment, the copies must be strictly reserved to the private use of the copier, whereas in this case the copier is a third party working effectively as an employee’*).

<sup>293</sup> Article L 122-5(1) of the French Intellectual Property Act: *‘Les représentations privées et gratuites effectuées exclusivement dans un cercle de famille.’* Canada adopts the same approach. see Commission du droit d’auteur, *Tarif des redevances à percevoir par la SCPCP en 2003 et 2004 sur la vente de supports audio vierges, au Canada, 2003-2004 (ci-après “CDA- Copie Privée III”)*, p. 20.

<sup>294</sup> S. Rompré, *‘Le régime de la copie privée face à Internet’*, *Lex Electronica*, vol. 12, no. 1, Spring 2007, p. 5, available online at <<http://www.lex-electronica.org/articles/v12-1/rompre.htm>>, lastly accessible on 9.9.2009; P. Alcaraz, *La notion de copie privée*, *Memoire de DEA de Propriété Intellectuelle*, Nantes, Faculté de Droit et des Sciences Politiques, Université de Nantes, 2002-2003, p. 4.

<sup>295</sup> Tribunal de Grande Instance, Toulouse 10.5.2005; Tribunal de Grande Instance, Créteil, 19.5.2005; Tribunal de Grande Instance, Lyon, 8.7.2005; Tribunal de Grande Instance, Bayonne 15.11.2005; Tribunal de Grande Instance, Châteauroux, 16.11.2005; *Netherlands: Internet – Piracy – The Home Copying Exception*, *Case Comment*, *Ent.L.Rev.*, 2009, 20(1), N. 3-4. Also see RIDA 1/97 nr. 140, p. 89; JCP, Éd. G. II 22727, note by F. Olivier and É. Barbry; JCP Éd. E. II, 881, note by B. Edelman (lyrics of the songs of Jacques Brel). The same day another injunction was issued on the same grounds as regards the uploading of works of Michel Sardou and others. See D. 1996, J. p. 490; RIDA nr. 171, January 1997, p. 361, note by C. Caron.

<sup>296</sup> *Duck v. Bates* (1883-84) L.R. 13 Q.B.D. 843, 850; *Harms (Incorporated) and Chappell & Co v. Martans Club, Ltd.* [1927] 1 Ch. 526.

smaller-sized groups have been deemed sufficient to form a public.<sup>297</sup> Mere numbers, therefore, cannot be the test.<sup>298</sup>

At the same time, Courts have examined the private character of a use through a series of qualitative conditions. For instance, they have considered a use to be private when made by the family and friends of the copier. Or even they have characterised a use as private when such use does not whittle down the rightholder's monopoly in terms that the rightholder would not expect this circle of recipients to buy extra copies of his work. These examples indicate that the relationship of the audience to the copier and to the rightholder have an interpretative value during the judicial determination of the private character of a use. We shall refer to these conditions as the character of the audience.

What is more, it appears that Courts draw a distinctive line between private uses made in public places and public uses realised in private premises. Indeed, the place where a use is made may matter in terms of the legitimacy of a use. For instance, a hotel room or a taxi may be conceived as public places for the purposes of copyright protection and, therefore, the use of copyrighted content made in such places be infringing, no matter how small the relevant audience might be.<sup>299</sup> At the same time, a music store accessible to the public at large may not infringe copyright if it provides earphone facilities so that its customers listen to the newest music tracks. The aforementioned examples illustrate that the location of the audience is a relevant criterion in determining the private character of a use.

Keeping in mind that the character and location of the audience are important determinants of the legitimacy of a use, we have developed a test which can be synthesised into the following main questions:

1. Does the audience have a special personal relationship with the copier?
2. Does the rightholder consider this audience to be part of his public as regards the exploitation of his works?
3. Is the place where the use is made a private place for the purposes of copyright protection?

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<sup>297</sup> *Performing Right Society, Ltd. V. Hawthorns Hotel (Bournemouth), Ltd.*, [1933] Ch. 855.

<sup>298</sup> *Jennings v. Stephens* [1936] Ch. 469, at 476.

<sup>299</sup> Finnish case 2002:101, Supreme Court: *Teosto v A Taxi Driver* [2004] ECDR 3; R. Paanila & M. Leppa, 'Finland: Copyright – Legislative Amendments and Recent Case Law', op. cit., N68-70. *Sociedad General de Auditores y Editores de España (SGAE) v Rafael Hoteles SL*, Case C-306/05, 7.12.2006 [2006] ECR 000. Finnish case 2002:20, Supreme Court/*Gramex*.

## 2.1. The character of the audience

We have already seen earlier in this thesis<sup>300</sup> that the beneficiaries of Article 5(2)(b) of Directive 2001/29/EC can be both the copier and a circle of users thereof. To determine whether these users are a ‘private’ audience, we need to examine their relationship with those that make the work or other subject-matter available to them for use, namely the copier and the rightholders. In particular, we need to examine how these users are related to the copier and whether the rightholders have a reasonable expectation to conceive these users as part of their public in the context of their exploitation rights.

### 2.1.1. The relationship of the audience with the copier: The criterion of ‘special personal relationship’

It is generally accepted that members of the family and friends form a private circle.<sup>301</sup> This is acknowledged by the Commission in its 2004 Working Paper. To the Commission, ‘the *immediate* family circle and the *closest* social acquaintances’ do not fall within the scope of a public audience.<sup>302</sup> In determining the scope of the private circle, the Commission is meticulous with the words that serve as the conceptual boundaries to the ‘non-public’. The family circle ought to be immediate and the social acquaintances close. This definition, interestingly, seems to restrict the scope of the private circle to the benefit of the rightholders since not many users can qualify as a private audience. Not all members of the family and not all friends comprise the private circle in terms of accessing copyright content. There has to be a special personal relationship between some members of the public so that they will be considered to form a private circle and to escape from the general definition of the public, even though they do not *stricto sensu* form the family of the copier.<sup>303</sup> Sure, the parents and siblings of the copier qualify as a private audience. Note, however, that the scope of the family circle varies amongst Member States, and while in some States family is conceived to be the immediate ‘nuclear’ family, other States confine this term a more enlarged meaning. This could be significant, for example, in determining the legitimacy of a music performance at a wedding party! What appears to be more problematic, however, is when an extra-familial circle, such as a social circle is considered to be ‘private’ within the meaning of Article 5(2)(b).

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<sup>300</sup> At page 63 *et seq.*

<sup>301</sup> Australian Copyright Council, ‘*Private Use Copying: Time-, Format- & Space Shifting*’, Information Sheet, GO97V01, Feb. 2008, p.1; Performances within a private group, such as friends and family, are permitted: J. P. Hugot, & O. Hugot, (2006) ‘The DADVSI Code: Remodelling French Copyright Law for the Information Society’, *Ent. L. Rev.* 17(5), pp. 139-144, at 142.

<sup>302</sup> Commission of the European Communities, Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, SEC(2004) 995, 19.7.2004, at p. 15.

<sup>303</sup> Wistrand indicates that there has to be a private link [*‘lien privé’*] between the copier and the recipients for the use to qualify as private. See H. Wistrand, *Les exceptions apportées aux droits de l’auteur sur ses œuvres*, op. cit., p. 316.

Some national laws explicitly provide that the copier has to have a special personal relationship with an audience for the use to be private. For instance, the Copyright Act of Liechtenstein requires a *close connection*, such as the one that characterises relatives or friends.<sup>304</sup> On similar grounds, the Polish Copyright Act mandates for a *personal interrelation*, such as the one that arises from blood relationship, kinship or friendship.<sup>305</sup> The Swiss Copyright Act reads that a private use is one that is made by a circle of persons that are *closely connected*, such as parents or friends.<sup>306</sup> Either put as a close connection or personal interrelation, the distinguishing criterion of the private sphere from the public at large in the field of copyright remains that of a special personal relationship between the audience and the copier.

The element of ‘special personal relationship’ is a qualitative condition in determining which uses are private and which are not. A copier may make strictly personal use of copyrighted content or use it with a circle of individuals with which he is personally connected. Still, it is only when this personal connection meets a ‘speciality’ threshold that a use can qualify as private. Determining speciality in this context is an issue of judicial examination and requires a case-by-case examination.<sup>307</sup> Indeed, a French Court held that the scope of ‘private’ use cannot be restricted to a strictly solitary use but it can also extend to a restricted circle of persons who share a family or friendship bond with each other.<sup>308</sup> Similarly, a Belgian Court ruled that a group of four people working together on a daily basis in an enclosed workplace accessible to them only are a private circle within the meaning of the private copying limitation. To the Court, these co-workers developed a tie that could be considered ‘private and intimate’. Indeed, the Court interpreted that the meaning of the phrase ‘private communication within the family circle’ could include a communication within a close group of people working together. This could include ties which are close enough to be considered equivalent to family ties, on the basis of a strong social relationship.<sup>309</sup> Speciality in this context is evaluated mainly in terms of the kind of intimacy involved. Interestingly, this point can also be found in Aristotle’s discussion on the private/public distinction!<sup>310</sup>

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<sup>304</sup> Article 22 of the Liechtenstein Copyright Law of 1999 identifies private use as ‘any use of the work in the personal sphere or within a circle of persons closely connected to each other, such as relations or friends’.

<sup>305</sup> Article 23 of the Polish Copyright Act of 4 February 1994, as amended up to February 5, 2005. The Article reads that ‘the scope of private use shall cover the use of single copies of the work by a group of persons staying in a personal interrelation with each other, including in particular blood relation, kinship or a social relationship’.

<sup>306</sup> ‘Par usage prive, on entend: a toute utilisation a des fins personnelles ou dans un cercle de personnes étroitement liées, tels des parents ou des amis.’ See Article 19(1) of the Swiss Federal Law of 9 October 1992 on the Right of Author and Neighboring Rights.

<sup>307</sup> Unfortunately, no Court in the EU has provided a ruling on this issue yet.

<sup>308</sup> *Studio Canal et al. V S. Penguin and Union Federale des Consommateurs Que Choisir*, Paris Court of Appeal, 4 April 2007, Gaz. Pal. 18/07/2007 No 199, p. 23.

<sup>309</sup> Unreported.

<sup>310</sup> See Aristotle, *Nicomachean Ethics*, Oxford University Press, 1954, at 1155b13-18, 28-1156a5.

No intimacy and no speciality in a personal relationship can be established, however, where the copier makes use of copyrighted content with a circle of users that he has not met before or are part of an enlarged circle of social acquaintances. For instance, the private copying limitation could not cover performances of films in a reunion where about twenty attendants met the organisers for the first time.<sup>311</sup> The same applied to another reunion organised by a sports organisation. In this reunion, non-member hockey players were attending with their families. This group again was not considered to be ‘private’ for copyright’s purposes since it consisted in an enlarged social circle.<sup>312</sup> One could question what the verdict of the courts would be if the use was made strictly within a group where membership is required to join in, such as a dancing club, a gym or a syndicate. In other words, are members of a group sufficiently related with each other so as not to be considered a public in the context of copyright protection? Case-law preceding the implementation of Directive 2001/29/EC indicates that members of such groups cannot make private use of copyrighted content. For instance, a group of employees belonging to a society was not considered to be making private use in France<sup>313</sup> and the performance of a play at an Institute before members of a club was held to be a public performance in the UK. In this latter case, the UK Court observed that the residence in ‘*the same village in different houses was not sufficient to make [these members of a club] a domestic or quasi-domestic audience*’ within the meaning of the CDPA.<sup>314</sup>

If members of clubs or other groups cannot qualify as a private circle, equally no private use of copyrighted content can be lawfully made in online forums. While these forums grant access to subscribers only, yet no selective process is made as to the identity of these subscribers. As a result, potentially anyone with an e-mail address can open an account and gain access to copyrighted content. This, however, does not help establish a special personal relationship of the forum’s administrator with the subscribers. As a result, the private copying limitation cannot apply. Would we reach a different conclusion if a selective process as to the potential users was set in place? Probably yes. Consider, for example, a blog which permits access only to invited guests. For instance, *blogger.com*<sup>315</sup> provides blog-authors with the option

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The intimacy criterion is also used in France. See, for instance, CA Grenoble, 28 feb. 1968, *RIDA*, July 1968, no. 57, p. 166, note by Desbois: *RTD Com.* 1968, p. 349; CA Paris, 1re ch., 13 may 1970: *Gaz. Pal.* 1970, 2, p. 46; T. Corr. Paris, 31e ch., 24 january 1984: *Gaz. Pal.* 1984, 1, p. 240, 1re esp., note Marchi. In this light, Lucas and Lucas state that ‘*l’intimité du cercle familial ou d’amis constitué par la réunion des parents, d’alliés ou des personnes ayant des relations habituelles.*’ See A. Lucas & H.-J. Lucas, *Traité de la Propriété Littéraire et Artistique*, op. cit., at p. 289.

<sup>311</sup> T. Corr. Paris, 31e Ch., 24 January 1984, note 435.

<sup>312</sup> TI Reins, 26 Oct. 1960: *Gaz. Pal.* 1961, 1, p. 36; *RTD Com.* 1961, p. 89, comment by Desbois.

<sup>313</sup> CA Douala, 3 march 1967: *RIDA* July 1968, n. 57, p. 164; *RTD Com.* 1968, p. 346, comment by Desbois; also see Cass. 1re Civ. 14 June 1972: *D.* 1972, p. 659; *RTD Com.* 1973, p. 262, comment by Desbois.

<sup>314</sup> *Jennings v. Stephens* [1936] Ch. 469.

<sup>315</sup> <www.blogger.com>

to select their readers by entering their e-mail addresses on a special form. If a blog-author uploads copyrighted content but at the same time has chosen her readers it is highly likely that she will benefit from Article 5(2)(b) since the mere selection of her audience could be proof of her relationship with them.

We have concluded from the analysis above that uses made within or by an audience qualify as private where the copier shares the copy or makes use of its contents with a close group of individuals with whom he is specially related by familial or social bonds. Besides the relationship of the copier with an audience, however, the relationship of the rightholder to that same audience is crucial in determining the private character of the use.

### **2.1.2. The relationship of the audience to the rightholder: The ‘monopoly’ test**

Consistent case-law from the UK indicates that a key criterion in establishing the private or non-private character of a use is whether the rightholder’s interests have been harmed by that use. For example, would the rightholder expect to be paid for this use? Does this use satisfy part of the public demand for the work and, thereby, reduce the rightholder’s potential income? We shall call this the ‘monopoly test.’ In *Duck v. Bates*,<sup>316</sup> the defendant performed a dramatic piece in a hospital room for the entertainment of about 170 nurses, attendants and other hospital workers free of admission charge. The Court held that the room where the drama was presented was not a place for public entertainment and that therefore this kind of use was not infringing. This was because such a private representation of the drama would not harm the rightholder, although a public representation in any place where the public were freely admitted with or without payment would.

Nonetheless, any distinction that might be drawn in this case between the public at large and a limited audience does not provide a workable formula, in our view, since there have been cases involving a limited audience in which the use has been deemed to be made in public. For instance, in *Ernest Turner v. Performing Right Society Ltd.*,<sup>317</sup> the owner of a factory played music in his factory to his 600 employees while strangers were not allowed to access. This use was held to be infringing for the purposes of the Copyright Act.<sup>318</sup> To the Court, it was important to

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<sup>316</sup> *Duck v. Bates* (1883-84) L.R. 13 Q.B.D. 843.

<sup>317</sup> *Ernest Turner Electrical Instruments, Limited v. Performing Right Society, Limited, Performing Right Society, Limited v. Gillette Industries, Limited* [1943] Ch. 167, p. 172-173. Also see *Jennings v. Stephens* [1936] Ch. 469 concerning a performance of a play for the members of a Women’s Institute; *Performing Rights Society v. Rangers FC Supporters Club* [1974] SC 49 where a band’s performance in the main lounge of a club before club members and their guests was held to be a performance in public.

<sup>318</sup> UK Copyright Act 1911, s. 1(2).

consider the relationship between the audience and the rightholder rather than the relationship between the audience and the person arranging the music performance, namely the employer. In Lord Greene's opinion, the 'statutory monopoly' granted under copyright law would be largely destroyed if performances to such audiences were permitted.

Albeit conflicting, the aforementioned judgements point to the conclusion that uses which are calculated to whittle down the rightholders' monopoly are considered to be addressed to a public and are, therefore, infringing.<sup>319</sup> Under this 'monopoly test', the critical question is whether the rightholder would fairly consider the audience as part of his public,<sup>320</sup> in terms that he would reasonably expect to sell extra copies to them. When uses are not calculated to reduce the value of the copyright monopoly, they are considered to be held in private; they do not, and cannot, have the substantial effect of depriving the rightholders of the public from whom they receive profit by selling their works. For instance, as indicated in the UK *Rangers* case, in a birthday party, the '*use of a copyright work is not rebounding to the financial disadvantage of the owner of the copyright, since the selected audience is not employing the work under conditions in which they would normally pay for the privilege in one form or another.*'<sup>321</sup> This could also be the case in a wedding party where an enlarged familial and social circle may be invited.

By contrast, uses that whittle down the value of the rightholders monopoly are considered to be public since the rightholders have a reasonable expectation to earn a profit from them. This could include performances held in public theatres or concert halls.<sup>322</sup> Of course, one can argue that amongst these public uses there might be some made to the best interests of the rightholders since they advertise the work and whet the public appetite in terms of increasing the number of ultimate sales. Still, when such uses are made by, or addressed to, a public they infringe copyright. This was held in *Performing Rights Society Ltd. v. Harlequin Record Shops Ltd.*,<sup>323</sup> where the defendant was a music shop playing music over loudspeakers. In its defence, *Harlequin* claimed that playing music in this context was beneficial to the rightholders since it could promote sales. However, this argument was rejected by the Court which went on to say that the performance was public and, hence, infringing. Publicity in this context was established on the basis that the audience comprised members of the public present in the music shops to which the public at large were permitted and encouraged to enter.

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<sup>319</sup> *Performing Rights Society v. Rangers FC Supporters Club* [1974] SC 49, pp. 65-66; *Performing Right Society v. Rangers FC Supporters Club, Greenock and Others* [1973] SLT (Notes), 52, at 52-53.

<sup>320</sup> *Performing Rights Society v. Rangers FC Supporters Club* [1974] SC 49, pp. 49-50.

<sup>321</sup> *Ibid.*, p. 59.

<sup>322</sup> *Ernest Turner Electrical Instruments, Limited v. Performing Right Society, Limited, Performing Right Society, Limited v. Gillette Industries, Limited* [1943] Ch. 167, p. 172-173.

<sup>323</sup> *Performing Rights Society Ltd. v. Harlequin Record Shops Ltd.*, (1979) 1 WLR 851.

In our view, the ‘monopoly test’ can also be applied in cases of digital private use. For instance, a user uploading a film on a file-sharing server so that other users can track and download whittles down the rightholders’ monopoly by depriving them of a number of sales that equate the number of unauthorised downloads. The argument that some downloaders may also go to the cinema afterwards and pay to watch the film does not suffice as a valid defence. At the same time, an individual sending an mp3 track to a friend through *msn-messenger* makes a private use since she does not deprive its rightholders from a public to which they would normally sell the track. We consider that in this latter case the private copying limitation applies.

We conclude from the aforementioned analysis that in the determination of the private character of an audience there are two conditions that need to be fulfilled. The first is that the audience has to be specially related with the individual who makes the copy available to them either by familiar or social bonds. The second is that the rightholders should not consider this audience to form part of their public in the context of their exploitation rights, or otherwise put, their copyright monopoly. If a use meets successfully these conditions, we then need to ‘localise’ the audience.

## **2.2. The location of the audience**

As Goldstein rightly acknowledges, ‘private’ copies can be used in public as well as private places.<sup>324</sup> Indeed, users may consume copyrighted content practically everywhere. This could include their home, the bus, or an online place, such as *youtube*.<sup>325</sup> Having gone through national case law we have observed that there might be public uses made in private places and private uses made in public places. National Courts indicate that the public or private character of the place where a use is realised may influence the legitimacy of the use. We shall therefore examine how the location of the audience affects the application of Article 5(2)(b).

### **2.2.1. Public uses in private premises**

There are cases where the use of copyrighted works is made in places accessible to only few individuals which may nonetheless qualify as a public audience. That would be, for instance, the case of playing music in a taxi, holding an open-guest party at home, or uploading a

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<sup>324</sup> P. Goldstein, *Copyright's Highway: from Gutenberg to the Celestial Jukebox*, Hill & Wang, New York, 1994, at p. 130.

<sup>325</sup> <<http://www.youtube.com>>

videoclip in a privacy-protected *facebook* account.<sup>326</sup> Do these uses benefit from the private copying limitation of Article 5(2)(b) of Directive 2001/29/EC?

Under the laws of some Member States, such as those of Germany and the common-law Member States, this question should be answered in the affirmative. This is supported by a statutory specification that permissible uses need to be domestic. Indeed, Article 53(1) of the German Copyright Act mandates that the use should be restricted to copying made by natural persons for domestic and personal purposes.<sup>327</sup> In the same vein, the copyright laws of the UK<sup>328</sup> and Ireland<sup>329</sup> stipulate that permissible use needs to be private and domestic. Interestingly, the UK CDPA indicates that the limited private-use exemption for the time-shifting of phonograms applies when the use takes place ‘in domestic premises’. The words ‘private’ and ‘domestic’ in the context of copyright protection are synonymous. In line with the UK statute, UK case-law indicates that performances to an audience or gathering which has a purely domestic character, or an enlarged domestic audience, are not in public.<sup>330</sup>

### Hotel rooms

Interesting case-law as regards the legitimacy of public uses made in private premises comes from the European Court of Justice. Consistent rulings of this Court underpin that hotel rooms, which are normally accessible by one or two persons only, cannot qualify as ‘private’ places in the context of copyright.<sup>331</sup> Whereas hotel rooms form part of the purely private or domestic sphere of a person and his family for the purpose of protecting fundamental human rights, in terms that intrusions in that sphere for the seizure of infringing material is unwelcome, ‘*the legal boundary between the private and the public is not necessarily the same in the area of copyright protection*’.<sup>332</sup> While intrusions in that sphere are unwelcome as violating the

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<sup>326</sup> <<http://www.facebook.com>>

<sup>327</sup> German Copyright Act of 10.9.2003 as amended by the Act of 26.10.2007 (‘second basket’).

<sup>328</sup> ‘*The making for private and domestic use of a recording of a broadcast or cable programme solely for the purpose of enabling it to be viewed or listened to at a more convenient time does not infringe any copyright in the broadcast or cable programme or in any work included in it*’: see s. 70 of the Copyright, Designs and Patents Act 1988, Ch. 48.

<sup>329</sup> Articles 101 and 240 of the Irish Copyright and Related Rights Act 2000.

<sup>330</sup> *Jennings v. Stephens* [1934.J.1427] [1935] Ch. 703, at 710-711.

<sup>331</sup> In this respect, a Finnish Court has provided a ruling that adheres to the ECJ stance. The Court accepted that hotel guests, albeit few in number, constitute ‘public’ in the context of the communication right. See: Finnish case 2002:20, Supreme Court/*Gramex*; R. Paanila & M. Leppa, ‘Finland: Copyright – Legislative Amendments and Recent Case Law’, op. cit., N68-70.

Interestingly, the same applies in the United States. The transmission of video cassettes of motion pictures to guest rooms was held to be a public performance, even though no more than one guest room could access a particular film at any time. See *On Command Video v. Columbia Pics*, 777 F.Supp. 787, 789-790, N.D. Cal. 1991.

In the UK, music played in the lounge of a hotel was considered to be a performance in public. See *Performing Right Society Ltd v. Hantborns Hotel (Bournemouth) Ltd.*, [1933] Ch. 885. In similar vein, performances audible in a restaurant were considered to be public. *Performing Right Society Ltd v. Camelo* [1936] 3 All E.R. 557.

<sup>332</sup> This probably responds to a question for a preliminary ruling by the Spanish Supreme Court on whether hotel rooms should be regarded as strictly domestic locations so that communication by TV sets should not be

fundamental right to privacy, hotel rooms qualify as public places for the purposes of copyright protection.

The determination of whether an audience is private in relation to the place where the use of copyrighted content takes place has been brought up in *Raphael Hoteles*.<sup>333</sup> In examining whether the provision of television facilities in hotel rooms amounts as a communication to the public, AG Sharpston created a test for distinguishing the private from the public in relation to the *locum* where the use takes place. Decisive in determining whether a communication has been made to the public are three criteria. Those would be (a) the extent of the circle of potential recipients of the communication, (b) the economic significance of that communication to the author,<sup>334</sup> and (c) the profit-making nature of the communication.<sup>335</sup> Although these criteria need to be examined cumulatively, we shall focus on the first one, namely the circle of the potential recipients. The Court upheld the existence of this criterion and held that whilst at a particular moment in time hotel guests cannot be more than one or two people, the fact that they quickly succeed each other cannot be neglected. The cumulative effects of such communication could be harmful to the rightholders.<sup>336</sup> Due to the lack of a ‘spatial continuity’ of hotel guests to hotel rooms, hotel customers constitute at a given time the public within the meaning and for the purpose of copyright.<sup>337</sup>

Reading the aforementioned judgement, one could perhaps conclude that the use of works cannot be private when users are not *spatially connected* to the place where the use is made. Nonetheless, such a conclusion as to the validity of the *spatial continuity* criterion would be premature, in our view. We consider that there may be occasions where users may not reside in, or somehow be connected to, the place where the use is made but still make lawful use. Consider, for instance, the example of group of friends that book a hotel room just to spend

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regarded as a communication. See Reference for a Preliminary Ruling from the Tribunal Supremo – Sala Primera Civil (Spain), 22.9.2006, *Entidad de Gestión de los Derechos de los Productores Audiovisuales (EGEDA) v Al Rima, S. A.*; Interesting comments on this case are provided in L. Bulger, ‘Are Works Communicated to through Television Sets in Hotel Rooms ‘a Communication to the Public’? *JIPLP* 2007, 2(5), 281-283.

<sup>333</sup> *Sociedad General de Auditores y Editores de España (SGAE) v Rafael Hoteles SL*, Case C-306/05, 7.12.2006 [2006] ECR 000.

<sup>334</sup> This reminds the ‘monopoly’ test, examined *supra* at p. 81 *et seq.*

<sup>335</sup> Opinion of Advocate General Sharpston delivered on 13 July 2006 in *Sociedad General de Auditores y Editores de España (SGAE) v Rafael Hoteles SL*, Case C-306/05, points 54-57; M.M. Frabboni, ‘European Union: Copyright – Communication to the Public’, *Ent.L.Rev.* 2002, 18(1), N1-3.

<sup>336</sup> *Sociedad General de Auditores y Editores de España (SGAE) v Rafael Hoteles SL*, Case C-306/05, 7.12.2006 [2006] ECR 000, point 39. This probably responds to a question for a preliminary ruling on whether a communication should be considered public because successive viewers have access to that communication. See Reference for a Preliminary Ruling from the Tribunal Supremo – Sala Primera Civil (Spain), 22.9.2006, *Entidad de Gestión de los Derechos de los Productores Audiovisuales (EGEDA) v Al Rima, S. A.*

<sup>337</sup> Opinion of Advocate General Sharpston in *Sociedad General de Auditores y Editores de España (SGAE) v Rafael Hoteles SL*, *op. cit.*, point 55.

Christmas Eve. One amongst them has brought some music from home so that they can all listen to it and perhaps sing along. Is this use public and therefore infringing? The answer is clearly no. Same as in *Raphael*, the group of friends is not spatially connected with the hotel room. And certainly, on the 26<sup>th</sup> of December there will be other hotel guests to succeed them. We consider that the difference of the example we gave with *Raphael* is the fact that in our example the group of friends qualifies as a private audience; it has a special personal relationship with the person who plays the music which can be established by the fact that they decided to spend Christmas together. What is more, this group of friends is not considered to be a public to which a rightholder would address his exploitation rights.<sup>338</sup> Indeed, as we have concluded earlier in this thesis, a private audience is personally related to the person providing a copy and is not considered to be part of a rightholder's public in the context of his exploitation rights. In *Raphael* none of these conditions is met since the hotel is in essence a commercial enterprise. Only natural persons may benefit from Article 5(2)(b), however. What is more, the hotel has a business relationship with its clients; commercial uses are excluded from Article 5(2)(b), as we shall examine later in this thesis.<sup>339</sup> What is more, rightholders have a reasonable expectation to receive royalties from hotels or other commercial enterprises, such as record stores,<sup>340</sup> the facilities of which are available to the public at large.

We have seen earlier that playing music over loudspeakers at a record store was held to be public performance in the UK since the audience comprised members of the public present in the music shops to which the public at large were permitted and encouraged to enter.<sup>341</sup> What if the same activity took place in an arguably private setting, like home? Would the judges issue the same ruling? We think not. Consider a birthday party held at home where loudspeakers have been installed to volume the music up. The only violation that we can identify in this example is the excessive noise that might disturb the neighbours but no copyright infringement thereof.

## **Taxis**

But if this is the case does the spatial continuity criterion have any relevance as to the identification of permissibility in a use? Speaking about the relationship of an audience with

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<sup>338</sup> For an extensive analysis of these criteria that determine the character of an audience see earlier in this thesis, at page 78 *et seq.*

<sup>339</sup> At p. 95 *et seq.*

<sup>340</sup> *Performing Rights Society Ltd. v. Harlequin Record Shops Ltd.*, (1979) 1 WLR 851.

<sup>341</sup> *Ibid.*

the place where the use is made, a Finnish decision that precedes *Raphael* comes to mind.<sup>342</sup> In *Teosto*, subject to examination was whether the act of playing music during a taxi journey in the presence of customers constitutes a communication to the public. To the Court, the number of the potential recipients of the communication is immaterial; in fact, however small that number may be, the taxi clientele is unspecified and, consequently, anyone paying the taxi can listen to that music.<sup>343</sup> Indicating that the clientele is unspecified, the Finnish judge considered the taxi to constitute a public place, and the act of playing music in this place a communication in public. To be treated as private, a communication should not be addressed but to a group of *specific* members of the public and not to individuals successively succeeding each other. It appears that the criterion of ‘spatial continuity’ adopted in *Raphael*, is reflected in the Finnish decision. However, it is conjunct with yet another element, namely the specificity of individuals in terms that successive access to works is not permitted. Of course, we should note that here again the use was considered to be public since the initiator of the transmission played the music in the course of his business, no matter the fact that he is a natural person. This parameter valued in the Court’s judgement and we shall analyse it later in this thesis.<sup>344</sup>

## Websites

The criteria of spatial discontinuity and of the specificity of individuals indicate that the place where a use is realised is an important determinant of the private character of the use, even though it is not the only criterion in evaluating its permissibility; there has to be an element of constant relationship of the users with the place where a use is realised. The constant relationship of the users with the location of the use inevitably begs the question whether this also applies to uses made online. Article 3(2) of Directive 2001/29/EC stipulates that the making available right consists in the provision of access to the work *from a place and at a time individually chosen* by members of the public. The ‘place’ most likely refers to the place where the member of the public is located, for instance, at an internet café or at home.<sup>345</sup> But the text may also be read to refer to the networked ‘place’, for example, a website, that the user contacts in order to gain access to the work.<sup>346</sup> Where this website is open to the public at large, such as *youtube.com*,<sup>347</sup> this is considered to be a public place enabling individuals to make

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<sup>342</sup> Finnish case 2002:101, Supreme Court: *Teosto v A Taxi Driver* [2004] ECDR 3; R. Paanila & M. Leppa, ‘Finland: Copyright – Legislative Amendments and Recent Case Law’, op. cit., N68-70.

<sup>343</sup> *Ibid.*

<sup>344</sup> At p. 100 *et seq.*, 113 *et seq.*

<sup>345</sup> The right of making available to the public would be meaningless if it did not also cover communications carried out in domestic premises or other private places. *Sociedad General de Auditores y Editores de España (SGAE) v Rafael Hoteles SL*, Case C-306/05, 7.12.2006 [2006] ECR 000, point 51.

<sup>346</sup> J. Ginsburg, ‘The (New?) Right of Making Available to the Public’, op. cit., at 242.

<sup>347</sup> <<http://www.youtube.com>>

use of copyrighted content in the privacy of their home. *Youtube.com* is considered to be a public place for copyright purposes since any member of the public can watch the uploaded videos not only successively but also at the same time with other users without degrading something in the quality or quantity of the uploaded copies.<sup>348</sup> So this means that *youtube* may be liable for contributory copyright infringement due to the provision of a platform to upload copyrighted content,<sup>349</sup> but users watching the videos are exempted from infringement for making passive private use of those videos. This is not the same for users engaging in uploading files, however, since they make those files available to the public at large.

This is not the case, however, with other types of websites. For instance, a user of *facebook.com*<sup>350</sup> who uploads a *youtube* video for his 'friends' to watch may not infringe copyright. The act of uploading a video consists in a dual set of activities, namely the reproduction of the video and its making available to some recipients. When the upload is meant to be kept for private use, no copyright infringement takes place and the limitation of Article 5(2)(b) of Directive 2001/29/EC applies. Essential in examining the legitimacy of *facebook* video-uploads is a determination of whether a group of friends is a private audience or not. *Facebook.com* is a special case of an online place since it enables users to choose amongst a series of privacy options. Users may choose to enhance their page's privacy settings and restrict its view only to people they confirm to be their friends. We consider that a privacy-protected *facebook* account will not qualify as a public place for copyright purposes since the 'friends' to which access is permitted are selected by the holder of this account; not anyone can have access. Enhanced privacy protection in such an account creates a spatial continuity of the online friends of the user to this online place in terms that it enables access to a specified audience. Where, however, privacy is not enhanced, potentially anyone with a *facebook* account can access the page. Visitors are not specified and, therefore, spatial continuity is not established. As a result, the private copying limitation of Article 5(2)(b) of Directive 2001/29/EC would not apply, in our view, and the uploader may be found to infringe copyright law.

In our opinion, the spatial continuity criterion equates the public or not characteristics of the place where a use is made with the private character of a use. So, once the location of an audience qualifies as private then the use made shall be private, too. If not, the use cannot

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<sup>348</sup> See P.M. Romer, 'Endogenous Technological Change', op. cit., at 573-574; also see Y. Benkler, 'A Political Economy of the Public Domain', op. cit., pp. 267-292, at 270-271 and footnote 9.

<sup>349</sup> In this respect one should not forget that in a US case Viacom asserted claims of direct wilful copyright infringement against Youtube for hosting over 100,000 of its clips. See *Viacom Intern. Inc v Youtube Inc* 540 F.Supp.2d 461 (S.D.N.Y., March 7, 2008).

<sup>350</sup> <<http://www.facebook.com>>

benefit from Article 5(2)(b). We consider that this criterion cannot be a workable formula in all cases, especially those where the use takes place in the premises of an enterprise or other place used in the course of business. Nonetheless, it should be subjected to examination once the place where the use is made may qualify as public. The only safe conclusion we can reach from the aforementioned analysis is that places which are considered to be private for the purposes of the protection of fundamental human rights may not be equally private within the meaning of copyright protection. For instance, a telephone conversation is covered by the right to privacy but, at the same time, music played over the telephone on hold may be infringing no matter the private setting of receiving this communication.<sup>351</sup>

The question is therefore whether private audiences can make lawful use in public places. We shall examine this parameter exactly below.

### **2.2.2. Private use in public places**

We consider that private uses that are realised in public places are legitimate no matter whether the works used are in analogue or digital form. For instance, an individual that listens to music on the train through earphones does not infringe performance rights, since the use he makes is not addressed to a public. In the UK case *Duck v. Bates*, a group of 170 nurses, surgeons, students of the hospital and other hospital employees that attended a theatrical performance in a hospital room was held to be a private performance.<sup>352</sup> The Court based this holding on the fact that the representation of the play was not made in a place destined for public entertainment.<sup>353</sup> In the same vein, the performance and authorisation of performing musical works in a dancing club in front of about 200 individuals, members of the club and their guests, was held to be private.<sup>354</sup>

Nonetheless, the legitimacy of private uses realised in public places is not equally straightforward in the online environment. As we have seen earlier in this thesis, websites are ‘places’ where uses of copyrighted content can be made.<sup>355</sup> In their majority, these places qualify as ‘public’ for the purposes of copyright protection. It is highly likely that these places are accessible by an indeterminate number of internet users. Do private uses made at a public website benefit from the private copying limitation of Article 5(2)(b) of Directive 2001/29/EC, or not?

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<sup>351</sup> See, for instance, *Australasian Performing Right Association Ltd. V. Telstra Corp. Ltd*, Australia Federal Court [1995] 31 IPR 289.

<sup>352</sup> *Duck v. Bates* (1883-84) L.R. 13 Q.B.D. 843.

<sup>353</sup> *Ibid*; *Duck v. Bates* (1883-84) L.R. Q.B.D. 79.

<sup>354</sup> *Harms (Incorporated) and Chappell & Co v. Martans Club, Ltd.* [1927] 1 Ch. 526.

<sup>355</sup> At page 87.

In defining the making available right in Article 3(2) of Directive 2001/29/EC, the Commission indicates that the ‘public [in the context of the making available right] consists of individual “members of the public”<sup>356</sup> that successively access the work from different places. It is immaterial whether the access occurs from websites or hard drives since files are equally available for accessing.<sup>357</sup> Take, for instance, the *youtube.com* example given *supra*.<sup>358</sup> Anyone wishing to watch a music video can locate it, if available, by visiting this website and watch it with friends or colleagues. Such use is private and benefits from Article 5(2)(b) since the audience qualifies as private no matter the fact that *youtube* is a public place within the meaning of copyright protection.<sup>359</sup>

One can question whether file-sharing networks are a place where private uses may also be made. In these networks, users can upload and download copyrighted content to share with other users. These networks are accessible to potentially anyone with an internet access. Users downloading content for their private use most likely will avoid litigation, irrespective of the fact that the Torrent is a public online place. This is affirmed by consistent case-law indicating that downloading may be made for private use. Uploading content on the other hand may be held, and has been held,<sup>360</sup> infringing; copies of material that are uploaded to online networks cease to be ‘private’ since they are made available to all those who can access the website, so that they can make further copies.<sup>361</sup> In our view, this is due to two reasons. The first relates to the identity of the users. Since users of online networks are far from having personal relationships, defining their uses as private is arguably difficult to defend. The second reason is associated with the cumulative effects of the use and the role of the user as an intermediary. When a work is made available, the subsequent retrieval of that work is thereby not covered by the making available right; rather, it may constitute a reproduction of the work according to Article 2 of Directive 2001/29/EC.<sup>362</sup> In this respect, the user breaks the copyright chain and,

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<sup>356</sup> European Commission, *Explanatory Memorandum to the Proposal for a European Parliament and Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, 10.12.1997, COM(97) 628 Final, p. 33.

<sup>357</sup> J. Ginsburg, ‘The (New?) Right of Making Available to the Public’, *op. cit.*, at 244.

<sup>358</sup> At p. 87-88.

<sup>359</sup> In this respect see *Viacom Intern Inc v Youtube Inc* 540 F.Supp.2d 461 (S.D.N.Y., March 7, 2008).

<sup>360</sup> Tribunal de Grande Instance, Toulouse 10.5.2005; Tribunal de Grande Instance, Créteil, 19.5.2005; Tribunal de Grande Instance, Lyon, 8.7.2005; Tribunal de Grande Instance, Bayonne 15.11.2005; Tribunal de Grande Instance, Châteauroux, 16.11.2005; ‘Netherlands: Internet – Piracy – The Home Copying Exception’, *Case Comment, Ent.L.Rev.*, 2009, 20(1), N. 3-4. Also see *RIDA* 1/97 nr. 140, p. 89; JCP, Éd. G. II 22727, note by F. Olivier and É. Barbry; JCP Éd. E. II, 881, note by B. Edelman (lyrics of the songs of Jacques Brel). The same day another injunction was issued on the same grounds as regards the uploading of works of Michel Sardou and others. See D. 1996, J. p. 490; *RIDA* nr. 171, January 1997, p. 361, note by C. Caron.

<sup>361</sup> J. Ginsburg & Y. Gaubiac, ‘Private Copying in the Digital Environment’, *op. cit.*, at p. 153.

<sup>362</sup> Th. Dreier, & P. B. Hugenholtz, *Concise European Copyright Law*, *op. cit.*, at p. 361.

by this, prejudices the interests of the rightholders.<sup>363</sup> Consequently, a use that takes place in the context of a collectivity of strangers and in violation of the author's privilege to exploit works exclusively cannot qualify as a private use. This was affirmed in a French case under which students uploading lyrics of songs onto a website could not benefit under the private copying limitation. To the Court, the copied lyrics were not meant to be used only by the students but also by anyone who accessed the website in point.<sup>364</sup>

In our view, the place where the use is made is not a sufficient determinant of the permissibility of a use. Yet, it is subjected to judicial examination as soon as it qualifies as a public place within the meaning of copyright protection. We have observed that the boundary of private and public places is not the same in different legal contexts. For instance, a place that qualifies as private for the purposes of the protection of human rights may be a public place within the realm of copyright. Case-law indicates that the determination of the private or not character of the place where the use of copyrighted content is realised requires an examination of the spatial continuity of the audience to the place. This means that once successive access is granted to an audience, the place qualifies as a public place and uses realised in such a place are highly likely to be deemed infringing. We consider that the examination of the private or not character of the location of an audience should be made but is not decisive as to the establishment of the private character of a use.

Through our analysis of the 'private' character of permissible uses within the meaning of Article 5(2)(b) of Directive 2001/29/EC we have reached two main conclusions. The first is that purely personal uses, namely uses made by a single individual, fall within the scope of permissible private use. In this context, we have argued that copying made by third parties on behalf of beneficiaries of the private copying limitation may be permitted as long as the 'physical copier', namely the person pushing the 'record' button is a natural person and not a legal entity. National laws are quite diverse as to whether third-party copying is permissible and a clarification at EU level could resolve this controversy. In our opinion, it would be absurd to restrict permissible private copying only to the 'physical' copier and not to the individual ordering a copy from him insofar as as the 'physical' copier is a natural person and

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<sup>363</sup> Therefore, such use would not be in accordance to the three-step test as articulated under Article 5(5) of Directive 2001/29/EC and examined *infra* at p. 117 *et seq.* D. Scolnik, 'Private Use out of Control: Disintermediation in the Music Business while the Bands Play on', *op. cit.*, at p. 13.

<sup>364</sup> See *RIDA* 1/97 nr. 140, p. 89; JCP, Éd. G. II 22727, note by F. Olivier and É. Barbry; JCP Éd. E. II, 881, note by B. Edelman (lyrics of the songs of Jacques Brel). The same day another injunction was issued on the same grounds as regards the uploading of works of Michel Sardou and others. See *D.* 1996, J. p. 490; *RIDA* nr. 171, January 1997, p. 361, note by C. Caron.

not a legal entity. We have further identified a grey zone of uses created when uses are made by, or addressed to, an audience. While public uses are certainly infringing, there is no clear distinction between what is considered to be a private and a public audience.

To address this issue, we built a test based on the interpretations of the term 'private' under national legislation and case-law. This test comprises a dual set of criteria that need to be examined so as to ascertain which audiences qualify as private and which do not. First, for the use to be lawful, the use needs to be private in terms that the audience making the use has to be personally related to the copier and should not be considered a public from which the rightholder expects to make a profit by exercising his exploitation rights. If the audience qualifies as a private circle of recipients we then need to 'localise' the use. The place of the use is an important, albeit not decisive, factor of its permissibility. We have concluded that a place that may be private for the purposes of the protection of fundamental human rights may not be considered as such within the meaning of copyright protection. A place is public in the context of copyright where an audience is not spatially connected to it and members of the public may successively access it. This applies to both geographical and cyber places, such as websites. As soon as the place where the use is made qualifies as public the legitimacy of the use is put at blunders.

Once the private character of a use is established, it is then essential to examine whether the use in question is commercial or not. Article 5(2)(b) excludes every form of commercial copying from its scope. Nonetheless, there is no interpretative standard as to the determination of which uses are commercial and, as a result, national legislations and case-law vary. On top of this national diversity, the traditional concept of 'commerciality' does not translate well in the digital environment where many of the private uses are made essentially for free. We will therefore attempt to determine which uses are commercial or not for copyright purposes with a view to define the scope of permissible uses under Article 5(2)(b) of Directive 2001/29/EC.

## Chapter II: The non-commercial character of permissible private copying under Article 5(2)(b) of Directive 2001/29/EC

Article 5(2)(b) of Directive 2001/29/EC indicates that permissible private use should be made *'for ends that are neither directly nor indirectly commercial'*. While this clearly excludes every form of commercial copying from the scope of the private copying limitation, no clarification is given as to the meaning of commerciality and non-commerciality. Indeed, Directive 2001/29/EC does not define the copyright owner's rights in commercial or non-commercial terms. Yet, it sometimes attaches legal significance to whether a use is 'commercial' or 'non-commercial'<sup>365</sup> or to whether a user is deemed to be a commercial or non-commercial entity.<sup>366</sup> Nonetheless, rarely are these terms defined, and the Directive offers no specific guidance on how to differentiate between commercial or non-commercial uses or users of copyrighted content.

One may wonder whether there is any meaningful distinction between commercial and non-commercial uses in the digital environment, since in our view the distinctive line between these uses is fuzzy as well as contested. It is questionable whether a blog with *Google AdSense*<sup>367</sup> makes a commercial use of the uploaded content. Equally controversial is the question as to whether an individual downloading a movie from a file-sharing server makes a commercial use of that content since he merely saves money from buying the original. The distinction between commercial and non-commercial uses does not translate well in the digital environment where most uses are not *stricto sensu* carried out for profit, yet they may be beneficial in other ways. One could argue that even if there was a clear legal definition of what constitutes commerciality in a copyright use the inverse definition would probably not adequately capture the concept of non-commerciality.<sup>368</sup> Some evidence in this respect can be tracked down to

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<sup>365</sup> See, for instance, Article 5(2)(c) of Directive 2001/29/EC: *'Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 [...] in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage.'*

Article 5(3)(a) of Directive 2001/29/EC: *'Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 [in the respect of] use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved.'*

Article 5(3)(b) of Directive 2001/29/EC: *'Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 [in the case of] uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability.'*

Article 5(3)(j) of Directive 2001/29/EC: *'Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 [in the case of] use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use.'*

<sup>366</sup> For instance, Recital 40 of the Directive reads that *'[m]ember States may provide for an exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions, as well as archives.'*

<sup>367</sup> < [www.google.com/adsense](http://www.google.com/adsense) >

<sup>368</sup> Note that in a recent Study on the meaning of non-commerciality most respondents thought that if they had been given some definition of a commercial use, they would give non-commerciality the inverse definition. See

national case-law which examines different conditions to establish a commercial character in the use and other conditions to determine non-commerciality. For instance, if commercial uses are those from which the user makes money, non-commercial uses would have to be those from which the user does not *intend* to make money.

Our aim in this section of the thesis shall be to provide some interpretative guidelines as to how non-commerciality should be defined in the context of Article 5(2)(b) with a view to identify which acts of private use are permitted and which are not. Defining the meaning of the phrase *‘for ends that are neither directly nor indirectly commercial’*, as used by this article, is very difficult. The silence of the Directive as to what a non-commercial use is has led to divergent approaches amongst Member States which confine to its meaning either broader or narrower definitions. This results to legal uncertainty as to the scope of non-commercial uses. Where non-commerciality is broadly defined, for instance, by also covering economically significant uses, the scope of permissible private uses is restricted. Under such broad definition, the status of the private copying limitation is endangered since, in our view, every copy made and not bought may have an economic effect to the interests of the rightholders. At the same time, where non-commerciality is very narrowly defined, for instance by excluding profit-making activities only, the private copying limitation may not successfully pass the scrutiny of the three-step test of Article 5(5) in terms that economically prejudicial copying may be still permitted. This latter test is in essence an ‘economic-prejudice’ test for determining the legitimacy of copyright limitations; it is yet another condition for the permissibility of an exempted use, such as private copying! Under this test, a copyright limitation (a) should be defined as a certain special case, (b) it should not come in conflict with the normal exploitation of a work and (c) it should not unreasonably prejudice the legitimate interests of the rightholders. Since, in our view, this test assesses the economic effects of copyright limitations it is essential to subject digital private copying to it so as to safely ascertain its non-commercial character.

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Netpop Research, *Defining “Non-Commercial”: A Study on How the Internet Population Understands “Non-Commercial Use”*, Creative Commons Corporation, September 2009, p. 50.

## Section 1: The meaning of ‘non-commerciality’ in the context of Article 5(2)(b) of Directive 2001/29/EC

Article 5(2)(b) of Directive 2001/29/EC clearly excludes from its scope any form of commercial copying. As a matter of language, this article reads that reproductions are permissible when made *‘for ends that are neither directly or indirectly commercial’*. This wording indicates that *every* act of commercial use cannot benefit under the private copying limitation. Interestingly, a different phrasing was used in the 1998 proposal for the Directive 2001/29/EC; private reproductions were permitted as long as they were made *‘for non-commercial ends’*.<sup>369</sup> No distinction was made between direct or indirect non-commerciality. This wording was maintained up to 2001<sup>370</sup> when the Parliament adopted the phrase currently incorporated in the Directive.<sup>371</sup> The Commission expressed its confidence that this new version of the non-commerciality criterion clarified adequately the meaning of *private* use!<sup>372</sup> Under this statement, with which we agree, the absence of a commercial purpose in a use guarantees its private character.

While a private use cannot theoretically be commercial, it is questionable whether a non-commercial one shall remain private. As Bernault and Lebois rightly put it, even if private use is incompatible with the commercial use of the copy, the absence of commerciality does not necessarily signify that the use is private.<sup>373</sup> For instance, raising funds for charity purposes by selling artwork or other copyright materials is a non-commercial practice but certainly is not meant to be kept private. The ‘non-commercial’ purpose of the use, therefore, does not form

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<sup>369</sup> Proposal for a European Parliament and Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, COM/97/0628 final, COD 97/0359 \*/, *Official Journal* C 108, 07.04.1998, p. 0006, at p. 0011.

<sup>370</sup> Legislative resolution embodying Parliament’s opinion on the Proposal for a European Parliament and Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, COM (97) 0628 C4-0079/98 97/0359 (COD) (Co-decision Procedure: First Reading), *Official Journal* C 150, 28.05.1999, p. 171, at 179; Amended Proposal for a European Parliament and Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, COM/99/0250 final – COD 97/0359\*, *Official Journal* C 180, 25.06.1999, p. 0006, at 0012; Common Position (EC) No 48/2000 of 28 September 2000 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a Directive of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, *Official Journal* C 344, 01.12.2000, p. 0001-0022, at p. 0009.

<sup>371</sup> European Parliament legislative resolution on the Council common position for adopting a European Parliament and Council directive on the harmonisation of certain aspects of copyright and Related Rights in the Information Society, 9512/1/2000 – C5-0520/2000 – 1997/0359 (COD), 14.2.2001, at amendment No. 5.

<sup>372</sup> Commission of the European Communities, Commission Opinion pursuant to Article 251(2)(c) of the EC Treaty, on the European Parliament’s Amendments to the Council’s Common Position regarding a Proposal for a Directive of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, Amending Proposal of the Commission pursuant to Article 250(2) of the EC Treaty, Brussels, 29.3.2001, COM(2001) 170 final, 1997/0359(COD), at p. 3.

<sup>373</sup> C. Bernault, & A. Lebois, *Peer-to-peer File-Sharing and Literary and Artistic Property: A Feasibility Study regarding a system of compensation for the exchange of works via the Internet*, Institute for Research on Private Law, University of Nantes, June 2005, p. 30.

a stand-alone test; rather, it should be subject to examination as soon as the activity at issue qualifies as private. Indeed, where the use is not private, examining its non-commercial character is redundant. This is because public uses of copyrighted content will most likely be held infringing at a Court examination due to the fact that most exploitation rights in copyright entail the notion of a public.<sup>374</sup> As Lucas and Lucas rightly point out, the fact that the copier has received no profit does not indicate that the use is lawful if this use becomes public.<sup>375</sup> For instance, US courts have found that the infringer receives benefit from releasing a copyrighted work to the general public, irrespective of the fact that the activity was not commercial.<sup>376</sup> We therefore consider that where the private character of the use is not established, the private copying limitation cannot apply irrespective of the lack of commerciality in the use.

By the time that a use qualifies as private, it is then essential to examine whether this use is commercial or not. Note that the private and non-commercial character of a use are cumulative conditions for the application of Article 5(2)(b); a use has to be both private and non-commercial to be permitted. Nonetheless, more than half EU Member States do not condition the permissibility of private copying upon its non-commercial character.<sup>377</sup> At the same time, the few national laws that set non-commerciality as a requirement vary considerably<sup>378</sup> by providing either broader or narrower stipulations. For instance, the

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<sup>374</sup> Examined earlier, at p. 53 *et seq.*

<sup>375</sup> A. Lucas & H.-J. Lucas, *Traité de la Propriété Littéraire et Artistique*, op. cit., at p. 303; D. Panethiere, *The Persistence of Piracy: The Consequences for Creativity, for Culture, and for Sustainable Development*, op. cit., p. 11.

<sup>376</sup> Prosecutions against internet piracy rings such as Drink or Die and associated actions are presented at <<http://www.cybercrime.gov/iplaws.html>>. See also the extradition proceedings for Mr Griffiths, a leader of the “Drink or Die” in Australia, in the decision *USA v Griffiths* [2004] F.C.A. 879 and on appeal to the Full Federal Court at [2005] F.C.A.F.C. 34 (March 10, 2005). The prosecutions in the UK for members of the infamous copyright piracy ring have only been reported in newspaper articles, see for example, <[http://news.cnet.com/DrinkorDie-pair-convicted-of-software-piracy/2100-7348\\_3-5623999.html](http://news.cnet.com/DrinkorDie-pair-convicted-of-software-piracy/2100-7348_3-5623999.html)>, lastly accessible on 9.9.2009.

<sup>377</sup> There is no statutory mention in Austria, Belgium, Cyprus, France, Germany, Greece, Ireland, Liechtenstein, Poland, Portugal, Switzerland and the UK. It is only indirectly implied that the use should not be directed to any other, than strictly private, purposes in the Czech Republic [See Articles 25 and 30 of Law No. 121/2000 Coll. of 7 April 2000 on Copyright, Rights Related to Copyright and on the Amendment of Certain Laws, as amended by Act of 21 January 2005, 81/2005], Finland [Article 12 of Copyright Act (Law No. 404, of July 8, 1961 as amended by Law No. 748, of October 9, 1998 and Law No. 821, of October 14, 2005)], the Netherlands [Article 16 of the Copyright Act of 1912 of the Netherlands as amended on July 6, 2004 and January 20, 2006], Romania [Article 34(1) of Law no. 8/1996 on Copyright and Neighbouring Rights (*amended by* Law no. 285/2004, by EGO no 123/2005) and Sweden [Article 12 of the Act on Copyright in Literary and Artistic Works, No. 1960:729, of December 30, 1960, as amended by Government Bill No. 2004/2005:110].

<sup>378</sup> Hungary [Article 35(1) of Act No. LXXVI. of 1999 on Copyright, as amended by Act No. LXXVIII. of 2001 and Act No. CII of 2004], Italy [Article 71 *sexties* (1) of the Italian Law on the Protection of Copyright and Neighbouring Rights [Law No. 633 of April 22, 1941, as last amended by Legislative Decree No. 68, of April 9, 2003]: *provided that it has not a gainful intent, nor does it have direct or indirect commercial purposes*.], Latvia [Article 34(1) of the Latvian Copyright Law as last amended on April 22, 2004], Lithuania [Article 20(1) of Law amending the Law on Copyright and Related Rights, No. IX-1355, of March 5, 2003], Luxembourg [Article 10(4) of Law of April 18, 2001 on Copyright, Neighbouring Rights and Databases, as amended on April 18, 2004 (Memorial A, no. 61 du 29 avril 2004, pp. 942-948)], Malta [Article 9(1)(c) of the Copyright Act XIII of 2000, as amended by Acts VI

Hungarian Copyright Act mandates that a private copy should ‘not [be] designed for earning or increasing income even in an indirect way.’<sup>379</sup> This definition of non-commerciality is very restrictive, in our view, since it covers acts that are not carried out for profit. We consider that this could create legal uncertainty as to which uses qualify as non-commercial since the income raised from a use is an easily identifiable criterion. At the same time, the laws of other Member States, such as Finland,<sup>380</sup> stipulate that private copies ‘may not be used for other purposes’, other than private use. These purposes may be commercial, economic, profit-making, business-related, and so on. We consider that this abstract formula of ‘other purposes’ restricts the scope of permissible private copying. Since the implementation of the non-commerciality criterion did not yield an expected degree of uniformity across the EU, uncertainty with respect to the scope of the private copying limitation remains. These discrepancies do not create certainty to users as to which uses are permitted and which are not, and hinders the creation of a level playing field for the rightholders. As indicated in Recital 6 of Directive 2001/29/EC, ‘[s]ignificant legal differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights.’

In the confusion as to the definition and scope of non-commerciality, one should acknowledge that it was Directive 2001/29/EC which first introduced non-commerciality as a prerequisite for permissible private copying. Before the enactment of this Directive, national legislations across the EU did not require permissible private uses to be non-commercial. Indicative in this respect is the fact that some of the Member States,<sup>381</sup> where the private copying limitation used to exist prior to this Directive, did not update their relevant provisions, a phenomenon referred to as a ‘grandfather’ tendency.<sup>382</sup> It were these legislations,

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of 2001 and IX of 2003, Government Gazette of Malta, No. 17467], Slovakia [Article 24(1) of Copyright Act No. 618/2003 of December 4, 2003], Slovenia [Article 50(2)(2) of Copyright and Related Rights Act, as amended on May 11, 2004, Official Gazette RS No. 43/04], Spain [Article 31(1)(2) of the Consolidated Text of the Law on Intellectual Property, regularising, clarifying and harmonising the applicable statutory provisions (approved by Royal Legislative Decree 1/1996 of April 12, 1996, and amended by Law 5/1998 of March 6, 1998, incorporating Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases): ‘provided that the copy is not put to either collective or profit-making use’]. Also the EEA States Iceland, [Article 11(1)] and Norway [Article 12 of the Act No 2 of 12 May 1961 relating to Copyright in Literary, Scientific and Artistic Works as last amended on 17 June 2005: ‘provided that this is not done for purposes of gain’].

<sup>379</sup> Article 35(1) of Act No. LXXVI. of 1999 on Copyright, as amended by Act No. LXXVIII of 2001 and Act No. CII of 2004.

<sup>380</sup> Article 12 of the Copyright Act (Law No. 404, of July 8, 1961 as amended by Law No. 748, of October 9, 1998 and Law No. 821, of October 14, 2005)

<sup>381</sup> Such as Austria, Belgium, Cyprus, France, Germany, Greece, Ireland, Liechtenstein, Poland, Portugal, Switzerland and the UK.

<sup>382</sup> T. Heide, ‘The Approach to Innovation under the Proposed Copyright Directive’, op. cit., pp. 215-232, p. 228; L. Guibault, ‘The Nature and Scope of Limitations and Exceptions to Copyright and Neighbouring Rights with Regard to General Interest Missions for the Transmission of Knowledge’, op. cit., p. 316-317; P.B. Hugenholtz, ‘Why the Copyright Directive is Unimportant, and Possibly Invalid’, op. cit., p. 499; T. C. Vinje, ‘Should we Begin Digging Copyright’s Grave’, op. cit., p. 551; G. P. Cornish, ‘Libraries and the Harmonisation of Copyright’,

*inter alios*, however, that inspired the European legislators to formulate Article 5(2)(b) and provide a harmonised provision to apply throughout the EU. Since non-commerciality in the context of the private copying limitation did not pre-exist at European level, its introduction by the Directive could not have been incidental; rather, the European legislator used non-commerciality as a criterion to separate private copying from commercial and, hence, infringing uses.

Indicative in this respect is the wording used to define the non-commerciality requirement in Article 5(2)(b) which stipulates that it is both direct and indirect commercial copying that is excluded from the scope of the exception. In our view, the exclusion of both directly and indirectly commercial uses appears *prima facie* to be redundant; simply dictating that *any* form of commercial copying is prohibited could arguably lead to the same effect. Yet, the Directive's articulation is surprisingly too precise; no further specification is given, however, by Directive 2001/29/EC. As a result, much as its meaning seems quite clear, non-commerciality is a vague concept with no settled legal contour. These unclaritys are even more paramount in the digital environment where most uses have no clear commercial nature, since they are not carried out for profit. Our purpose below is to define non-commerciality by use of national legislation and case-law with a view to determine which acts of private copying are permissible and which are not. At some points we will also use the example of the United States, where the issue of non-commerciality has been subject to more extensive judicial examination, and see if we can draw any valuable conclusions that can also apply in the EU context.

Before examining what the meaning and scope of non-commerciality is under Article 5(2)(b) of Directive 2001/29/EC, we first need to define which uses qualify as commercial in copyright law. This is particularly important vis-à-vis Directive 2004/48/EC<sup>383</sup> which lays down a series of draconian procedures on the enforcement of intellectual property rights against infringements carried out '*on a commercial scale*'. At the same time, the proposed Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights provides measures against commercial infringements, too.<sup>384</sup> For instance, if file-sharing is considered to be commercial judicial authorities may order the precautionary seizure of the

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*EIPR*, 1998, pp. 241-243, p. 241; M. Hart, 'The Proposed Directive for Copyright in the Information Society: Nice Rights, Shame about the Exceptions', *op. cit.*, at p. 169; R. Burrell & A. Coleman, *Copyright Exceptions: The Digital Impact*, *op. cit.*, pp. 302-304.

<sup>383</sup> Corrigendum to Directive 2004/48/EC, *op. cit.*

<sup>384</sup> See Proposal for a European Parliament and Council Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights/Proposal for a Council framework decision to strengthen the criminal law framework to combat intellectual property offences, {SEC(2005)848}, Brussels, 12.7.2005, COM(2005)276 final, 2005/0127(COD), 2005/0128(CNS).

movable and immovable property of the alleged infringer, including the blocking of his bank accounts and other assets.<sup>385</sup> Below we examine the elements that comprise the concept of commerciality.

## 1. Defining ‘commerciality’ in copyright

While Directive 2001/29/EC does not define the copyright owner’s rights in terms of commercial or non-commercial use, it excludes every form of commercial use from the scope of the private copying limitation. It stipulates that permissible private copying should be made ‘*for ends that are neither directly nor indirectly commercial.*’ In this sense, it attaches legal significance to the distinction between ‘commercial’ and ‘non-commercial’ uses. Nonetheless, neither of these terms is defined, and the Directive offers no specific guidance as to their interpretation.

Such guidance, however, can be tracked down to Directive 2004/48/EC on the enforcement of intellectual property rights. Recital 14 of this Directive indicates that ‘*[a]cts carried out on a commercial scale are those carried out for direct or indirect economic or commercial advantage; this would normally exclude acts carried out by end-consumers acting in good faith.*’ In our view, this definition given to commercial uses appears to be *quite* the inverse stipulation of non-commerciality used in the context of the private copying limitation; yet, it is not *exactly* the inverse definition. Uses made on a commercial scale may also entail an economic significance. This element, however, is missing from Article 5(2)(b) of Directive 2001/29/EC whereas the European legislator is familiar with the economic impact that private copying may have in the digital environment. Indeed, Recital 38 to Directive 2001/29/EC acknowledges that ‘*[d]igital private copying is likely to be more widespread and have a greater economic impact*’. One can then wonder if uses carried out with a view to gain should be exempted from Article 5(2)(b).

Our aim below is to explore the elements that comprise the concept of commercial use. Certainly, exclusive rights in copyright contain an element of commerciality, even though this does not appear on statute. Yet, these rights refer to the commercial *exploitation* of a work and not to its commercial *use* thereof. As we have illustrated earlier, copyright has refrained from granting rights to use a work.<sup>386</sup> Our focus shall therefore be to analyse commerciality in the context of use made by ordinary individuals. This analysis would not be complete if we do not address the issue of uses bearing an economic significance and see whether these uses are substantially different from commercial uses or included within their scope. If there is any

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<sup>385</sup> Article 9(2) of Corrigendum to Directive 2004/48/EC, op. cit.

<sup>386</sup> At p. 50.

such difference we will then examine whether and how this may have an impact on the scope of Article 5(2)(b).

### 1.1. The elements of ‘commerciality’

The fear that with digitisation the risk of piracy and improper unauthorised use shall be increased was first expressed at European level as soon as 1995 in the Green Paper on Copyright in the Information Society.<sup>387</sup> Since then, the copyright industries have tended to redefine commercial uses to mean ‘unlicensed’, as Litman rightly points out.<sup>388</sup> We consider that this unprincipled expansion of the notion of non-commerciality vis-à-vis private uses<sup>389</sup> is not legally accurate. Not every use that bears resemblance to, or even has the same effect as piracy should be considered *a priori* as infringing. And while pirates may engage in the same activities as unlicensed users, there are some points where the private and the pirate copy are differentiated in terms of permissibility. Indeed, even though both piracy and private copying take place without the consent or other authorisation of the rightholder,<sup>390</sup> piracy takes place on a commercial scale as opposed to permissible private copying. To Davies and Hung, with whom we agree, this is what differentiates private copying from piracy, the latter being defined as the unauthorised copying for commercial exploitation.<sup>391</sup> Similar definitions are also given by other scholars, such as Panethiere, who defines piracy as the unauthorised manufacture and distribution of intellectual creations with the objective to obtain a commercial advantage of some kind.<sup>392</sup>

We consider that infringements carried out on a commercial scale, such as piracy, are characterised by two main elements. The first one involves a set of copyright infringing

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<sup>387</sup> Commission of the European Communities, *Green Paper: Copyright and Related Rights in the Information Society*, op. cit., at p. 28, point 70 and p. 79.

<sup>388</sup> J. Litman, ‘Lawful Personal Use’, op. cit., p. 1874.

<sup>389</sup> M. Meurer, ‘Too Many Markets or too Few? Copyright Policy Towards Shared Works’, 77 *S. Cal. L. Rev.*, 2004, 903, at 952; J. Tehrani, ‘Et tu Fair Use? The Triumph of Natural Law Copyright’, 38 *U. C. Davis L. Rev.*, 2005, 465, at 502-503.

<sup>390</sup> Both piracy and private copying take place without the authorisation of the rightholders. National laws explicitly stipulate that the act of private copying may permissibly occur without the rightholders’ authorisation or consent: See, for instance the copyright laws of Belgium, Bulgaria [Article 25 of Law on Copyright and Neighbouring Rights, Published in State Gazette No. 56/1993, lastly amended on January 1, 2003], Estonia [Article 18 of the Copyright Act of November 11, 1992 (RT 1992, 49, 615; consolidated text RT I 2000, 16, 109), entered into force on December 12, 1992, as lastly amended by the Act of 22.09.2004, entered into force 29.10.2004 – RT I 1999, 54, 580], France, Greece, Latvia, Lithuania [Article 20 of the Law amending the Law on Copyright and Related Rights, No. IX-1355, of March 5, 2003], Malta [Article 9 of the Copyright Act XIII of 2000, as amended by Acts VI of 2001 and IX of 2003, Government Gazette of Malta, No. 17467], Poland, Portugal, Romania, Slovakia [Article 24 of Copyright Act No. 618/2003 of December 4, 2003] and Spain.

<sup>391</sup> G. Davies & M.E. Hung, *Music and Video Private Copying: An International Survey of the Problem and the Law*, Sweet & Maxwell, 1993, p. 1 and 4.

<sup>392</sup> C. I. Dalamaras, *Copyright and Challenges to Copyright: The case of Piracy’ and ‘Private Copying’*, Center of Education, Research & Development, Athens 1999, p. 65; D. Panethiere, *The Persistence of Piracy*, op. cit., p. 10-11; M. Flint, N. Fitzpatrick & Cl. Thorne, *A User’s Guide to Copyright*, op. cit., at 33.06-33.08; J.A.J. Sterling, *World Copyright Law*, Sweet & Maxwell, London, 1999, at 13.12.

activities to take place. Those would be the reproduction and the distribution of works thereof without the authorisation or consent of the rightholder. One can only wonder how the creation of multiple copies of a work would impact copyright protection if these copies were not subsequently distributed. Commercial activities, therefore, entail a ‘trade’ element or, put in copyright terms, an act of distribution, communication or other form of making a work available to the public. The second element that distinguishes commercial uses from private copying is the profit-making character of the use. When copies are bootlegged or counterfeited in large quantities to be subsequently disseminated to the public, there is a good reason to establish an intention to make a profit out of those copies. This is not always the case however. For instance, one might produce a large amount of copies of a speech made by someone he dislikes just to dispatch it in the public domain! While this use is clearly non-commercial, it is still infringing since it involves an unauthorised act of distribution to the public.

Below, we examine these two elements on which the concept of commerciality is premised, namely trade and profit.

### 1.1.1. Trade

Copyright law provides legal control over the exchange of works.<sup>393</sup> This is manifested through the exclusive rights granted to the rightholders, such as the distribution right,<sup>394</sup> the communication and making available right,<sup>395</sup> the rental and lending rights.<sup>396</sup> By virtue of these rights, works are traded under terms defined by copyright law and derogations from this rule have to be statutorily provided to be permitted. In lack of such an express derogation, which normally takes the form of a copyright exception or limitation, third parties that break the copyright chain in this legally protected ‘trading’ process<sup>397</sup> infringe copyright. The ‘trade’ element in commercial uses is apparent in the provisions of secondary infringement found in the copyright law of some States, such as the UK law. These provisions mandate that criminal liability for copyright infringements arises when the copies are made or possessed with the

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<sup>393</sup> M. L. Montagnani & M. Borghi, ‘Positive Copyright and Open Content Licences: How to Make a Marriage Work by Empowering Authors to Disseminate their Creations’, *International Journal of Communications Law and Policy*, *IJCLP*, Winter, Vol. 12, 2007, pp. 244-273, see fn 6.

<sup>394</sup> Article 4 of Directive 2001/29/EC.

<sup>395</sup> Article 3 of Directive 2001/29/EC.

<sup>396</sup> See Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property repealing Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, *Official Journal L* 376, 27.12.2006, pp. 28-35.

<sup>397</sup> D. Scolnik, ‘Private Use out of Control: Disintermediation in the Music Business while the Bands Play on’, 5 *Intell. Prop. L. Bull.*, 2000, pp. 13-34, at p. 13.

purpose of selling, letting for hire or dealing with the infringement in the course of trade.<sup>398</sup> This latter phrase, namely ‘in the course of trade’, has been statutorily recognised to refer to activities undertaken by a commercial enterprise or an entity that has an ongoing concern aiming at making a profit.<sup>399</sup>

While uploading works on a file-sharing server may not be held as carried out ‘in the course of trade’, it entails a trading activity in terms that it consists in an act of making works available to the public from a place and at a time individually chosen by the file-sharer. This act has been held infringing several times so far, since it infringes the making available right once the use is addressed to an audience that qualifies as public within the meaning of copyright protection.<sup>400</sup> Indeed, as we have illustrated earlier in this thesis,<sup>401</sup> most of the exclusive rights in copyright are addressed to a public, this being apparent in their statutory definition. When a use is made by, or within, a private audience it does not violate copyright, regardless of the fact that it may resemble an act reserved by copyright.<sup>402</sup> There ought to be some sort of public diffusion of the copyrighted content for the use to be infringing. We have also concluded earlier that the private copying limitation cannot apply to the acts of communicating works or otherwise making them available to the public.<sup>403</sup> This means that a file-sharer who uploads content online infringes copyright since he is involved in a trading process that is not statutorily exempted from infringement.

Albeit infringing, the mere engagement in file-sharing uploads does not suffice in establishing commerciality in a use. This is because commercial uses are characterised by yet another element which, in our view, is missing from this kind of infringing use: this would be profit.

### 1.1.2. Profit

Defining what a ‘commercial scale’ means within the meaning of the proposed Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights,<sup>404</sup> the

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<sup>398</sup> See in this respect s. 108 of the Copyright, Designs and Patents Act 1988 (CDPA)

<sup>399</sup> See Sale of Goods Act, 1979; Sale and Supply of Goods Act, 1994; Civil Partnership Act 2004.

<sup>400</sup> See for instance: Tribunal de Grande Instance, Toulouse 10.5.2005; Tribunal de Grande Instance, Créteil, 19.5.2005; Tribunal de Grande Instance, Lyon, 8.7.2005; Tribunal de Grande Instance, Bayonne 15.11.2005; Tribunal de Grande Instance, Châteauroux, 16.11.2005; ‘Netherlands: Internet – Piracy – The Home Copying Exception’, Case Comment, *Ent.L.Rev.*, 2009, 20(1), N. 3-4. Also see *RIDA* 1/97 nr. 140, p. 89; JCP, Éd. G. II 22727, note by F. Olivier and É. Barbry; JCP Éd. E. II, 881, note by B. Edelman (lyrics of the songs of Jacques Brel). The same day another injunction was issued on the same grounds as regards the uploading of works of Michel Sardou and others. See *D.* 1996, J. p. 490; *RIDA* nr. 171, January 1997, p. 361, note by C. Caron.

<sup>401</sup> At p. 72 *et seq.*

<sup>402</sup> At p. 53 *et seq.*

<sup>403</sup> *Ibid.*

<sup>404</sup> See European Commission, Proposal for a European Parliament and Council Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights/Proposal for a Council framework decision to

Industry, Research and Energy Committee refers to it as a *‘for-profit infringement [...] which causes significant direct loss to the holder of an intellectual property right’*.<sup>405</sup> The concept of profit as an element of commerciality and its nexus to the economic harm to the rightholders are apparent in this definition. To qualify as commercial, therefore, an allegedly infringing use ought to be carried out for profit and this profit should have an adverse impact on the interests of the rightholders. In our view, the linkage of the profit made from an alleged infringement to the harm caused to the rightholders complicates matters. In the same way that for-profit activities may cause decrease in sales, not for-profit uses may produce shortfalls at the earnings of the rightholders. Every sale that is displaced by an unauthorised copy causes significant direct loss to the rightholders, irrespective of whether it was conducted with a profit-making purpose or not. At the same time, the Industry, Research and Energy Committee indicates that the *‘non-profit exchange of legally acquired content between individuals must be excluded from the application of the directive’*.<sup>406</sup> In these terms, uses made without a profit-making purpose are not conceived as made on a commercial scale. Yet, in our view, the indication that the content exchanged has to be ‘legally acquired’ implies that the source-copy has to be of a lawful origin, namely the copy exchanged should not be a by-product of an infringing act. This means that in cases where a private copy is not made from a lawful source and it is exchanged amongst end users, the use might be held to have a commercial character. For instance, a user who downloads a track from *Apple i-tunes*<sup>407</sup> has acquired that copy legally. Things are not equally clear if a user downloads the exact same track from a file-sharing network; the legality of the copies made in such networks is tainted due to the uncertain origin of the source copies. The lawfulness of the source copy however is something we shall discuss later on.<sup>408</sup> A reader at this point should just keep in mind that the concept of profit is a *sine qua non* condition for acts carried out on a commercial scale.

This is also affirmed by the Committee on Civil Liberties, Justice and Home Affairs which indicates that the notion of commercial use in the context of criminal enforcement measures<sup>409</sup>

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strengthen the criminal law framework to combat intellectual property offences, {SEC(2005)848}, Brussels, 12.7.2005, COM(2005)276 final, 2005/0127(COD), 2005/0128(CNS).

<sup>405</sup> Committee on Industry, Research and Energy, Draft Opinion of the Committee on Industry, Research and Energy for the Committee on Legal Affairs on the amended proposal for a directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights, (COM(2006)0168 – C6-0233/2005 – 2005/0127(COD)), PROVISIONAL 2005/0127(COD), 20.9.2006, at p. 3, available online from <<http://www.europarl.europa.eu>>, lastly accessible on 9.9.2009.

<sup>406</sup> *Ibid.*

<sup>407</sup> <[www.apple.com/itunes](http://www.apple.com/itunes)>.

<sup>408</sup> At page 131 *et seq.*

<sup>409</sup> See European Commission, Proposal for a European Parliament and Council Directive on criminal measures, aimed at ensuring the enforcement of intellectual property rights/Proposal for a Council framework decision to strengthen the criminal law framework to combat intellectual property offences, {SEC(2005)848}, Brussels, 12.7.2005, COM(2005)276 final, 2005/0127(COD), 2005/0128(CNS).

encompasses acts ‘*carried out with the intention to earn a direct economic or commercial profit, or acts carried out on such a large scale that may cause significant direct loss for the holder of the right.*’<sup>410</sup> Here again, the concept of commerciality is linked to the profit-making nature of the use. Yet, there is also another criterion added to the equation of what constitutes a commercial use; this is the scale on which a use is practiced which may have an adverse impact on the interests of the rightholders. In our view, this definition of commercial uses makes reference to the harm to the rightholder’s interests not in connection to the profit-making nature of the use but in respect of the scale on which this use takes place! If we adopt this definition of commerciality, a habitual and inveterate file-sharer could be held to make use on a commercial scale and be criminally prosecuted. This is ratified by the justification given by the Committee on how acts on a commercial scale should be interpreted: commercial uses should be ‘*not only acts that have an economic or commercial intention, but also serious acts of piracy at a large scale, that is, for more than individual or personal use, which may have no economic advantage for the offender but which may cause a very substantial harm to the rightholder.*’<sup>411</sup> In our opinion, the adoption of such broad definition as to the scope of commercial uses prejudices the permissibility of some controversial forms of private copying, such as file-sharing. The latter activity may not be carried out for profit but may cause substantial harm to the rightholders by not having being kept for private use. One can only wonder whether a habitual file-sharer that has sworn not to buy copyrighted content as long as this content is available online for free infringes copyright on a commercial scale just because she saves money from buying original works. We consider that if this file-sharer engages only to acts of downloading but does not share content thereof does not commit a commercial infringement, since acts of downloading are more likely to qualify as private. Our point in this respect is affirmed by the definition given to commercial uses in the context of the proposed Directive on criminal enforcement measures<sup>412</sup> by the European Parliament. These uses cover acts ‘*committed to obtain a commercial advantage; this would exclude acts carried out by private users for personal and not for profit purposes.*’<sup>413</sup> This definition underpins the profit-making nature of an activity carried out on a commercial scale. In our view, this is the most adequate

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<sup>410</sup> Committee on Civil Liberties, Justice and Home Affairs, Opinion of the Committee on Civil Liberties, Justice and Home Affairs for the Committee on Legal Affairs on the amended proposal for a directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights (COM(2006)0168 – C6-0233/2005 – 2005/0127(COD)), 2005/0127(COD) 12.12.2006, at p. 5.

<sup>411</sup> *Ibid.*

<sup>412</sup> See European Commission, Proposal for a European Parliament and Council Directive on criminal measures..., op. cit.

<sup>413</sup> Committee on Legal Affairs, ‘European Parliament Report Final A6-0073/2007’, 2007, see Draft European Parliament Legislative Resolution on the proposal for a directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights, (COM(2006)0168 – C6-0233/2005 – 2005/0127(COD)), at p. 11, available online at <<http://www.europarl.europa.eu>>, lastly accessible on 9.9.2009.

way of interpreting commerciality in a use since the profit or other advantage earned from an alleged infringement is irrebuttable evidence and Courts can easily recognise it, despite the fact that the term profit may receive various definitions.<sup>414</sup>

We conclude from the aforementioned analysis that uses carried out on a commercial scale entail a profit-making purpose. Still, to make a profit, an alleged infringer has to disseminate the copyrighted content to the public. If no such dissemination is realised and the alleged infringer has merely made or possesses the copies, then no profit can be obtained. Profit may be made only when the copies reach an audience. We therefore consider that a use is commercial if it entails a trading activity and this activity is carried out for profit. In our view, these conditions are cumulative. Albeit infringing on other grounds in the context of copyright protection, a use entailing a trade element shall not be deemed commercial if it lacks a profit motive. For instance, a student running for the school elections may give potential voters copies of music to promote her political campaign. This use infringes copyright because it involves an act of distribution to the public. Yet, it is not a commercial use since the student does not get a monetary payment in return.

To our surprise, we have identified an alternative definition of Article 5(2)(b) of Directive 2001/29/EC in the Parliament's definition of commercial uses!<sup>415</sup> While this latter Article 5(2)(b) permits private copying on condition that it is not made for ends that are either directly or indirectly commercial, the Parliament refers to it as not for profit use. It reads that commercial uses are not those '*carried out by private users for personal and not for profit purposes*'.<sup>416</sup> One could assume at this stage that our definitional questions have been answered and that non-commerciality in private copying means the lack of a profit-making purpose. Yet, this is not the case. As we have indicated earlier, digital private copying is often carried out with no view to make a profit.<sup>417</sup> A user uploading content on a file-sharing network does this essentially for free and a user downloading content from such network merely saves money from buying the original. They do not make profit in terms of a monetary advantage even though they benefit from their activities in a more broad sense. So, if non-commerciality was to be perceived as the lack of profit it would only ban very few digital private uses, such as blogs with *Google AdSense* or *youtube* videos with prepended advertisements. In our view, if

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<sup>414</sup> See *Dart Industries Inc. v. Décor Corp Pty Ltd* [1994] FSR 567; *Attorney General v. Guardian Newspapers Ltd* (No. 1) (*Spycatcher*) [1987] 3 All ER 316; *Apand Pty v. Kettle Chip Company Pty Ltd* (in liquidation) [1999] 43 IPR 225; *Kettle Chip Company Pty Ltd v. Apand Pty Ltd* [1998] 40 IPR 481; *Peter Pan Manufacturing Corp v. Corsets Silhouette Ltd* [1964] 1 WLR 96.

<sup>415</sup> Committee on Legal Affairs, 'European Parliament Report Final A6-0073/2007', op.cit., at p. 11.

<sup>416</sup> *Ibid.*

<sup>417</sup> At p. 104.

non-commerciality was so narrowly defined it would be a very helpful sorting tool between legitimate private copying and infringing activities.

Nonetheless, before reaching a conclusion that non-commercial uses are the ones not carried out for profit, we need to examine yet another parameter in the context of commercial uses. As we have pointed out earlier in this thesis commenting on Recital 14 of Directive 2004/48/EC,<sup>418</sup> commercial uses may also entail an economic significance. Moreover, we have observed that this element is missing from the concept of non-commerciality in the context of Article 5(2)(b) of Directive 2001/29/EC. Our aim below is to examine if there is a meaningful reason for this omission given that the European legislator is familiar with the economic impact that private copying may have in the digital environment.

## 1.2. The distinction between commercial and economically significant copying

Article 5(2)(b) of Directive 2001/29/EC stipulates that private copying is permissible insofar as it is made *'for ends that are neither directly nor indirectly commercial.'* This stipulation deviates from a phraseology that is commonly used by the European legislator when referring to non-commerciality in different contexts. Yet, it lacks the element of economic significance which appears on other EU Directives, such as Directive 2004/48/EC.<sup>419</sup> Same as in Recital 14 of the latter Directive, Directive 2006/115/EC<sup>420</sup> refers to *'direct or indirect economic or commercial advantage.'*<sup>421</sup> This exact same wording has been also used in Article 5(2)(c) of Directive 2001/29/EC. The latter article permits acts of reproduction made by publicly accessible establishments, such as libraries and archives, which are not set *'for direct or indirect economic or commercial advantage.'* Inherent in the aforementioned stipulations is not only an element of commerciality but also the element of an economic advantage. In our view, this means that while in other contexts the European legislator afforded a broader scope in the commercial nature of activities, permissible private copying needs only be non-commercial; quite surprisingly, its economic impact does not matter since the element of economic significance does not feature in Article 5(2)(b). One can only wonder whether this terminological shift

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<sup>418</sup> At page 99.

<sup>419</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, *Official Journal* L 157, 30.4.2004.

<sup>420</sup> Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property repealing Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, *Official Journal* L 376, 27.12.2006, pp. 28-35.

<sup>421</sup> The later phrase has been invoked to define what 'rental' and 'lending' mean for the purposes of that Directive. For instance, 'rental' is defined as 'making available for use, for a limited period of time and *for direct or indirect economic or commercial advantage*': Article 2(1)(a) of the Rental and Lending Rights Directive. Based on the same terminology, 'lending' refers to the act of 'making available for use, for a limited period of time and *not for direct or indirect economic or commercial advantage*, when it is made through establishments which are accessible to the public': Article 2(1)(b) of the Rental and Lending Rights Directive. Directive 2006/115/EC, *ibid*.

bears any substantive meaning as to the scope of the private copying limitation or whether it merely denotes an inadvertent oversight on behalf of the European legislator. If the element of economic advantage is intentionally missing from Article 5(2)(b) the scope of this article is significantly enlarged to cover uses which may be economically significant to end users and, at the same time, non-commercial. For instance, downloading may be economically advantageous for the end user but is not a commercial use since, it does neither entail a 'trade' element nor is it carried out for profit.

Even though it is common to use the terms 'economic' and 'commercial' indiscriminately, these terms have a different meaning. 'Commercial' refers to commerce as the interchange of goods and commodities; it entails a 'trade' dimension, as already illustrated.<sup>422</sup> The term 'economic' is broader in scope since it is associated with economy, commerce being only part of it but not fully inclusive. As Advocate General Trstenjak rightly pointed out in his opinion on *Infopaq*,<sup>423</sup> a case examining the legitimacy of temporary copying under Article 5(1) of Directive 2001/29/EC, economic significance means that a use must involve an economic advantage for the person who carries it out, such as a profit or a deduction in costs, an increase in productivity or other similar advantages. In the context of private copying such an advantage could be the fact that users save money from buying originals.

Yet, by omitting a reference to 'economic' ends within the meaning of the private copying limitation, the European legislator left room for permissibility to acts that might be economically significant to users. In our view, this was not incidental. If economically significant uses were excluded from Article 5(2)(b) then this limitation would have no reason to exist on statute since every private copy is economically significant to the user for the mere reason that she does not pay to buy an original! We therefore consider that economically significant or advantageous uses are covered by Article 5(2)(b) of Directive 2001/29/EC.

Having determined that commerciality in copyright is comprised by a trade and profit element and that economic significant acts are covered by Article 5(2)(b), we will now examine which uses qualify as non-commercial and are, therefore, permitted. As we mentioned earlier, non-commerciality may not receive the exact inverse definition of commerciality in the context of

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<sup>422</sup> At page 101 *et seq.*

<sup>423</sup> Opinion of Advocate General Trstenjak, *Infopaq International A/S Danske Dagblades Forening*, Case C -5/08, 12.2.2009, at point 125. The lack of the independent economic significance in temporary copies has not been dealt by the ECJ since the transient copying in question did not fulfil the second condition of Article 5(1) of Directive 2001/29/EC and the Court did not move on to examine the rest of these conditions. See *Infopaq International A/S Danske Dagblades Forening*, Case C -5/08, 16.7.2009.

copyright protection.<sup>424</sup> What is more, we feel that the concept of non-commerciality may lack a substantive meaning since most acts of digital private copying lack a profit element.

## **2. Determining the meaning of ‘ends that are neither directly nor indirectly commercial’ under Article 5(2)(b) of Directive 2001/29/EC**

Article 5(2)(b) of Directive 2001/29/EC states that private copying is permitted as long as it is not made for either direct or indirect commercial ends. Instead of simply excluding every form of commercial copying from the scope of the private copying limitation, the legislator conditions the exercise of permissible private copying on the absence of both direct and indirect commerciality. It is, however, unclear what the difference between direct and indirect non-commerciality is and what practical consequences this may have. These are the aspects we intend to tackle below.

### **2.1. The absence of direct commerciality in permissible private copying**

Judicial practice of national courts in Europe indicates that there are two criteria to be considered so that private copying qualifies as a non-commercial use. The first is that the copier should not have intent to infringe copyright, for instance, by intending to make a profit from an allegedly infringing use. If the copier has knowledge or reason to believe that the copies are infringing it is highly likely that Article 5(2)(b) shall not apply. Yet, one should not neglect that the legitimacy of some private copies is contestable, such as those made in file-sharing networks, and as a result, establishing knowledge to infringe may be difficult. The second criterion refers to the number of the copies of the exact same work produced; if this number exceeds a reasonable limit the private copying limitation cannot apply. Nonetheless, we consider that this second criterion is easier to comprehend with reference to copies of works as tangible goods. One can only wonder how it can translate as regards the contents of works that can be transmitted online. Below we examine both these criteria under which a use qualifies as non-commercial for the purposes of Article 5(2)(b).

#### **2.1.1. The infringing intent of the copier**

In determining whether a particular use is non-commercial, Courts in Europe examine the intent of the copier to infringe copyright. This is, *inter alios*, normally made by reference to the intention of making a profit from that use. For instance, in the Finnish *Finreactor* case,<sup>425</sup> the Court held that the operators and administrators of a *BitTorrent* tracker were liable for

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<sup>424</sup> At page 93.

<sup>425</sup> (Unreported). For a comment, see M. Manner, ‘A Bittorrent P2P network shut down and its operation deemed illegal in Finland’, *Ent. L.R.* 2009, 20(1), pp. 21-24.

copyright infringement on the basis of their intent to make a profit by sharing copyrighted content under terms violating copyright law. In our view, linking non-commerciality to the absence of intent to infringe and earn profit is not a helpful criterion so as to safely ascertain which uses are non-commercial. This is because establishing intent is not always an easy task. It would be far more operative to link non-commerciality with the lack of profit *per se*. We acknowledge, however, that many allegedly infringing activities, such as file-sharing, may not be carried out for profit so judges turn to a mere intent to earn an advantage to evaluate their legitimacy. Yet, it should not be forgotten that intentional infringements are covered by the proposed Directive on the criminal enforcement of intellectual property rights.<sup>426</sup> Those infringements are deliberate and conscious; they intend to make an economic advantage. As Sudgen rightly points out, the words intentional, deliberate and conscious are connected to the criminal concept of *mens rea* for the criminalisation of an infringing act.<sup>427</sup> What is more, Recital 17 of Directive 2004/48/EC<sup>428</sup> states that *‘[t]he measures, procedures and remedies provided for in this Directive should be determined in each case in such a manner as to take due account of the specific characteristics of that case, including [...], where appropriate, the intentional or unintentional character of the infringement.* This means that the intent of an alleged infringer may be evaluated at the stage of civil sanctions, too. The practical significance of this is that if the private copying limitation does not apply the alleged infringer may find herself in the difficult position of facing criminal and civil sanctions.

As opposed to piracy and other forms of unauthorised distribution which derive from a wilful determination not to respect copyright,<sup>429</sup> permissible private copying should not be practiced with intent to infringe. This is confirmed by Recital 14 of Directive 2004/48/EC which states that *‘acts carried out on a commercial scale are those carried out for direct or indirect economic or commercial advantage; this would normally exclude acts carried out by end-consumers acting in good faith.’* In our view, good faith in this context means that the end user does not have knowledge or reason to believe that the activities she carries out are wrongful. In other words, an end user may escape liability only where she establishes that she does not have either actual or constructive

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<sup>426</sup> See Article 3 of the See European Commission, Proposal for a European Parliament and Council Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights/Proposal for a Council framework decision to strengthen the criminal law framework to combat intellectual property offences, {SEC(2005)848}, Brussels, 12.7.2005, COM(2005)276 final, 2005/0127(COD), 2005/0128(CNS). Also see Article 3 of the Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights /\* COM/2006/0168 final - COD 2005/0127 \*/.

<sup>427</sup> P. Sudgen, ‘How Long is the Piece of a String? The Meaning of ‘Commercial Scale’ in Copyright Piracy’, *EIPR*, 2009, 31(4), 202-212, at 204.

<sup>428</sup> Corrigendum to Directive 2004/48/EC, op. cit.

<sup>429</sup> D. Panethiere, *The Persistence of Piracy*, op. cit., p. 9.

knowledge. Practically, this is determined on the basis of objective criteria, such as the mode of the distribution, the profit-making nature of the activity, the potential harm to the rightholder, the market value of the items produced or the duration of engagement in the infringing activity. For instance, in a French file-sharing case, the Court found *Madame A.* liable for copyright infringement since, under the Court's reasoning, she was aware that she was violating copyright. This was established on the basis of the number and the nature of the works she had file-shared.<sup>430</sup> In similar vein, the Finnish Supreme Court based the liability of *Kaajamaa* on a 'wilful conduct' to infringe copyright.<sup>431</sup> *Kaajamaa* was an operator of an electronic 'mail box' in which users were able to save computer programs and copy programs saved there by other users. To the Court, the intent of *Kaajamaa* to breach copyright was based on two main elements. The first was the fact that *Kaajamaa* received payments from users and, hence, he exploited the opportunity to commercially deal with illegal copies. The second element was that he could accumulate for himself a significant quantity of computer software free of charge. Both these factors were enough evidence for the Court to establish that *Kaajamaa's* conduct was intended to infringe copyright in those computer programs.<sup>432</sup>

In our view, establishing the lack of direct commerciality in a use by reference to the intent of the copier is complicating judicial examination. The intent of the copier is evaluated either in terms of the mode by which the copies are traded or by the profit-making nature of the activity. This turns us back to the elements comprising the concept of commerciality, as examined earlier.<sup>433</sup> While we agree with Geiger that the copier's motivation could serve as a method for determining the legitimacy of private copying<sup>434</sup> and establishing commerciality in a use, we consider that at the end of the day the result is the same whether infringing intent is established or not. In many cases also, infringement may occur without intent and even without knowledge that the copy made is infringing. We identify that there is a need to use more objective criteria when determining the concept of non-commerciality.

To establish absence of commerciality in the context of private copying, courts indicate that there is yet another element that needs to be examined. This is the number of the copies of the exact same work produced.

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<sup>430</sup> *Procureur de la République SSCP and SPPF v. Madame A.*, Tribunal de Grande Instance de Rennes, Correctional Judgement, 30.11.2006, available in French from <<http://www.juriscom.net>>, at p. 7.

<sup>431</sup> *Adobe Systems Inc. and Others v. Tomi Kristian Kaajamaa* (KKO 1999: 115), Supreme Court, Helsinki [2001] ECDR 1, p. 3, point 5.

<sup>432</sup> *Ibid.*

<sup>433</sup> At page 100 *et seq.*

<sup>434</sup> C. Geiger, 'The Private Copy Exception: An Area of Freedom (Temporarily) Preserved in the Digital Environment', *op. cit.*, at 78; C. Geiger, *Droit d'auteur et droit du public à l'information*, *op. cit.*, p. 428.

### 2.1.2. The number of the copies produced

Directive 2001/29/EC does not set limitations as to the number of copies produced in the context of Article 5(2)(b). Yet, in some Member States the number of permissible private copies is set as a prerequisite for the application of the private copying limitation. For instance, some States explicitly stipulate that only single copies of a work can be lawfully made in the context of this limitation.<sup>435</sup> While there have been times where the validity of this single-copy criterion has been upheld by judicial practice,<sup>436</sup> its relevance was minimal in other cases.<sup>437</sup> For instance, in France a student was exempted from liability even though he was caught with 488 CD's containing motion pictures he had downloaded or copied from films he borrowed from friends.<sup>438</sup> *Inter alios*, the Court observed that *'the fact that there was only one copy of the films [...] indicated that the reproductions were made for personal use, and confirmed that there was no act of sale or exchange by the defendant.'*<sup>439</sup> In other cases, however, commerciality in a use has been inferred irrespective of the number of the copies produced. For example, in the UK case *R. v. Carter*, the appellant was found liable for distributing 219 infringing copies of *Shirley Valentine* on video.<sup>440</sup> The Court did not examine the number of the copies but held that counterfeiting films is a serious offence. What is more, commerciality has been established despite the fact that the number of the copies was small where copying was made in the course of business. In *Halawa v. Federation against Copyright Theft*, the appellant was found with only 33 video tapes and at the same time possessed 7 video machines, a TV monitor and a colour corrector.<sup>441</sup> The

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<sup>435</sup> Austria. See Article 42(1) of Austrian Federal Law on Copyright in Works of Literature and Art and on Related Rights (BGBl. No. 111/1936, as last amended [BGBl. I No. 25/1998]; Denmark (Article 39 of the Consolidated Act on Copyright 2003, No. 164, of March 12, 2003); Finland [Article 12 of the Copyright Act (Law No. 404, of July 8, 1961 as amended by Law No. 748, of October 9, 1998 and Law No. 821, of October 14, 2005)]; Latvia; Lithuania [Article 20 of the Law amending the Law on Copyright and Related Rights, No. IX-1355, of March 5, 2003]; Norway; Poland; Sweden [Article 12 of the Act on Copyright in Literary and Artistic Works, No. 1960:729, of December 30, 1960, as amended by Government Bill No. 2004/2005:110].

Also see Article 16(b)(2) of the Copyright Act of 1912 of the Netherlands as amended on July 6, 2004 and January 20, 2006. Although in the Netherlands there is no explicit mention to the permissible number of copies, it is legal to make no more than to 2 or 3 copies. On this see J.H. Spoor & D.W.F. Verkade, *Auteursrecht*, Deventer, Kluwer, 1993, p.230; From the EEA Countries, quantitative restrictions can be found in Article 22(3) of the Copyright Act of Liechtenstein and Article 19(3) of the Swiss Copyright Act.

<sup>436</sup> *Ministère Public, FNDF, SEV, Twentieth Century Fox et al. v. Aurélien D.T.*, Rodez District Court, Case 03001251, 13.11.2004; *Ministère Public, FNDF, SEV, Twentieth Century Fox et al. v. Aurélien D.T.*, Court of Appeals of Montpellier, 10.3.2005, 222 *Legipresse* 120, 2005, note by I. Wekstein, p. 6.

<sup>437</sup> *R. v. Carter (Carol Dawn)*, [1992] 13 Cr. App. R. (S.) 576.

<sup>438</sup> *Ministère Public, FNDF, SEV, Twentieth Century Fox et al. v. Aurélien D.T.*, op. cit., p. 6.

<sup>439</sup> *Ibid.* This ruling was upheld on appeal. See *Ministère Public, FNDF, SEV, Twentieth Century Fox et al. v. Aurélien D.T.*, Court of Appeals of Montpellier, 10.3.2005, 222 *Legipresse* 120, 2005, note by I. Wekstein. Note, however, that the Supreme Court took a different position. In particular, it emphasized the way by which the copies were made, namely by downloading them from peer-to-peer networks, and considered that the lawfulness of the source is a relevant criterion in determining the legitimacy of private copies. This later criterion shall be examined later in this thesis at page 131.

<sup>440</sup> *R. v. Carter (Carol Dawn)*, [1992] 13 Cr. App. R. (S.) 576.

<sup>441</sup> *Halawa v. Federation against Copyright Theft*, [1995] 1 Cr. App. R. 21. Also see *R. v. Lloyd (Grant Oatey)*, [1997] 2 Cr. App. R. (S.) 151 (the case involved 61 copies of counterfeit copies of computer programmes).

Court found *Halawa* guilty irrespective of the number of the copies since copying was conducted within a commercial counterfeiting operation.

In our view, the number of the copies of the exact same work may be indicative of intent to distribute these copies or make a profit but at the same time it is not decisive of the commercial character of the use. This is because an end user may potentially make numerous copies of works and all of them be made for his private use. For instance, he may make one copy of his favourite track-list on this laptop memory, a second copy to listen at his CD player, a third copy for his holiday home, a fourth copy to listen to his car, a fifth copy for his mother as a birthday gift, a sixth copy to bring along at a friend's party, and so on. All these copies are meant to be kept for private use and are not infringing. What is more, a copier may possess copies of different works to build up a home library for repeat viewing. This activity, which is known as librarying,<sup>442</sup> is not infringing and is covered by Article 5(2)(b), insofar as the copies are made for private use. We consider therefore that the number of the copies may be irrelevant in determining commerciality in a use.

To determine whether a use is non-commercial, Courts in Europe examine mainly two issues: the intent of the copier to trade the copies and make a profit out of them, and the number of the copies made. This indicates that non-commerciality does not receive the exact inverse definition of commercial uses. Since the latter uses are characterised by a trade and profit element, as illustrated earlier,<sup>443</sup> non-commercial uses are judicially conceived as those uses in which the copier does not have intent to commercially exploit the copies and for this reason does not produce a large number of infringing articles. We acknowledge that the examination of the copier's intent contains a reference to both the elements of trade and profit, without this examination, however, striking at the heart of commerciality but referring to commercial intent in general. In our view, Courts would reach safer conclusions by examining whether the copier trades the copies and makes profit from them, rather than by inquiring whether commercial intent exists. What is more, the number of the copies produced may be indicative of a commercial use but is not decisive as to its infringing character. As a result, the application of the private copying limitation should not be premised on a number of permissible copies. We consider that lack of direct commerciality under Article 5(2)(b) should mean that the copier does not trade the copies by making them available to a public and get a payment in return. For instance, uploading copyrighted content on a file-sharing network may

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<sup>442</sup> K. Weatherall, 'A Comment on the Copyright Exceptions Review and Private Copying', op. cit., p. 22.

<sup>443</sup> At page 100 *et seq.*

not be profit-making in the majority of cases but it certainly involves an act of making works available to a public. The use is infringing since it impacts the making available right but it is not commercial since it is not made on a profit basis.

Consider, however, another example. An end user holds a blog on which she uploads copyrighted content. The blog is for private use in terms that only invited readers can have access. Yet, the blog author has activated *Google AdSense* so that she gets advertising revenue based on the frequentation of her webpage. In this case, there is a trading process in terms that works are somehow disseminated to an audience and at the same time the author gets paid. This means that this activity is commercial. The profit earned, however, does not come directly from the readers but from the advertising company. Is this the meaning that the European legislator meant to afford to indirectly commercial uses which cannot benefit from Article 5(2)(b) of Directive 2001/29/EC? This is one of the questions that we shall answer below.

## **2.2. The absence of indirect commerciality in permissible private copying**

Judicial practice in Europe indicates that indirect commercial uses are those where copyrighted content is made available to an audience under the auspices of a commercial enterprise the main purpose of which is an activity other than piracy or counterfeiting. For instance, playing background music in a restaurant is an indirectly commercial use since the owner of this business earns money by selling food and not by performing music. This was held in the Finnish *Papegoya* case.<sup>444</sup> There, an association of performing artists and phonogram producers, *Gramex*, sued a pizzeria for playing background music on its premises. The Court affirmed the claimant's argument that the pizzeria had a 'remunerative intent' in indirectly using that music via performance.<sup>445</sup> No further justification was given by the Court, however, on how indirectly commercial uses are defined. Similarly, playing music at a taxi was held to have 'a connection to the commercial activities of the taxicab owner' and the performance at issue was held to be commercial and, therefore, infringing.<sup>446</sup>

In our view, the common denominator in both aforementioned cases is that the use of copyrighted content is made in connection, but not as the main purpose of, business-related

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<sup>444</sup> *Esittävien Taiteilijoiden Ja Äänitteiden Tuottajien Tekijänoikeusyhdistys Gramex Ry v. Pizzeria Papegoya Oy*, Case No. 2862, The Supreme Court of Helsinki, 29.10.2002, [2003] ECDR 9.

<sup>445</sup> An opposite ruling was issued in the US case, *Twentieth Century Music Corp. V. Aiken*, where the Court held that a restaurant playing radio music programmes in the dining area did not infringe copyright by publicly performing the music for profit. To the Court, playing the music for customers at the restaurant was listening rather than performing! 422 U.S. 151, 160-161, 163-164, (1975).

<sup>446</sup> Finnish case 2002:101, Supreme Court: *Teosto v A Taxi Driver* [2004] ECDR 16; R. Paanila & M. Leppa, 'Finland: Copyright – Legislative Amendments and Recent Case Law', op. cit., N68-70.

activities. We consider that there is no direct nexus between this use and the monetary benefit that the initiators of the performance might gain; nonetheless, they may benefit in different ways, for instance, by attracting more customers and, thereof, by upgrading their business. So, a use is indirectly commercial where it is not profit-making *per se* but may be profitable in other ways, such as by helping run a successful business.

Yet, the uses of copyrighted content made in restaurants and taxis are addressed to a public, as we have already concluded.<sup>447</sup> One can only wonder how indirect commerciality can be established in the context of private uses. An individual performing music at his birthday party cannot be held liable for an indirectly commercial use by receiving gifts from his guests. In our opinion, indirect commerciality is linked with activities taking place in the course of business and not with uses made by ordinary individuals in private.

Nonetheless, this assertion may not lead to safe conclusions as regards ordinary individuals that make use of copyrighted content online. For instance, a blog author may play background music on her blog, on which *AdSense* has been activated. In this context, she may raise advertising revenue by the frequentation of her page. While the blog may not be commercial *stricto sensu*, and its purpose may be the communication of its author's ideas, its author unquestionably derives significant commercial benefit from performing music in the form of increased user traffic and, in turn, increased advertising revenue. This bears an analogy to the restaurant and taxi rulings we have just mentioned and this use is highly likely to be considered indirectly commercial. One should not neglect at this point, however, that the readers of a blog may be considered to be the public for copyright purposes. So, unless the blog author restricts the view to her blog only to selected readers the use may not pass the scrutiny of the private-character test.<sup>448</sup> Even if the audience qualifies as private, however, the fact that the blog author earns advertising revenue is decisive in establishing the commercial character of her activity, even indirectly. The same ought to apply to *youtube* subscribers who upload videoclips with prepended advertisements. This is because they raise advertising revenue calculated on the basis of the frequentation of the videoclip.

What if a user earns no money but merely saves money from buying the original? Can this use qualify as indirectly commercial, too? Certainly, this use has an economic significance to the user and, as we illustrated earlier, economically-significant uses benefit from Article 5(2)(b) of Directive 2001/29/EC. Since there is no EU case-law as to whether this kind of use is indirectly commercial or not, we might get some answers by reverting to the US cases under

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<sup>447</sup> At page 86-87, 89 *et seq.*

<sup>448</sup> At page 86 *et seq.*

which the issue has been dealt. In the US, the concept of indirect commerciality in the context of private copying is apprehended as covering activities where users are getting for free something they would otherwise have to pay for. This was held in the famous *Napster* case.<sup>449</sup> *Napster* provided a platform where users could upload and download music files in a compressed digital format. To the Court, *‘the fact that Napster users get for free something they would ordinarily have to buy suggests that they reap economic advantages from Napster use’*. As Lunney rightly observes, under this approach, private copyright is infringing without any need to resell the copies produced!<sup>450</sup> In our view, this is not the type of meaning that one can uncover behind the non-commerciality requirement of Article 5(2)(b) of Directive 2001/29/EC. We consider that such a broad definition of indirect commerciality would be useless as a sorting tool. This is because, to be capable of distinguishing between lawful and unlawful uses, the scope of commerciality needs to be narrowly defined so as to capture indirect financial gain and, at the same time, exclude other forms of benefit. A user engaged in file-sharing merely saves money from buying an original but this is not sufficient for this use to qualify as commercial, even indirectly.

Article 5(2)(b) of Directive 2001/29/EC requires that the practice of private copying should be non-commercial, to be permitted. We have concluded that commercial uses in copyright are those which accumulatively entail a trade and a profit element. While uses that involve the dissemination of copies to the public may be infringing on other grounds, such as the violation of exclusive rights, they cannot be deemed commercial unless they are profit-making. One could eagerly conclude that non-commercial uses are the exact inverse of commercial uses, in terms that where a trade or a profit element is not established a use is non-commercial. Yet, Courts in Europe do not seem to examine these conditions to determine the lack of commerciality in permissible private copying. Rather, their main focus is the commercial intent of the copier and the number of the copies produced. Neither of these criteria, in our opinion, however, can lead to safe conclusions. This is because establishing intent is a complex issue and the number of the copies is only indicative, yet not decisive, as to the existence of a trading element in a use. We would therefore suggest that direct non-commercial uses should be considered to be those which do not involve the ‘trading’ or works and are not made for profit. At the same time, indirect commerciality refers to uses of

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<sup>449</sup> *A&M v. Napster*, 114 F.Supp. 2d 896, C.D Cal. 2000 – Affirmed in part, reversed in part, 239 F.3d 1004 (9<sup>th</sup> Cir. 2001).

<sup>450</sup> G. Lunney, ‘The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act’, *Virginia L. Rev.*, Vol. 87, No. 5, 2001, pp. 813-920, at p. 824.

copyrighted content made in connection, but not as the main purpose of, business-related activities. These uses are not profit-making *per se* but may be profitable in other ways, such as by attracting more customers. Still, one should not neglect that most uses realised online are not made for profit; they merely save users from the cost of the original. These uses may have an economic significance for the user but are not excluded from the scope of Article 5(2)(b) and are, therefore, permitted. This article would lose much of its significance if it deprived users from economically advantageous copying since, in our view, every private copy is beneficial to end users since they save money from buying an original.

Nonetheless, uses that are economically significant to users may cause irreparable harm to the rightholders. Permissible private copying may be beneficial to the copier and his private circle but at the same time this activity may prejudice the legitimate interests of the rightholders. To attenuate the economic impact that the private copying limitation of Article 5(2)(b) may have to these interests, Article 5(5) of Directive 2001/29/EC sets forth the three-step test, a general restriction to the application of every copyright exception and limitation under this Directive. This test evaluates the economic prejudice that these exceptions and limitations may cause and permits their application insofar as the conditions of this test are met. We shall examine the lack of commerciality in permissible private copying by subjecting this limitation to the scrutiny of the three-step test in the section below.

## Section 2: Establishing non-commerciality in permissible private copying under the three-step test of Article 5(5) of Directive 2001/29/EC

To establish the lack of a commercial character in permissible private copying, we further need to revert to the three-step test as provided under Article 5(5) of Directive 2001/29/EC. This test is in essence an economic-prejudice test, as rightly pointed out by Weise-Montag,<sup>451</sup> it serves as a general restriction to all copyright exceptions and limitations on the basis of three conditions:<sup>452</sup> under Article 5(5), copyright exceptions and limitations ‘*shall only be applied*

*[a] in certain special cases*

*[b] which do not conflict with a normal exploitation of the work or other subject-matter and*

*[c] do not unreasonably prejudice the legitimate interests of the rightholder.*<sup>453</sup>

A copyright limitation is permissible insofar as it passes the scrutiny of all three conditions of this test, which are cumulative.<sup>454</sup> This means that if one of these conditions is not fulfilled the copyright limitation cannot apply and the rightholder can prohibit the activity at issue. The permissibility of the private copying limitation of Article 5(2)(b) of Directive 2001/29/EC, therefore, does not stand on its own but further depends on this threefold set of conditions.<sup>455</sup> Given that permissible private copying should be non-commercial and since, in our view, the three-step test calculates the economic prejudice that the rightholders may suffer due to

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<sup>451</sup> See Statement of Brigit Weise-Montag, ‘Rights, Limitations and Exceptions: Striking a Proper Balance’, *Imprimatur European Commission DGIII, Esprit Project Consensus Forum*, 1997, 30-31 October, Amsterdam, available at <<http://www.imprimatur.alcs.uk/legal/>>, lastly accessible on 9.9.2009, at p. 47; also see T. Heide, ‘The Approach to Innovation under the Proposed Copyright Directive: Time for Mandatory Exceptions’, *op. cit.*, at pp. 220-221.

<sup>452</sup> It is one of the foundations of the framework for copyright exceptions and limitations. P. Sirinelli, ‘Exceptions et limites aux droit d’auteur et droits voisins’, *op. cit.*, p. 6.

<sup>453</sup> Article 5(5) of Directive 2001/29/EC is largely influenced by Article 9(2) of the Berne Convention, according to which the exceptions must be ‘*only in certain special cases, provided that such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice legitimate interests of the author*’. Article 13 of TRIPs Agreement, *op. cit.*, expanded the application of the test to all exclusive rights provided under this Agreement and the Berne Convention. The WIPO treaties [Article 10 of the WCT and Article 16(2) of the WPPT] extended the test to neighbouring rights of phonogram producers and Directive 2001/29/EC includes both copyright and neighbouring rights.

Note that two earlier Directives also made reference to two of the three steps included in Article 9(2) of the Berne Convention. Those would be Article 6(3) of Council Directive of 14 May 1991 on the legal protection of computer programs (91/250/EC), *OJ No. L 122/42* and Article 6(3) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, *OJ No. L 77/20* of 27 March 1996.

<sup>454</sup> Opinion of Advocate General Trstenjak, *Infopaq International A/S Danske Dagblades Forening*, Case C -5/08, 12.2.2009, at point 134.

<sup>455</sup> Note, however, that a number of scholars believe that the private copy exception should not be subjected to examination under the three-step test. See Y. Gaubiac & J.C. Ginsburg, ‘L’avenir de la copie privée numérique en Europe’, *Communication Commerce Electronique*, January 2000, 1, p. 9; C. Caron, ‘Les clairs-obscur de la rémunération pour copie privée’, *Daloz, Cahier Droit des affaires*, n° 42, 2001, pp. 3421-3424; C. Caron, ‘Les exceptions: l’impact sur le droit français’, *Propriétés intellectuelles*, 2002, no. 2, p. 25; A. Lucas & H.-J. Lucas, *Traité de la Propriété Littéraire et Artistique*, Litec, Paris, 2001, 2<sup>nd</sup> Ed., p. 315.

exempted activities, our aim in this section shall be to examine whether and how does the private copying limitation pass the scrutiny of this test.

### The origin

Before subjecting digital private copying to this test, however, it is essential to understand the context in which this test is set. One can only wonder how this test which was first introduced by the Berne Convention in its 1967 revision<sup>456</sup> can be still valid to fit the needs of the digital environment. The main objective of this revision was to enshrine the reproduction right at international level through its Article 9(1); but since most national laws provided exceptions to this right, and the signatory states did not wish to modify their laws, a second *alinéa* was added to Article 9 of the Convention. Article 9(2) provided a ‘catch-all’ limitation for all applicable exceptions to the newly defined right. In this respect, we view Article 9(2) of the Berne Convention as an intentionally vague diplomatic compromise, drafted broadly enough so as to embrace all national exceptions to the reproduction right, irrespective of their continental or common law origin. It is this broad formulation of the test, in our view, that insured its successful introduction to subsequent agreements on intellectual property rights.

Indeed, before making its way into Article 5(5) of Directive 2001/29/EC,<sup>457</sup> the test has been repeated several times in international law, such as Article 13 of the 1994 TRIPs Agreement and Article 10 of the WCT,<sup>458</sup> as a criterion for evaluating the permissibility of all applicable national exceptions and limitations.<sup>459</sup> Even though the Berne’s test applied only in respect of the reproduction right, the TRIPs expanded the scope of the test to cover all economic rights. Interestingly, the third step of the test aims at protecting the legitimate interests of all

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<sup>456</sup> Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works 1886 (1971 revision with 1979 amendments): ‘It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.’

<sup>457</sup> For an analysis and comment on Article 5(5) of Directive 2001/29/EC see M. Buydens, ‘La nouvelle directive du 22 mai 2001 sur l’harmonisation de certains aspects du droit d’auteur et des droits voisins dans la société de l’information: le régime des exceptions’, *A&M*, 2002, 442; H. Cohen Jenoram, ‘Restrictions on Copyright and their Abuse’, *EIPR*, 2005, pp. 359-364, at p. 364; M. Buydens & S. Dusollier, ‘Les exceptions au droit d’auteur: évolutions dangereuses’, *Comm. Com. Électr.*, September 2001, p. 10, at p. 12; T. Heide, ‘The Berne Three-Step Test and the Proposed Copyright Directive’, *EIPR*, 1999, pp. 105-109, at p. 105.

<sup>458</sup> See Article 13 of TRIPs Agreement: ‘Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.’

Also see Article 10 of the WIPO Copyright Treaty (WCT), op. cit.: ‘(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.’

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.’

<sup>459</sup> For an analysis see M. Ficsor, *The Law of Copyright and the Internet*, op. cit., p. 521.

rightholders rather than those of the authors only. Designed to transfer the WIPO Treaties into national law, Directive 2001/29/EC incorporated the three-step test in its Article 5(5).

### **Legislative guide or rule of judicial interpretation?**

The three-step test as formulated under the relevant international instruments is for legislative use only; it is addressed to national legislators as a guide in tailoring exceptions and limitations. Nonetheless, Article 5(5) of Directive 2001/29/EC represents a shift in this approach. It stipulates that copyright exceptions and limitations ‘*shall only be applied*’ when the conditions of the test are met. This means that, under this Directive, the test is aimed directly at the *application* of copyright exceptions and limitations and not only to their *introduction* into national law by legislators. Indeed, Recital 44 of Directive 2001/29/EC specifies that ‘*such exceptions and limitations may not be applied in a way that prejudices legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject-matter.*’ Since the judge is in principle responsible for the application of an exception or limitation, one can only wonder who the true addressee of the test is; is it only the legislative body or is it also the judge?

In this confusion, several Member States have explicitly incorporated the three-step test of Article 5(5) of Directive 2001/29/EC into their national laws and have, therefore, put it at the disposal of judges. For instance, the Italian Copyright Act stipulates that ‘*the natural person [...] may make a private copy, which can also be just an analogue copy, for personal use, on condition that this act does not conflict with the normal exploitation of the work or other subject-matter and does not unreasonably prejudice the rightholders.*’<sup>460</sup> Under the Italian statute, the test is directly set as a condition for the application of the private copying limitation. So, when an end user invokes the private copying limitation as a defence against allegations for infringement, the Italian Courts subject the use at question to the three-step test. In our view, this makes the three-step test an extra condition for the application of the private copying limitation. The same applies in Greece where the Copyright Act mandates that ‘*the freedom to make a reproduction for private use shall not apply when the act of reproduction is likely to conflict with the normal exploitation of the work or to prejudice the author’s legitimate interests.*’<sup>461</sup> The aforementioned national examples are only part of a legislative trend around Europe under which the three-step test has been statutorily set as an additional condition that judges have to consider before applying the private copying limitation. This trend is

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<sup>460</sup> Article 71 *sexties* (4) within the framework of the private copying exception, incorporated into the Italian statute on April 9, 2003. Also see Article 71 *nonies*.

<sup>461</sup> Article 28(c) of the Greek Copyright Act, implementing Directive 2001/29/EC by L. 3057/2002, JO A/239 of October 10, 2002.

followed by Bulgaria,<sup>462</sup> Estonia,<sup>463</sup> France,<sup>464</sup> Hungary,<sup>465</sup> Latvia,<sup>466</sup> Luxembourg,<sup>467</sup> Malta,<sup>468</sup> Poland,<sup>469</sup> Portugal,<sup>470</sup> Romania,<sup>471</sup> Slovenia<sup>472</sup> and Spain.<sup>473</sup> Even in Member States that have not inserted the test into national law, the judges apply the test when they are in doubt whether an activity may be exempted.<sup>474</sup>

We therefore feel that the three-step test has evolved from an intentionally vague criterion to a test that has to be applied by the judiciary. Legal literature, however, is divided as to whether

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<sup>462</sup> Article 23 of the Law on Copyright and Neighbouring Rights, Published in State Gazette No. 56/1993, lastly amended on January 1, 2003

<sup>463</sup> Article 17 of the Estonian Copyright Act of 11 November 1992, lastly amended by the Act of 22.9.2004 entered into force 29.10.2004 – RT I 1999, 54, 580.

<sup>464</sup> Penultimate paragraph of Article L. 122-5 of the Intellectual Property Code. The same sentence has been inserted in Articles L. 211-3 and L. 342-3 6f the CPI regarding the exceptions on related rights and the exceptions to the right of the maker of a database. See Code de la propriété intellectuelle (partie législative), Première partie - La propriété littéraire et artistique. The French Constitutional Council concluded that Directive 2001/29/EC requires the application of the exceptions to be subordinated to the three-step test. Decision 2006-540 DC of July 27, 2006. V.-L. Benabou, 'Patatras! À propos de la décision du Council Constitutionnel du 27 juillet 2006', 20 *Propr. Intell*, 2006, 240.

<sup>465</sup> Article 33(2) of the Act No. LXXVI. of 1999 on Copyright, as amended by Act No. LXXVIII of 2001 and Act No. CII of 2004.

<sup>466</sup> Article 18(2) of the Latvian Copyright Law as last amended on April 22, 2004.

<sup>467</sup> Article 10(2) of the Act on Copyright, Neighbouring Rights and Databases, introduced by the Law of April 18, 2004 (published in *Mémorial A*, No. 61, 2004, at 941). Also see J. Neuen, 'Luxembourg's Implementation of the European Directive of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society', 202, 2004, *RIDA*, 139, 153.

<sup>468</sup> Article 9(3) of the Copyright Act XIII of 2000, as amended by Acts VI of 2001 and IX of 2003, Government Gazette of Malta, No. 17467.

<sup>469</sup> Article 35 of the Act of 4 February 1994 on Copyright and Neighboring Rights, Monitor Polski, 23.2.1994, No. 24, item 83, as amended by Act of 1 April 2004 [Ustawa o zmianie ustawy o prawie autorskim i prawach pokrewnych z dnia 1 kwietnia 2004 r.]

<sup>470</sup> Article 75(4) of the Portuguese Act on Copyright, introduced by Law 50/2004 of August 24, 2004 and published in *Diário da República – I Série – A*, No. 199, 24 de Agosto de 2004, at 5658. See L.F. Rebello, 'Implementation of Directive 2001/29/EC in Portuguese Law', 206, 2005, *RIDA*, 148, 153.

<sup>471</sup> Article 33(1) of Law no. 8/1996 on Copyright and Neighbouring Rights (*amended by* Law no. 285/2004, by EGO no 123/2005).

<sup>472</sup> Article 46 of the Copyright and Related Rights Act, as amended on May 11, 2004, Official Gazette RS No. 43/04.

<sup>473</sup> Article 40*bis* of the Spanish Copyright Act, introduced into Spanish Law as soon as 1998 when the Database Directive was implemented. Rather than limiting the application of the test to databases, the Spanish legislator extended the application of the test to all exceptions under copyright.

Note that China and Australia have also incorporated the three-step test into their relevant statutes. See Article 21 of the Chinese Law of August 14, 2002. Also see s. 200 AB of the Australian Copyright Act of 1968, as introduced into Australian Law by the Copyright Amendment Act 2006, No. 158, 2006, commenced on December 11, 2006.

<sup>474</sup> See, for instance, *Google v. Copiepresse*, Brussels District Court, 13.2.2007, (2007) 1-2 A&M 107, comment by D. Voorhoof; German Federal Supreme Court, 11.7.2002, [2002] GRUR 963 (the exception in favour of summarising the press in electronic format for intra-company purposes was held to be compatible with the three-step test); Swiss Federal Court of 26.6.2007, 4c.73/2007/len (the three-step test was used to validate the extension of the limitation for press review to digital press clipping); an opposite decision was reached in a Dutch decision. See First Instance Court of the Hague (Rb.'s Gravenhage) of 2.3.2005 [2005] *Computerrecht*, 143, comment by K.J. Koelman. Also see S. Dusollier, 'L'encadrement des exceptions au droit d'auteur pour le test des trois étapes', *IRDI*, 2005, 217.

On the Court decisions applying the three-step test see S. Dusollier, 'The Application of the Three-Step Test by the National Courts', paper presented at the Workshop 'Rethinking the Three-Step Test' jointly organised by the Max Planck Institute for Intellectual Property Law and Queen Mary University in London, Paris, ULIP, 16 Feb 2007.

the European three-step test should serve as a guide for legislative action or a rule of judicial interpretation. Von Lewinski and Reinbothe argue that it is the European Court of Justice (ECJ) and not national Courts that should control the interpretation and implementation of copyright limitations.<sup>475</sup> Koelman is sceptic as to the application of the test by national judges<sup>476</sup> and Geiger anticipates the issue of an ECJ ruling determining who the true addressee of the test is.<sup>477</sup> In our view, the application of the three-step test at judicial level could seriously restrict the scope of applicable copyright limitations. Since the three-step test was initially adopted as a diplomatic compromise, it is not best suited for judicial application. As opposed to the fair-use test in the US,<sup>478</sup> which is set as a standard for the courts to actually apply, the three-step test does not give judges sufficient latitude for considering other interests than those of the rightholder's, even though copyright limitations are essential for the preservation of the interests of the end users and, therefore, for maintaining the copyright balance. This is because the three-step test is inherently an economic-prejudice test measuring the effect that a use may have on the normal exploitation of works and its potential prejudice over the rightholder's interests; in every interpretation that this test may receive, the impact of an activity on the rightholders' interests is, in our opinion, decisive. If private copying has to judicially pass the scrutiny of this test every time that a user invokes the private copying limitation, the scope of permissible uses will be unprecedentedly narrowed. This is because if the three-step test is to be applied by the judges it means that the test forms yet another condition that private copying has to fulfil so as to be permitted! In our opinion, the three-step test is ill-suited for the purposes of judicial examination as it currently stands. Things could perhaps be different if this test was reformulated so as to form a standard for judicial application.<sup>479</sup>

### **Interpretative difficulty and digital relevance**

Apart from the controversy as to whether the three-step test should be applied by the judiciary or not, the formulation of the three-step test is far from clear, as Verken and Vivant rightly

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<sup>475</sup> S. von Lewinski & J. Reinbothe, 'The WIPO Treaties 1996: Ready to Come into Force', *EIPR*, 2002, p. 204; V.-L. Benabou, 'La directive droit d'auteur, droits voisins et société de l'information: valse à trois temps avec l'acquis communautaire', *Comm. Com. Électr.*, October 2001, 10.

<sup>476</sup> K.J. Koelman, 'Fixing the Three-Step Test', *EIPR*, 2006, p. 407; M. Vivant & G. Vercken, 'Comment on Paris Court of Appeal', *Légipresse*, 22 April 2005, 227, at 233.

<sup>477</sup> C. Geiger, 'From Berne to National Law, via the Copyright Directive: The Dangerous Mutations of the Three-Step Test', 2007, *EIPR*, 486, at 488; P.B. Hugenholtz *et al*, *The Recasting of Copyright and Related Rights for the Knowledge Economy*, IViR, November 2006, p. 71.

<sup>478</sup> Section 107 of title 17 of the US Code.

<sup>479</sup> Proposals to this end have been put forward by many scholars. Indicatively, see C. Geiger, 'The Three-Step Test, a Threat to Balanced Copyright Law?', 37 *IIC*, 6/2006, pp. 683-699, at p. 697 *et seq.*

point out.<sup>480</sup> Indeed, the test is replete with terms which may receive diverse interpretations,<sup>481</sup> either broader or narrower. For instance, there is no clear definition as to what a normal exploitation is or how the interests of the rightholders may be prejudiced. If a broad interpretation is adopted then most activities falling under the scope of copyright limitations shall be seriously restricted. Since the ECJ has not so far applied the three-step test, its scope remains largely uncertain.<sup>482</sup> In this confusion, the digital context complicates issues further still. In our view, if no consensus could be reached as to the interpretation of the three-step test in the analogue environment, things are more likely to be complicated in the digital context. It should not be neglected that the three-step test was first introduced in 1967 at the revision of the Berne Convention. Digital uses were not available at that time. In fact, they did not even exist! One can only wonder how digital private copying can comply with this 'ancient' test.

In a decision dated 25 June 2000<sup>483</sup> referred to by the European Union, the WTO Panel, stated that the exception adopted by the American legislator, which exempted all commercial establishments that broadcast music, such as bars or restaurants from copyright-royalty payments,<sup>484</sup> violated the TRIPS Agreement's three-step test.<sup>485</sup> For the first time, an international adjudicative body offered a definition of the conditions set by the test, whose content had until then been very vague. Since then, scholars have proposed other interpretations, due to the fact that many grey areas still exist as to the exact scope of the test. Our purpose is neither to examine the Panel's decision in detail, which has been analysed many times already,<sup>486</sup> nor to present an in-depth study of the content of the three-step test.

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<sup>480</sup> G. Vercken & M. Vivant, 'Mesures techniques de protection sur le DVD, le test des trois étapes met en échec l'exception de copie privée', *Legipresse*, n°214, Rubrique Cours et Tribunaux, 2004, pp. 148-155, at p. 153; P. Johnson, 'One Small Step or One Giant Leap' 26(6) *EIPR*, 265-272, 2004, at 265; F. Gotzen, 'Copyright in Europe: Quo Vadis? Some Conclusions on after the Implementation of the Information Society Directive', *RIDA*, 2007, 211, at 211 *et seq.*

<sup>481</sup> S. Ricketson, 'The Berne Convention: the Continued Relevance of an Ancient Text', *op. cit.*, at 223. C. Geiger, 'From Berne to National Law, via the Copyright Directive', *op. cit.*, at 487.

<sup>482</sup> Note that the application of the three-step test in respect of temporary copying has been brought up in *Infopaq*, but the Court did not examine this issue. See *Infopaq International A/S Danske Dagblades Forening*, Case C - 5/08, 16.7.2009.

<sup>483</sup> World Trade Organisation, *United States – Section 110(5) of the U.S. Copyright Act*, Report of the Panel, WT/DS160/R, 15 June 2000.

<sup>484</sup> 17 U.S.C. § 100 (5), as modified by an act of 1998 (*Fairness in Music Licensing Act*).

<sup>485</sup> Article 13 of the Agreement on Trade Related Aspects of Intellectual Property Rights, 1994 (TRIPS): "confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."

<sup>486</sup> For an analysis of the WTO Trade decision see J.C. Ginsburg, 'Towards Supranational Copyright Law? The WTO Panel Decision and the Three-Step Test for Copyright Exceptions', *RIDA*, 2001, 187, 2; M. Ficsor, 'How Much of What? The "Three-Step Test" and its Application in two Recent WTO Dispute Settlement Cases', *RIDA*, 2002, 192, 111; A. Lucas, 'Le "triple test" de l'article 13 de l'Accord ADPIC à la lumière du rapport du Groupe spécial de l'OMC "États-Unis – Article 110(5) de la loi sur le droit d'auteur"', in P. Ganea, C. Heath, &

Rather, we will go through the test and see whether digital private copying passes its scrutiny since, in our view, the test is not well adapted to cover digital uses of copyrighted content.

## 1. First step: Private copying under Article 5(2)(b) of Directive 2001/29/EC as a ‘certain special case’

Under the first step of Article’s 5(5) test, a copyright limitation has to be statutorily prescribed as a ‘*certain special case*’ to be permitted. Below, we examine how the private copying limitation of Article 5(2)(b) of Directive 2001/29/EC qualifies as such ‘certain special case’.

### 1.1. ‘Certainty’

A copyright limitation is considered to reach a threshold of certainty within the meaning of the three-step test when it is ‘*clearly defined*’.<sup>487</sup> This was the opinion of the WTO Panel in its 2000 decision.<sup>488</sup> To some extent, this matches the interpretation suggested by Ricketson, who argues the term ‘certainty’ should measure whether the exception, as formulated, is ‘*clearly defined and narrow in its scope and reach*’.<sup>489</sup> One should not neglect that the draft legislation that precedes, and has later become, the TRIP’s three-step test,<sup>490</sup> dictated that copyright exceptions should be provided to ‘*clearly and carefully defined special cases*’,<sup>491</sup> a wording that never

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G. Schricker, *Urheberrecht Gestern – Heute – Morgen, Festschrift für Adolf Dietz zum 65. Geburtstag*, C.H. Beck, 2001, p. 423; D.J. Brennan, ‘The Three-Step Test Frenzy – Why the TRIPS Panel Decision might be Considered Per Incuriam’, *IPQ*, 2002, 2, 212; B.C. Goldman, ‘Victory for Songwriters in WTO Music-Royalties Dispute Between US and EU – Background of the Conflict over the Extension of Copyright Homestyle Exemption’, *IIC*, 2001, 32, at 412; J. Olver, ‘Copyright in the WTO: The Panel Decision on the Three-Step Test’, 25 *Colum. J. L. & A.*, 2002, 119; M. Senfileben, ‘Towards a Horizontal Standard for Limiting Intellectual Property Rights? WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Tests in Patent and Trademark Law’, *IIC*, 2006, 37, 407.

<sup>487</sup> World Trade Organisation, *United States – Section 110(5) of the U.S. Copyright Act*, Report of the Panel, WT/DS160/R, 15 June 2000, at paragraph 6.108.

<sup>488</sup> *Ibid.* In this report, the Panel concluded that subparagraph (A) of Section 110(5) of the United States Copyright Act meets the requirements of Article 13 of the TRIPS Agreement, while subparagraph (B) of Section 110(5) of the United States Copyright Act does not meet the requirements of Article 13 of the TRIPS Agreement.

<sup>489</sup> S. Ricketson, *The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions*, Centre for Copyright Studies Ltd, 2002, at p. 29; M. Tawfik, ‘International Copyright Law and ‘Fair Dealing’ as a ‘User Right’, *e-Copyright Bulletin*, Unesco, April-June 2005, at p. 11.

<sup>490</sup> Article 13 of the Agreement on Trade Related Aspects of Intellectual Property Rights, 1994 (TRIPs): ‘*Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.*’

<sup>491</sup> This language was proposed by the United States. See GATT Doc. MTN.GNG/NG11/W/70, 11<sup>th</sup> of May 1990, 6. Gradually, it has been approximated to the wording of Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works 1886 (1971 revision with 1979 amendments).

made its way to the three-step test.<sup>492</sup> A similar position was also taken prior to the 1996 WIPO Diplomatic Conference.<sup>493</sup>

A reader at this point should keep in mind that ‘certain’ are those cases which are clearly defined.

## 1.2. ‘Speciality’

To the WTO Special Panel, speciality in the context of the three-step test could be defined as ‘*having an individual or limited application or purpose*’, ‘*exceptional in quality or degree; unusual; out of the ordinary*’ or ‘*distinctive in some way*’.<sup>494</sup> As Gervais rightly indicates, this definition is controversial since it may receive two distinct interpretations.<sup>495</sup> The first interpretation is supported by Seftleben. To him, speciality in the context of the three-step test means that exceptions should have a limited scope and, hence, enable only limited privileged uses.<sup>496</sup> This is what we qualify as the quantitative dimension of speciality. The second interpretation of speciality is made by Ricketson who suggests that a ‘special’ case is one having a distinctive, exceptional objective.<sup>497</sup> This definition emphasises more the qualitative aspect of speciality, under which a use is ‘special’ when it is based on specified particular objectives. Such a particular objective could be, for example, the reproduction of a work for educational purposes or for public security.<sup>498</sup> Both the qualitative and quantitative approaches to ‘speciality’ indicate that exceptions should be justified by a ‘*clear reason of general policy or other exceptional circumstance*’.<sup>499</sup> This means that, to be permitted, a copyright limitation should be premised on a rational public-policy objective.<sup>500</sup>

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<sup>492</sup> M. Senftleben, *Copyright, Limitations and the Three-Step Test, An Analysis of the Three-Step Test in International and EC Copyright Law*, Kluwer Law International, 2004, at p. 134.

<sup>493</sup> Preparatory Document for and Report of the WIPO/Unesco Committee of Governmental Experts, Geneva, December 7 to 11, 1987, *Copyright*, 1988, 42, at p. 63: copyright exceptions should only be confined to ‘precisely defined special cases’.

<sup>494</sup> See *United States – Section 110(5) of the U.S. Copyright Act*, Report of the Panel, op. cit., 6.109.

<sup>495</sup> D. Gervais, *The TRIPS Agreement: Drafting History and Analysis*, 2<sup>nd</sup> Ed., Sweet & Maxwell, 2003, p. 146.

<sup>496</sup> M. Senftleben, *Copyright, Limitations and the Three-Step Test*, op. cit., p. 134.

<sup>497</sup> *United States – Section 110(5) of the U.S. Copyright Act*, Report of the Panel, op. cit., at paragraph 6.109; S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, Centre for Commercial Law Studies, Queen Mary College, Kluwer, 1987, p. 482; A. Lucas, ‘Le “triple test” de l’Article 13 de l’Accord ADPIC’, op. cit., p. 430.

<sup>498</sup> See Articles 5(3)(a) and (e) of Directive 2001/29/EC respectively.

<sup>499</sup> S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works*, op. cit., p. 482. See also, M. Ficsor, ‘How Much of What?, The Three-Step Test and Its Application in Two Recent WTO Dispute Settlement Cases’, *RIDA*, 2/2002, p. 133; J. Reinbothe & S. von Lewinski, *The WIPO Treaties 1996*, op. cit., p. 124; M. Senftleben, *Copyright, Limitations and the Three-Step Test*, op. cit., p. 152.

<sup>500</sup> S. Ricketson, *ibid*; J. Reinbothe & S. von Lewinski, *ibid*, p. 124; M. Ficsor, *ibid*, p. 133; M. Ficsor, *The Law of Copyright and the Internet*, op. cit., p. 284 & 516; P.-Y. Gautier, ‘De la transposition des exceptions: à propos de la directive “droit d’auteur dans la société de l’information”’, *Communication Commerce Électronique*, 2001, chron. 25, no. 19.

We conclude from the aforementioned analysis that the first condition of the test under which copyright limitations should be confined as certain special cases means that these limitations must be clearly defined and must be based on specified particular objectives.<sup>501</sup> Concerning the private copying limitation provided for in Article 5(2)(b), the particular objective on which this limitation is based is the protection of end-user privacy, as we illustrated earlier.<sup>502</sup> If a Court finds that an act of private copying constitutes a lawful use by virtue of Article 5(2)(b), that would implicitly be on the assumption that the private use of a work is made for the purposes of learning, study and enjoyment in privacy. For instance, an individual copying a DVD for private non-commercial use shall be exempted from infringement, *inter alios*, for making that copy at the privacy of his home which is inviolable. The same would apply to a private circle of individuals watching *Youtube* videos. In our view, therefore, acts of private copying either digital or analogue serve a special policy objective, namely the right to privacy. At the same time, the permissibility of private copying is clearly defined under Article 5(2)(b) in terms that the scope of the limitation is not broadly framed; as Vercken and Vivant rightly observe, the conceptual contours of the private copying limitation are comprised within relatively precise terms.<sup>503</sup> These contours are the private and non-commercial character of the use, which we analysed earlier.<sup>504</sup> In our opinion therefore digital private copying is a certain special case within the meaning of the first condition of Article 5(5) of Directive 2001/29/EC.

Since the three criteria of the three-step test are meant to function as cumulative conditions, it remains to be seen whether the private copying limitation fulfils the second requirement. This is the absence of a conflict with a normal exploitation of the work that is privately copied.

## **2. Second step: The absence of a conflict with a normal exploitation of the work that is subject to private copying**

Copyright limitations that qualify as ‘certain special cases’, such as the private copying limitation of Article 5(2)(b) of Directive 2001/29/EC, should further not come in ‘*conflict with a normal exploitation of the work*’.<sup>505</sup> Hugenholtz and Visser have rightly pointed out the lack of

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<sup>501</sup> J. Reinbothe & S. von Lewinski, *ibid.*

<sup>502</sup> At page 39 *et seq.*

<sup>503</sup> G. Vercken & M. Vivant, ‘Mesures techniques de protection sur le DVD, le test des trois étapes met en échec l’exception de copie privée’, *op. cit.*, at p. 152.

<sup>504</sup> At pp. 61 *et seq.*, 93 *et seq.*

<sup>505</sup> The wording of the second condition of the test is employed alike in Article 5(5) of Directive 2001/29/EC, Article 9(2) of the Berne Convention, Article 13 of the Agreement on Trade Related Aspects of Intellectual Property Rights, 1994 (TRIPs), and Article 10 of the WIPO Copyright Treaty (WCT).

clear interpretation as to what constitutes a ‘normal exploitation of a work’.<sup>506</sup> While there are three main approaches regarding the interpretation of this second criterion of the three-step test, we do not find all of them suitable for application in the digital environment. As we will illustrate below, under each proposed interpretation of the concept ‘normal exploitation’ the losses to the rightholders are decisive and the main difference between the various perspectives may only be found in the way that they determine the relevant harm to the rightholders. Three main approaches have been proposed in the context of the second step of the test: the historical, the empirical and the normative approaches. We examine them below.

### **Historical approach**

Under the first approach, a conflict with a normal exploitation shall only take place where the use in question competes *directly* with traditional forms of exploitation, such as letterpress printing.<sup>507</sup> Bornkamm, the main proponent of this approach, argues that where the exploitation of a work would be *indirectly* affected due to the application of a copyright limitation, such as private copying, this effect should be subject to examination under the third condition of the test, namely the prohibition against the unreasonable prejudice to the interests of the rightholder.<sup>508</sup> Consequently, Bornkamm’s approach confines the scope of the second criterion of the test to direct inroads made into the field of the traditional, analogue, forms of exploitation.<sup>509</sup> Yet, as Senftleben rightly acknowledges, this approach should be rejected since it is ill-suited in the digital environment.<sup>510</sup> This is due to the possibility of offering an unequal treatment to the different categories of works since not all works can be marketed successfully in both analogue and digital ways. For instance, a book may be available online in electronic format and at the same time be placed on the shelves of booksellers. Still, one should not neglect the fact that the commercialisation of copyrighted content on the internet may not be equally attractive to all kinds of works. And whilst the internet may be an ideal place to exploit newspaper articles, dictionaries and academic writings, this may not be the case to some other forms of works, such as the book we mentioned earlier. In these terms, we consider that the reduction of the scope of the second criterion of the three-step test to traditional forms of exploitation is not adequate in the context of the digital environment.

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<sup>506</sup> For the unclarity of the Berne Convention on these definitions, see P. B. Hugenholtz & D.J.G. Visser, ‘Copyright problems of electronic document delivery’, op. cit., p. 4.

<sup>507</sup> J. Bornkamm, ‘Der Dreistufentest als urheberrechtliche Schrankenbestimmung – Karriere eines Begriffs’, in H.J., Ahrens *et al.*, *Festschrift für Willi Erdmann zum 65. Geburtstag*, Carl Heymanns, Köln-Berlin-Bonn-München, 2002, p. 34.

<sup>508</sup> *Ibid.*

<sup>509</sup> The proponents of this approach underscore that the aforementioned argumentation draws successfully a distinctive line between the second (conflict with a normal exploitation) and the third (unreasonable prejudice to the legitimate interests) condition of the three-step test. J. Bornkamm, *ibid.*, p. 46.

<sup>510</sup> M. Senftleben, *Copyright, Limitations and the Three-Step Test*, op. cit., at pp. 170-171.

## Empirical approach

The second approach in defining normal exploitation, which is supported by Ricketson, places its focus on the author and the way by which he usually derives profit from a work. To this approach,

*“the expression “normal exploitation of a work” refers simply to the ways in which an author might reasonably be expected to exploit his work in the normal course of events. Accordingly, there will be kinds of use which do not form part of his normal mode of exploiting his work – that is, uses for which he would not ordinarily expect to receive a fee – even though they fall strictly within the scope of his reproduction right.”*<sup>511</sup>

Ricketson emphasises the empirical connotation of the term ‘normal’. To him, uses that fall within the scope of copyright limitations do not form part of a rightholder’s normal mode of exploiting the work. Indeed, the rightholders do not normally exploit their work where copyright limitations apply,<sup>512</sup> since they do not expect to make a profit in that exempted area.<sup>513</sup> Under the empirical approach, therefore, the question to ask would be whether the exempted use would otherwise fall within the scope of activities from which the rightholder would usually expect to receive compensation. Yet, framing the question in this way leads to a circular argumentation that shelters copyright limitations. As Goldstein has noted,

*“[a]t least historically, an author will normally exploit a work only in those markets where he is assured of legal rights; by definition, markets for exempted uses fall outside the range of normal exploitation. Consequently, it might be thought that to expand an exemption is to shrink the “normal market,” while to expand the definition of “normal market” is to shrink the permitted exception.”*<sup>514</sup>

Ricketson himself acknowledges the inherent circularity of the empirical approach and suggests that it would be preferable to simply ask whether the particular use is one that the

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<sup>511</sup> S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works*, op. cit., p. 483.

<sup>512</sup> *United States – Section 110(5) of the U.S. Copyright Act*, Report of the Panel, op. cit., §6.188 ; Also see A. Lucas, ‘Le “triple test” de l’article 13 de l’accord ADPIC à la lumière du rapport du groupe spécial de l’OMC “Etas-Unis – Article 110(5) de la loi sur le droit d’auteur”’, in P. Ganeva, C. Heath & G. Schricker, *Urheberrecht Gestern – Heute – Morgen, Festschrift für Adolf Dietz zum 65. Geburtstag*, C.H. Beck, 2001, p. 432; P. Goldstein, *International Copyright – Principles, Law and Practice*, Oxford University Press, 2001, p. 295.

<sup>513</sup> This approach has been subject to criticism due to its inherent circularity. Ricketson himself is alert to this circularity. See S. Ricketson, *WIPO Study on Limitations and Exceptions to Copyright and Related Rights in the Digital Environment*, WIPO Doc. SCCR/9/7, 5 April 2003, at p. 23; Also see J.C. Ginsburg, ‘Toward Supranational Copyright Law? The WTO Panel Decision and the “Three-Step Test” for Copyright Exceptions’, *Revue Internationale du Droit d’Auteur*, 2001, 13, at p. 23; J. Oliver, ‘Copyright in the WTO: The Panel Decision on the Three-Step Test’, *The Columbia Journal of Law & the Arts*, 2002, 25, 119, at p. 159.

<sup>514</sup> P. Goldstein, *International Copyright: Principles, Law and Practice*, Oxford University Press, New York, 2001, at § 5.5.

rightholder would ordinarily or, perhaps, reasonably seek to exploit.<sup>515</sup> This would involve looking at what presently is the case in the market of copyrighted materials, and would disregard potential modes of exploitation that might arise in the future.

While we agree with this approach, we think that it is more adequate to fit the needs of the analogue environment. In our view, there is reason to believe that this approach is ill-suited as regards digital uses of copyrighted content, mainly due to its inherent circularity. On the side of the rightholders, the adoption of the empirical approach could gradually lead to the abridgement of exclusive rights in cases where technical advances offer new possibilities for taking advantage of a limitation. On the side of end users, it is possible that legislators may refrain from introducing new limitations in the digital environment, an option reflected in the Agreed Statements concerning the three-step test of Article 10 WCT. These Statements indicate that *'the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.'* Since Ricketson's approach safeguards the acts of exploitation that are known to date and not potential new ways of exploiting works that might emerge in the future, new limitations may only be placed on exclusive rights in areas which are not currently exploited by the rightholders in the normal course of events. Nonetheless, digital technology offers new possibilities in controlling individual uses of copyrighted content so that new ways of contracting with end users and new markets will emerge. We agree with Ginsburg that associates 'normal exploitation' with technical evolution, since, in our opinion too, normal exploitation and the advance of technology are inextricably connected.<sup>516</sup> Yet, if these new areas of normal exploitation were to put beyond the reach of national legislators, the ability of these legislators to react adequately to pursue policy objectives via the introduction of new limitations would be unduly curtailed. One should not neglect, however, that one of the prime objectives of the three-step test was to allow national legislation great latitude. As a result, we do not endorse Ricketson's empirical approach as an adequate interpretation of what a conflict with a normal exploitation is in the digital environment.

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<sup>515</sup> S. Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, Standing Committee on Copyright and Related Rights, Ninth Session, Geneva, June 23-27, 2003, WIPO, SCCR/917, April 5, 2003, p. 25.

<sup>516</sup> G. Ginsburg, 'Vers un droit d'auteur supranational? La décision du groupe spécial de l'OMC et les trois conditions cumulatives que doivent remplir les exceptions au droit d'auteur', *RIDA*, 1/2001, pp. 42 & 44.

## Normative approach

The normative approach as to the interpretation of the second condition of the three-step test upholds that the decisive factor in a conflict with a normal exploitation occurs when a use encroaches upon the economic core of copyright. The crucial question under this approach is whether a copyright limitation impairs the possibility of marketing a work. To the WTO Panel, *‘if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that the right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains.’*<sup>517</sup> A conflict with a normal exploitation occurs where an exception or limitation deprives the rightholders of an actual or potential market of considerable practical or economic importance. As a result, to conflict with a normal exploitation, a use ought to deprive the rightholders from significant or tangible commercial gains;<sup>518</sup> as Gautier has put it, it should entail a risk of ‘commercial parasitism’.<sup>519</sup>

In our view, the normative approach has the merit of being technologically neutral. This means that it can equally apply to the analogue and the digital environment since its focus is on the actual harm that rightholders might suffer from a copyright limitation irrespective of the context to which this limitation applies, digital or analogue. Yet, it is constructed on the basis of economic considerations. This is justified by the fact that the Panel’s interpretation revolved around Article 13 of the TRIPs Agreement which follows a predominantly economic logic. One can only wonder how this economic rationale can adhere to the socio-cultural dimension of European copyright law, as affirmed in many Recitals of Directive 2001/29/EC.<sup>520</sup> We consider that it would be advisable to adopt, in addition to a normative approach, an extremely restrictive approach as to what constitutes a normal exploitation of a

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<sup>517</sup> *United States – Section 110(5) of the U.S. Copyright Act*, Report of the Panel, op. cit., §§ 6.183 & 6.184

<sup>518</sup> *Ibid.*, § 6.187.

<sup>519</sup> P.-Y. Gautier, *De la transposition des exceptions: à propos de la directive “droit d’auteur dans la société de l’information”*, *Communication, Commerce Electronique*, 2001, chron. 25, no. 19. This interpretation of the second condition of the three-step test is largely driven by economic considerations. For a critique of this economic interpretation, see A. Lucas, *Le “triple test” de l’article 13 de l’accord ADPIC à la lumière du rapport du groupe spécial de l’OMC “Etas-Unis – Article 110(5) de la loi sur le droit d’auteur”*, op. cit.; E. Bréart, *‘Informatique, communication et créations immatérielles: Chronique No XVI (1<sup>ère</sup> partie): Parlez-moi de droits intellectuels!’*, *Petites Affiches*, no. 157, 8 august 2001, pp. 20-24, at p. 20.

<sup>520</sup> Recital 3: *‘The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.’*

Recital 9: *‘Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large.’*

Recital 12: *‘Adequate protection of copyright works and subject-matter of related rights is also of great importance from a cultural standpoint.’*

work. As Dusollier justly underlines, normal exploitation should only cover *'the main avenues of the exploitation of the work, i.e. those which constitute the author's major sources of income'*.<sup>521</sup>

Subjecting acts of digital private copying to the second condition of the test as approached normatively, we need to examine whether this kind of copying deprives the rightholders from an actual or potential market of practical or economic importance. If the effect of private copying on this market is noticeable and the sale of work diminishes, this goes against normal exploitation.<sup>522</sup> That would be, for instance, the case of commercial private copying in terms that this kind of use competes directly with the exploitation rights of the rightholders. Yet, commercial copying is explicitly excluded from the scope of Article 5(2)(b). We view the lack of a commercial character in permissible private copying as an attempt to ensure that no conflict with the normal exploitation occurs. This is because activities falling under the scope of the private copying limitation, being non-commercial, cannot lead to the creation of a market for selling unauthorised copies and thereof cannot conflict with a normal exploitation of a work.

We consider that while some forms of digital private copying shall certainly pass the scrutiny of this step of the test, others will probably face difficulties. For instance, time-shifting does not divest the rightholders from a source of income since it does not encroach upon any main way of exploitation.<sup>523</sup> Indeed, there is no market for time-shifted content; if the beneficiaries of permissible time-shifting had to pay for the content that they time-shift it is likely that they would stop engaging in this activity. Therefore, one cannot conclude with certainty that a source of income for rightholders would be generated.

Nonetheless, this may not be the case with acts of downloading copyrighted content from file-sharing networks. As we mentioned earlier, downloading may be permitted as long as it is private and non-commercial, despite its potential economic significance to those engaged in it.<sup>524</sup> Yet, it deprives the rightholders from potential sales in terms that end users do no longer need to buy the content they download; due to lack of empirical evidence, however, we can neither conclude with certainty that acts of downloading impair the market for selling copies nor can we assume that the end users would otherwise be prompted to purchase the

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<sup>521</sup> See S. Dusollier, 'L'encadrement des exceptions au droit d'auteur pour le test des trois étapes', *IRDI*, 2005, 218.

<sup>522</sup> J. Reinbothe & S. von Lewinski, *The WIPO Treaties 1996*, op. cit., p. 125.

<sup>523</sup> This is not to say however that the potential market for permissible time-shifting would not form a major revenue stream for rightholders if time-shifting was not statutorily exempted from infringement. See, for instance, *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417, 1984.

<sup>524</sup> At page 106 *et seq.*

copyrighted content. Certainly, some end users might be tempted to buy this content and finally refrain from doing so due to the option of downloading it for free. One can wonder, however, whether the excess number of users of file-sharing networks justifies discussing about a substantial impairment to the sale of copies and that the potential market for file-sharing downloads itself forms a plausible major source of income. Of course, as in the time-shifting example, downloaders could refrain from their file-sharing activities had they been expected to pay. A major form of revenue need therefore not necessarily be expected. In our opinion, downloading does not affect the normal exploitation of the works available on file-sharing networks. We therefore conclude that digital private copying passes the scrutiny of the second condition of Article 5(5) of Directive 2001/29/EC.

Before we subject digital private copying to the last step of Article's 5(5) test, there is another parameter that we need to examine in the context of the normal exploitation of works: the lawfulness of the source-copy. Some national laws and courts around Europe have evolved yet another criterion for determining whether a particular use comes in conflict with the normal exploitation of works. Central in this 'criterion' is an examination of whether the method used to make a copy is lawful or not. Practically, this means that the private copying limitation applies only where the copy is made from a lawfully acquired original. Otherwise, a conflict with the normal exploitation occurs. While we do not uphold the validity of this criterion we consider that its examination is essential in understanding how the scope of the private copying limitation may be unreasonably restricted to the detriment of end users if the test is put at the hands of national judges.

### **Lawfulness of the source-copy and normal exploitation**

Under the laws of some Member States, such as Germany<sup>525</sup> and Italy,<sup>526</sup> digital private copying is permitted insofar as the copies are made from a lawfully acquired original. Where a digital work has been made available without the authorisation of the rightholder, and therefore not in the process of its normal exploitation, its further reproduction is unlawful.<sup>527</sup> Thus, it cannot benefit from the private copy limitation of Article 5(2)(b) of Directive

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<sup>525</sup> Article 53(1) of the German Copyright Act of 10.9.2003 and the same Article of the same Act of 26.10.2007 ('second basket'). Commission of the European Communities, Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, SEC(2004) 995, 19.7.2004, at p. 15; T. Dreier, 'La transposition de la directive sur le droit d'auteur et les droits voisins dans la société de l'information en Allemagne' in R.M. Hilty & C. Geiger (eds.), *Impulse für eine europäische harmonisierung des urheberrechts*, Springer/Litac, Berlin-Paris, 2007, p. 16.

<sup>526</sup> Article 71 *sexties* (4) of the Italian Law for the Protection of Copyright and Neighbouring Rights (Law No. 633 of April 22, 1941, as last amended by Legislative Decree No. 68 of April 9, 2003).

<sup>527</sup> P. Sirinelli, *Code de la Propriété Intellectuelle*, Dalloz-Sirey, 2004, 4<sup>ème</sup> ed., p. 782; C. Bernault, & A. Lebois, *Peer-to-peer File-Sharing and Literary and Artistic Property*, op. cit., pp. 19-22.

2001/29/EC. The logic behind this idea flows from the Roman maxim *'fraus omnia corrumpit'* which literally means that fraud negates every following act. Where a copy originates from an unlawful source, its legitimacy under the private copying limitation is tainted due to this unlawful origin. This is particularly relevant to copies made on file-sharing networks where the content is not made available by the rightholders but the users themselves. In our opinion, the real question is not whether the method used to make the copy should be lawful or not but rather whether lawfulness is a prerequisite for the application of the private copying limitation in the context of the second condition of Article 5(5).

The German Copyright Act sets the lawfulness of the source copy as an explicit requirement for the permissibility of private copying; it reads that the source-copy should not be *'manifestly illegal'*.<sup>528</sup> In our opinion, the German statute introduces yet another condition as regards the application of the private copying limitation in excess of Article 5(2)(b) of Directive 2001/29/EC. This means that the scope of the private copying limitation is restricted. Italy keeps a similarly restrictive stance. The Italian Copyright Act refers to the beneficiary of the private copy exception as *'the natural person who has acquired legal possession of copies of the protected works or the protected subject matters, or has legally accessed them'*.<sup>529</sup> Here again, the scope of the private copying limitation seems to be unreasonably narrowed in terms that it is not afforded to natural persons in general, as does Article 5(2)(b), but only to lawful users. This turns us back to the concept of the lawful user as employed in Directive 91/250/EEC on the legal protection of computer programs and Directive 96/9/EC on the legal protection of databases which afford their relevant limitations to lawful users only.<sup>530</sup> Yet, Directive 2001/29/EC makes no such reference but affords the private copying limitation to natural persons in general rather than to lawful users only.

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<sup>528</sup> Article 53(1) of the German Copyright Act of 10.9.2003 and the same Article of the same Act of 26.10.2007 ('second basket'). Commission of the European Communities, Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, SEC(2004) 995, 19.7.2004, at p. 15; T. Dreier, 'La transposition de la directive sur le droit d'auteur et les droits voisins dans la société de l'information en Allemagne' in R.M. Hilty & C. Geiger (eds.), *Impulse für eine europäische harmonisierung des urheberrechts*, Springer/Litec, Berlin-Paris, 2007, p. 16.

<sup>529</sup> Article 71 *sexties* (4) of the Italian Law for the Protection of Copyright and Neighbouring Rights (Law No. 633 of April 22, 1941, as last amended by Legislative Decree No. 68 of April 9, 2003).

<sup>530</sup> Article 5(1) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122, 17/05/1991 P. 0042 – 0046; Articles 6(1), 8 and 9 of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996, p. 20–28.

Also see C. Caron, 'La source de la copie privée doit-elle être illicite?', *Comm. Com. Électr.*, no. 9, September 2006, pp. 27-29, at 29-29.

While there are many cases in Europe that have dealt with the lawfulness of the source copy, either by upholding it<sup>531</sup> or by rejecting it,<sup>532</sup> in our view, the condition on the lawfulness of the source copy deviates from an unacceptably expansive interpretation of the wording of Article 5(2)(b) of Directive 2001/29/EC. We question its validity and consider that the neutral approach adopted by the Directive leads to safer conclusions for practical and technical reasons. Indeed, the distinction between lawful and unlawful copies may be burdensome.<sup>533</sup> Yet, the fact that there are some Member States in the EU that provide the lawfulness of the source copy as an express condition for the application of the private copying limitation<sup>534</sup> and

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<sup>531</sup> Consistent case-law in France, however, indicates that the lawfulness of the source copy is a criterion for determining the applicability of the exception, even though such condition nowhere appears on statute. The lawfulness of the source from which the copy was made is a prerequisite for the permissibility of online downloads. See Cass. Crim., 30 May 2006, 2006, JCP G II 10124, comment by C. Caron; 9 JCP E 1114, 2007, comment by M.-E. Laporte-Legeais; 2006 D. AJ 1684, Comment by J. Daleau; 2006 D. 2676, comment 'by E. Dreier; 210 RIDA 327, 2006, comment by P. Sirinelli, at 237. Also see A. Singh & T. Debieesse, 'Droit d'auteur, copie privée et responsabilité pénale', *Les cahiers de propriété intellectuelle*, January 2007, vol. 19, n° 1, pp. 349-362, at p. 349; *Procureur de la République SCPP and SPPF v. Madame A.*, Tribunal de Grande Instance de Rennes, Correctional Judgement, 30.11.2006, available in French from <<http://www.juriscom.net>>, at p. 7; CA Versailles, 9<sup>th</sup> Division, 16.3.2007, July-August 2007, *Comm. Com. Électr.* 30, comment by C. Caron.

In *Ludovic L.*, the Court held that the reproduction that follows an illicit act does not fall within the legal definition of the private copy. *Le Ministère Public, SEV, FNDF, Twentieth Century Home Ent. et al. v. Ludovic L.*, TGI Saint-Quentin, 10.1.2006, available in French from <<http://www.juriscom.net>>, at p. 7.

Similarly, in *Madame A.*, the court kept a similar stance; it ruled that the private copying limitation does not mean that lawful reproductions can be made from illicitly obtained works. *Procureur de la République SCPP and SPPF v. Madame A.*, Tribunal de Grande Instance de Rennes, Correctional Judgement, 30.11.2006, available in French from <<http://www.juriscom.net>>, at p. 7.

<sup>532</sup> In a 2004 Dutch case, the Court of Haarlem examined *obiter* the lawfulness of the source element and held that the search engine *zoekmp3.nl* was not liable for copyright infringement. The search engine provided links to sites making available mp3 files without the authorisation of the rightholders. To the Court, links to such sites were not illegal since mere acts of reproduction in which no sharing is involved do not violate copyright. Even though Directive 2001/29/EC had not yet been implemented in the Netherlands at the time of the trial, the Court took it into account and held that the copy of an 'illegal' mp3 file for private use did not violate copyright; uploading that file however on a network might infringe copyright. By this, the Court took the position that the lawfulness of the source copy is immaterial in the context of the private copying limitation. *Stichting Bescherming Rechten Entertainment Industrie Nederland (BREIN) v. Techno Design "Internet Programming" B.V.*, Haarlem District Court, 12.5.2004, available online in Dutch from <<http://zoeken.rechtspraak.nl>>, lastly accessible on 29.5.2008.

The stance of the 2004 Court was reaffirmed on appeal. In fact, the 2006 Court stressed that, since unauthorised communication of music files to the public infringes copyright, downloads of such files are by necessity preceded by an infringing act. In this context, downloading for private use does not purify the infringing communication. However, the Court accepted that such '*private use is irrelevant to the wrongful nature of the communication to the public.*' By this, the Court did not condition private copying to the lawfulness of the source copy. *Stichting Bescherming Rechten Entertainment Industrie Nederland (BREIN) v. Techno Design "Internet Programming" B.V.* [2006] ECDR 21, at point 4.6. For a comment of these cases see G. Champeau, 'Le MP3 en toute liberté aux Pays-Bas', *Numerama: Réfléchir le Numérique*, 13.5.2004, available online at <<http://www.numerama.com>>; S. Brandner, 'MP3: télécharger n'est pas pirater, selon le tribunal d'Haarlem', available online at <<http://www.juriscom.net>> 20.5.2004.

<sup>533</sup> C. Bernault, & A. Lebois, *Peer-to-peer File-Sharing and Literary and Artistic Property*, op. cit., p. 20, point 41.

<sup>534</sup> Express mention of the lawfulness condition is also made in Finland, Latvia, Spain and Sweden; copying in these States is permitted only when it is made from 'lawfully acquired' works. Commission of the European Communities, Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, SEC(2004) 995, 19.7.2004, at p. 15; Article 34(1) of the Latvian Copyright Law as last amended on April 22, 2004; Article 12 of the Copyright Act (Law No 404 of July 8, 1961 as last amended by Law No 748 of October 9, 1998); Section 11(5) of the Finnish Copyright Act of July 8, 1961, as amended by the Law of October 14, 2005; Article 31(2) of the Spanish Copyright Act, Law of 7 July 2006, BOE, No. 162, 8 July 2006, at 25561. The copy should be 'accessed legally' for the private copying limitation to apply; Article 12 of the Act on Copyright in Literary and Artistic Works as amended up to July 1, 2005: '*This Article does not confer a right to*

others which do not, reveals that the scope of the private copying limitation is not uniform across the EU. Where the permissibility of private copying is premised on the legitimate possession of, or access to, the source copy, the scope of the private copying limitation becomes arguably narrow. As Geiger rightly observes, the private copying limitation would be seriously weakened if the user would have to show that he made a copy from a lawful source every time he invoked the benefit of the private copying limitation.<sup>535</sup>

What is more, we think that the unlawfulness of the source copy is merely indicative and not decisive as to whether a conflict with a normal exploitation has taken place in the context of Article 5(5) of Directive 2001/29/EC. This is because under the normative interpretation of what constitutes such conflict, an activity covered by a copyright limitation should deprive the rightholders of an actual or potential market of considerable practical or economic importance. Yet, the mere fact that a user copies a work which he has not bought, or has no legal access to, does not mean that the rightholders are deprived of a market on which they exploit their works. This is because there is no clear indication that the end user would otherwise buy the copy. At the same time, a lawful user of a work may deprive rightholders of such markets. This is affirmed, for instance, by Article 8(2) of Directive 96/9/EC,<sup>536</sup> under which '[a] lawful user of a database which is made available to the public in whatever manner may not perform acts which conflict with normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database.' We therefore conclude that the lawfulness of the source copy is not a useful condition in determining whether a conflict with a normal exploitation has taken place.

Having concluded that digital private copying is a certain special case which does not come in conflict with the normal exploitation of works we need to examine whether it fulfils the last condition of the three-step test, *i.e.* whether it does not unreasonably prejudice the legitimate interests of the rightholders.

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*make copies of a work when the copy that constitutes the real master copy has been prepared or has been made available to the public in violation of Article 2.'*

Referring to the lawfulness of the source criterion, Estonia and Greece explicitly indicate that copying is permitted only from 'lawfully published' works. Article 18(1) of the Estonian Copyright Act of 11 November 1992, lastly amended by the Act of 22.9.2004 entered into force 29.10.2004 – RT I 1999, 54, 580; Article 18(1) of the Greek Copyright Law 2121/1993 as amended by Law 3057/2002.

<sup>535</sup> C. Geiger, 'Legal or Illegal? That is the Question! Private Copying and Downloading on the Internet', 5 *IIC*, 39, 2008, pp. 597-603, at p. 602; S. Dusollier, 'L'utilisation légitime de l'œuvre: un nouveau sesame pour le bénéfice des exceptions en droit d'auteur?', *Comm. Com. Électr.*, November 2005, pp. 17-20, at p. 19.

<sup>536</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, *OJ* No. L 77/20 of 27 March 1996.

### **3. Third step: The absence of an unreasonable prejudice to the legitimate interests of rights-holders vis-à-vis private copying**

Under the last condition of the three-step test of Article 5(5), an activity covered by a copyright limitation ‘*should not prejudice the legitimate interests of the rightholders.*’ This last criterion has evolved in international law and, even though its first stipulation under Article 9(2) of the Berne Convention<sup>537</sup> referred to the legitimate interests of *authors*, its scope was expanded by Article 13 of the TRIPs Agreement which refers to the legitimate interests of the *rightholder*.<sup>538</sup> The same expansive stipulation is maintained by Article 5(5) of Directive 2001/29/EC. As Ricketson rightly acknowledges, the different contexts in which the three-step test has been applied has impacted on the formulation of this last criterion.<sup>539</sup> We agree with this observation. Indeed, as we indicated earlier, the three-step test was first introduced as a general exception to the reproduction right and gradually its scope expanded to cover all exclusive rights.<sup>540</sup>

Two main elements have been factored into the equation of this last criterion of Article 5(5). The first is the reference to the legitimate interests of the rightholders rather than their rights. Not each and every set of interests is subject to consideration under the test. Secondly, activities that prejudice the legitimate interests of the rightholders may be permitted as long as they are not ‘unreasonable’. While copyright limitations have an effect to the interests of the rightholders, this effect is acceptable insofar as the resulting harm does not reach an unreasonable level.<sup>541</sup> As distinction should therefore be made between reasonable and, hence, permissible losses and unreasonable and, thereof, prohibited ones.

Below we examine this last condition of the three-step test with a view to ascertain whether digital private copying is in compliance with it.

#### **3.1. The reference to legitimate interests instead of rights**

The third condition of the three-step test mandates that a copyright limitation should not unreasonably prejudice the legitimate interests of the rightholders. To our surprise, this condition refers to ‘interests’ rather than ‘rights’. One can only wonder why the drafters of the

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<sup>537</sup> Berne Convention for the Protection of Literary and Artistic Works 1886 (1971 revision with 1979 amendments).

<sup>538</sup> Agreement on Trade Related Aspects of Intellectual Property Rights, 1994 (TRIPs).

<sup>539</sup> S. Ricketson, ‘The Boundaries of Copyright: Its Proper Limitations and Exceptions: International Conventions and Treaties’, *Intellectual Property Quarterly*, 1999, 56, pp. 69-71, at pp. 80-83 and 86-90.

<sup>540</sup> At pp. 118-119.

<sup>541</sup> S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, Centre for Commercial Law Studies, Queen Mary College, Kluwer, 1987, pp. 483-484; H. Desbois, A. Françon & A. Kéréver, *Les conventions internationales du droit d’auteur et des droits voisins*, Dalloz, Paris, 1976, p. 205.

three-step test chose the term ‘interests’ instead of directly prohibiting an unreasonable prejudice to the exclusive ‘rights’ of the rightholders. As we saw earlier in this thesis, copyright limitations apply to the exclusive *rights* of the rightholders.<sup>542</sup> At the same time, they ought not to prejudice their legitimate *interests*. In these terms, where copyright limitations apply and deprive the rightholders of the control they exercise over some uses of their works through their exclusive rights, protection is consequently given at least to the interests of the rightholders that are related to the exploitation of their works. Collovà indicates that, as opposed to rights, interests entail a teleological aspect of the content of a right; they may be subject to protection but that protection is less specific compared to that afforded to the exercise of subjective rights.<sup>543</sup> We agree with this view. While rights grant control to authorise or prohibit certain activities, interests are a broader concept with less specific meaning.

The WTO Copyright Panel interpreted the term ‘legitimate’ from a legal positivist perspective. To the Panel, ‘one – albeit incomplete and thus conservative – way of looking at legitimate interests is the economic value of the exclusive rights conferred by copyright on their holders.’<sup>544</sup> In our view, the Panel equated phraseologically the term ‘legitimate interests’ to ‘legal interests’ since the term legitimate is defined as conformable to, and authorised by, the law.<sup>545</sup> While Fiscor argues in favour of this legal positivism approach,<sup>546</sup> we consider that treating legitimate interests solely as the ‘legal interests’ may not be an adequate interpretation. In our view, the term ‘legitimate interests’ is broader and may include interests that are subject to protection by copyright law, such as the economic interests of the rightholders. Affirmative in this respect is Recital 44 of Directive 2001/29/EC, which by reference to the three-step test, stresses that ‘[t]he provision of [...] exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment.’ We read this Recital as referring to the economic interests of the rightholders.

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<sup>542</sup> At page 13 *et seq.*

<sup>543</sup> T. Collovà, ‘Reproduction sonore et visuelle pour l’usage personnel’, *Revue Internationale du Droit d’Auteur*, 1979, 77, p. 129-131.

<sup>544</sup> *United States – Section 110(5) of the U.S. Copyright Act*, Report of the Panel, *op. cit.*, at § 6.227.

<sup>545</sup> See the explanations given by Fiscor in M. Fiscor, ‘How Much of What?’, *op. cit.*, at p. 141.

Nonetheless, the Panel added that the term ‘legitimate’ further entails ‘the connotation of legitimacy from a more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights.’ *United States – Section 110(5) of the U.S. Copyright Act*, *ibid.*, at § 6.224.

Such objectives should be supported by relevant public policies or other social norms. World Trade Organisation, *Canada – Patent Protection of Pharmaceutical Products*, Report of the Panel, WTO Document WT/DS 114/R, 17 March 2000, § 7.69.

<sup>546</sup> M. Fiscor, ‘How Much of What?’, *op. cit.*, at p. 147.

We conclude therefore that the legitimate interests of the rightholders, which should not be unreasonably prejudiced by virtue of Article 5(5) of Directive 2001/29/EC, are their legally-protected economic interests.

### 3.2. Avoiding an unreasonable prejudice

To the WTO Panel, an unreasonable prejudice to the legitimate interests of rightholders occurs where a copyright limitation causes, or has the potential to cause, an intolerable loss of income to the rightholder,<sup>547</sup> this takes into account both actual and potential loss of income.<sup>548</sup> Yet, the mere fact that a copyright limitation affects the legitimate interests of the rightholders by depriving them of revenue sources is not sufficient so that this limitation is in conflict with the test. Rather, as Ficsor rightly puts it, the effect of this limitation on the legitimate interests of the rightholders should not be unreasonable.<sup>549</sup> The word ‘unreasonable’ indicates, in our view, that some level or degree of prejudice may be justified; as Reinbothe and Von Lewinski acknowledge, the degree of prejudice is measured in qualitative and quantitative terms.<sup>550</sup>

We have identified that legal scholars resort to the principles of suitability and necessity in interpreting the meaning of an unreasonable prejudice within the meaning of the three-step test. Some legal scholars, such as Senftleben, suggest that the third step of the test should be examined in the light of the principle of suitability,<sup>551</sup> under which copyright limitations should be suitable for attaining the public-policy objective which they are meant to serve; where this is not the case, limitations are considered to harm the legitimate interests of the rightholders and may become source of unreasonable prejudice.<sup>552</sup> Insofar as privacy reasons do no longer support the retainment of the private copying limitation, for instance, due to evolved technological protection, this limitation becomes source of unreasonable prejudice. Besides the principle of suitability, a second principle is used to identify whether an unreasonable prejudice has taken place: the ‘necessity’ principle. Under the necessity principle, a copyright limitation should be the least harmful of all relevant methods for accomplishing a certain objective, such as public policy or educational purposes. Gaubiac and Ginsburg indicate that

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<sup>547</sup> *United States – Section 110(5) of the U.S. Copyright Act*, Report of the Panel, op. cit., § 6.229.

<sup>548</sup> *Ibid.*, § 6.247 & § 6.261.

<sup>549</sup> M. Ficsor, *The Law of Copyright and the Internet*, op. cit., at p. 516, § C 10.03.

<sup>550</sup> J. Reinbothe & S. von Lewinski, *The WIPO Treaties 1996*, op. cit., pp. 126-127, § 22.

<sup>551</sup> M. Senftleben, *Copyright, Limitations and the Three-Step Test*, op. cit., p. 236; J.L. Jowell & A. Lester, ‘Proportionality: Neither Novel Nor Dangerous’, in J.L. Jowell & D. Oliver, *New Directions in Judicial Review*, Stevens, London, 1988, at pp. 52; P.B. Hugenholz, ‘Copyright and Freedom of Expression in Europe’, in N. Elkin-Koren & N.W. Netanel, *The Commodification of Information*, Kluwer, The Hague, London, Boston, 2002, 239, at pp. 246-247 and 262; Also see the ‘*Sunday Times*’ case, ECHR Judgement of April 26, 1979, Series A, No 30, §§ 59-68.

<sup>552</sup> See Senftleben, *ibid.*

the occurrence of an unreasonable prejudice should be considered in relation to the alternatives to the copyright limitation.<sup>553</sup> This means that legislators should choose amongst all measures adequate for achieving the objectives underlying a copyright limitation the one that causes minimal harm to the legitimate interests of the rightholders. If the least harmful method is not chosen, despite the fact that equal alternatives are at the legislators' disposal, the copyright limitation may prejudice the legitimate interests of the rightholders.

While we agree with the application of the suitability and necessity principle in the context of the three-step test, we feel that these principles are rules for legislative guidance and should not be subject to judicial examination. Indeed, the suitability and necessity principles should be examined at the stage of legislative action during the introduction of a limitation with a view to ascertain whether this limitation is suitable and necessary to attain the objectives it means to serve; they should not, however, be examined at the stage where this limitation is applied by courts. This is because Courts examine the permissibility of a particular activity covered by a copyright limitation, not the validity of this limitation *per se*.

We therefore keep in mind that an unreasonable prejudice occurs where the rightholders suffer an intolerable loss of income, either actual or potential, to an extent that is not justifiable. Yet, a principal feature in evaluating the intensity of a prejudice caused by a limitation is the payment of equitable remuneration to compensate the harm caused to the rightholders. By this, we mean that compensated copyright limitations do not reach the threshold of unreasonableness required for the fulfilment of the third condition of the test. This is probably one of the reasons why this third condition of the test has been considered to form the basis of statutory and compulsory licensing schemes. By this, however, we do not mean to say that there is no room for uncompensated limitations within the realm of copyright. Rather, the three-step test has always been meant to offer the option of delimiting exclusive rights without remunerating rightholders. This is affirmed by the Statement made in the General Report of the Main Committee at the 1967 Stockholm Conference which reads that:

*If [copying] implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, accordingly to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use.*<sup>554</sup>

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<sup>553</sup> Y. Gaubiac & J. Ginsburg, 'L'avenir de la copie privée numérique en Europe', *Communication Commerce Electronique*, January 2000, chron. 1.

<sup>554</sup> Report on the Work of Main Committee I, Records 1967, op. cit., pp. 145-1146.

This leaves legislators with sufficient latitude to evaluate which limitations cause the least harm and can be free from an obligation to compensate rightholders and which are not. In our view, therefore, compensated limitations neither reach the level of unreasonableness required nor do they produce such short-fallings to the earnings of the rightholders to fail the third step of Article's 5(5) test. We therefore conclude that an unreasonable prejudice to the legitimate interests of the rightholders occurs where a limitation causes an actual or potential loss of income to an unjustified extent.

With respect to digital private copying, rightholders certainly lose actual or potential income since they do not sell the copies that users reproduce themselves. Especially when it comes to online networks, such as file-sharing sites, users may track down works without a need to buy an original copy in the first place. As Ginsburg observes, peer-to-peer downloading is responsible for a loss of income that might prejudice the legitimate interests of the rightholders.<sup>555</sup> While this would *prima facie* lead us to conclude that an unreasonable prejudice to the legitimate interests of the rightholders occurs, the requirement of Article 5(2)(b) of Directive 2001/29/EC for the use to be non-commercial and the fact that fair compensation is due to the rightholders could be interpreted to indicate that the threshold of unreasonableness is not met. In particular, the lack of a commercial character in permissible private copying is meant to ensure that the rightholders do not encounter a loss in actual sales of works through their substitution by sales of unauthorised copies. If private copies were used on a commercial basis the private copying limitation could unreasonably prejudice the legitimate interests of the rightholders. Yet, this is not the case where private copying is premised on its non-commercial character, as in the case of Article 5(2)(b). This latter article reads that permissible private copying should be exercised on condition that the rightholders receive fair compensation. What is more, the private copying limitation is based on the condition that a fair compensation is due to the rightholders, as Article 5(2)(b) of Directive 2001/29/EC mandates. The obligation to pay fair compensation to the rightholders that is attached to the private copying limitation indicates that the prejudice remains at tolerable level. We therefore conclude that digital private copying does not cause an unreasonable prejudice to the legitimate interests of the rightholder and therefore passes the scrutiny of the last step of the three-step test.

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<sup>555</sup> See G. Ginsburg, 'Vers un droit d'auteur supranational?', op. cit., pp. 54 et 56.

Private copying, to be permitted, should adhere to the threefold set of conditions set by the three-step test of Article 5(5) of Directive 2001/29/EC. While international copyright law provides the test as a guide for legislative action, we have seen that Article 5(5) of Directive 2001/29/EC could be read as addressing the test to national judges. This could mean that national judges may examine activities covered by copyright limitations through the spectrum of the three-step test. While many national laws set this test at the disposal of the judges and in this respect provide it as an extra condition for the exercise of the private copying limitation, we cannot embrace this potential since the test has not been formulated as a rule of judicial interpretation and as such it is ill-suited in this context.

We have subjected digital private copying to the test and concluded that it passes its scrutiny. First, digital private copying is a ‘certain special case’ since it is based on a specific and sound legal-political justification, namely the enhancement of learning from, and enjoyment of, works in private. Secondly, it does not come in conflict with a normal exploitation of the copied works since it does not deprive the rightholders of potential or actual markets of practical and economic importance, irrespective of whether the source copy is lawfully acquired or not. This is mainly because permissible private copying under Article 5(2)(b) ought to be non-commercial. Finally, in our view, digital private copying does not prejudice the legitimate interests of the rightholders to an unreasonable level since it is accompanied by an obligation to fairly remunerate the rightholders. This means that the threshold of unreasonableness due to the possible prejudicial effect of private copying on the legitimate interests of the rightholders is not met. As a result, we consider that digital private copying passes the scrutiny of the three-step test of Article 5(5) of Directive 2001/29/EC.

Our analysis of the permissible limits of Article 5(2)(b) of Directive 2001/29/EC indicates that there are four parameters that need to be examined so that private copying is lawful. The first is the scope of the permissible activities. We conclude that private copying may cover acts of reproduction and may also impact other exclusive rights, as long as the use is kept within a private circle. The only activities that should be examined with caution are the act of communicating and making works available from a place and at a time individually chosen by end users, as provided under Article 3 of Directive 2001/29/EC. The second parameter that needs to be examined is the private character of the use. In our view, a use qualifies as private when it is made either by the copier himself or within an audience that qualifies as such. Since no clear legal definition exists as to what the term private means for the purposes of copyright law, we have built a test for determining which uses are private and therefore legitimate. Under this test, a private audience is one that is specially related to the copier and is not

considered a public from which the rightholder expects to make a profit; once the audience qualifies as private, we then 'localise' the use in terms that the audience should be spatially connected to the place where the use is made and that other users do not have successive access to this place. The third parameter that needs to be examined so as to determine which acts of private copying are lawful is the non-commercial character of acts of copying. We have concluded that non-commercial uses are those which do not involve the 'trading' of works and are not made for profit. However, most online uses are not made for profit but are merely economically significant to the users; yet, economically advantageous uses are not excluded from the scope of Article 5(2)(b) and are therefore permitted. Nonetheless, activities that are economically significant to users may cause irreparable harm to the rightholders. This is where the examination of the fourth parameter comes to place, namely that of the three-step test of Article 5(5). Normally, this would not be a fourth parameter; yet, the fact that many national laws have set the three-step test as a rule of judicial interpretation can be understood as setting an extra condition to the permissibility of private copying. We have expressed our concerns about this issue, mainly because the test was not made for judicial use in the first place. Indeed, this test would be a default instrument at the hands of national judges since it favours the interests of the rightholders by emphasising the potential harm they might encounter due to a copyright limitation, despite the fact that the permissibility of a copyright limitation has already been examined under the test at the stage of its introduction into statute by the legislators. In this respect, we are concerned that the judicial application of the test may jeopardise the viability of the private copying limitation. We have gone through the test and have identified its interpretations which, in our view, better fit the reality of the digital context. We have then examined digital private copying through the spectrum of this test and concluded that digital private copying passes successfully the scrutiny of the test.

Having examined the permissible limits of the private copying limitation it is now time to see how the European legislator has responded to the impact that this limitation has in the digital environment. Due to the nature of digital works as non-rival and non-excludable,<sup>556</sup> the impact of digital private copying is aggregate. Below we examine, and evaluate the efficacy of, the legislative solutions to deal with this impact as envisioned in Article 5(2)(b) of Directive 2001/29/EC.

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<sup>556</sup> At page 26.

## **Part II: The legislative response of Article 5(2)(b) of Directive 2001/29/EC to the impact of digital private copying**

Recital 38 to Directive 2001/29/EC foresees that *‘[d]igital private copying is likely to be more widespread and have a greater economic impact’*. Indeed, what appears to be the problem with digital private copying is its aggregate impact, which may have a prejudicial effect on the interests of the rightholders, for instance, through the decrease in sales.<sup>557</sup> As acknowledged by the Recording Industry Association of America (RIAA): *‘One individual making one copy is not likely to cause significant harm, but millions doing the same would, and does, cause extraordinary harm. The internet complicates the situation further still, where a single person has the ability to trigger incalculable damage.’*<sup>558</sup> We do not fully endorse RIAA’s observation, especially because it reflects the US reality on private copying, where no explicit provision exists to permit this phenomenon and, as a result, private copying may either be permitted under the fair-use doctrine or not depending on the facts of each case. In Europe, however, private non-commercial uses of copyrighted content are permissible under Article 5(2)(b) of Directive 2001/29/EC, as we have already seen, irrespective of the fact that these individual uses may have an economic impact when examined collectively. So, rephrasing the RIAA’s statement to reflect the European situation on private copying we could say that one individual making one copy makes legitimate private use and millions doing the same make lawful uses too. Yet, once we accumulate all these lawful private uses they might have a prejudicial effect to the legitimate interests of the rightholders, without them being infringing. Nonetheless, there is no reliable study indicating that digital forms of private copying have dropped the sales of the rightholders. Quite on the contrary indeed, Oberholzer and Strumpf indicate that file-sharing had not impacted on music sales by the year 2004.<sup>559</sup>

Yet, we acknowledge the possibility that the digital environment may open the door to more infringements since a generation of users has become contemptuous of copyright. Surveys conducted in the US and the EU indicate that digital private copying has become a social reality;<sup>560</sup> it is common amongst end users to think that the internet should be free and that

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<sup>557</sup> See earlier in this thesis at p. 134 *et seq.*

<sup>558</sup> <<http://www.riaa.com>>

<sup>559</sup> F. Oberholzer & K. Strumpf, ‘The Effect of File Sharing on Record Sales: An Empirical Analysis’, March 2004, available online at <[http://www.unc.edu/~cigar/papers/FileSharing\\_March2004.pdf](http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf)>, lastly accessible on 9.9.2009.

<sup>560</sup> See, for instance, Pew Internet and American Life Project, *Music and Video Downloading Moves beyond P2P*, March 2005; N. Dufft *et al.*, *Digital Video Usage and DRM, Results from a European Consumer Survey*, INDICARE, Berlin, 24 May 2005, available online at <<http://indicare.org>>, pp. 26-28; Australian Record Industry Association, *Impact of Internet Music File Sharing and CD Burning*, 16.7.2003.

they should not be required to pay for any content they access or use online.<sup>561</sup> This is probably due to the very origins of the internet as a bastion for free and unencumbered information sharing.<sup>562</sup> In our view, this means that the advance of new technologies has changed the mentality and the consumption habits of the users vis-à-vis private copying<sup>563</sup> so as to develop habits that do not respect copyright.<sup>564</sup> No wonder why some amongst them claim their ‘right’ to private copy!<sup>565</sup>

The main approaches that have been set forth as a response to the impact of private copying in the digital environment are two: the fiscal and the technological approach; Article 5(2)(b) of Directive 2001/29/EC adopts them both, without anywhere declaring the private copying limitation as a user right. In particular, it reads that private copying is permitted ‘*on condition that rightholders receive fair compensation that takes into account the application or non-application of technological protection measures*’. Fair compensation is a fiscal solution aimed at remunerating the rightholders for the harm they might suffer due to private copying. It is in essence a compromise under which private copying is legitimised and, at the same time, the rightholders get compensated. In Europe, the most common form that fair compensation takes is a levy on blank media and recording equipment. The existence of these levy schemes has been actually premised on the assumption that private copying of copyrighted content cannot be practically controlled or exploited individually. Yet, the advancement of technological protection measures that can be applied to works, and can thereof restrict the ability of users to produce copies, urges for a re-examination of this assumption. Indeed, technological protection measures carry the promise of enabling the rightholders to control the way that individuals use copyrighted content by determining which uses are permissible and which are not, by establishing prices, or contracting directly with individual users. Article 6 of Directive 2001/29/EC provides rigorous protection against the circumvention of these technological protection measures. As opposed to levies which are collected by national collecting organisations and then distributed to the rightholders, technological protection measures make it possible to reward the rightholders directly for the particular uses made of a work. One

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<sup>561</sup> T. Wu, ‘When Code Isn’t Law’, 889 *Va.L.Rev.*, 2003, 679, at 722-723.

<sup>562</sup> Piasentin, T.C. ‘Unlawful? Innovative? Unstoppable? A Comparative Analysis of the Potential Legal Liability facing P2P End-users in the United States, United Kingdom and Canada’ *International Journal of Law and Information Technology*, 2006, Vol. 14, Iss. 2, pp. 195-241, p. 203.

<sup>563</sup> S. Rompré, ‘Le régime de la copie privée face à Internet’, op. cit., p. 2; Organisation for Economic Cooperation and Development [OECD], Working Party on the Information Economy, *Digital Broadband Content: Music*, June 2005, DSTI/ICCP/IE(2004)12/FINAL, at p. 12.

<sup>564</sup> B.A. Lechman, ‘Intellectual Property and the National and Global Information Infrastructure: The Report of the Working Group on Intellectual Property Rights’, *The WIPO Worldwide Symposium on Copyright in the Global Information Infrastructure*, Mexico City, 1995, at p. 77.

<sup>565</sup> C. Geiger, ‘Right to Copy v Three-Step Test’, op. cit., at p. 7; C Geiger, ‘The Private Copy Exception’, op. cit., p. 74.

should not neglect, however, that technological protection measures are still neither sufficiently interoperable nor error-free in terms that they might be circumvented by end users, and at the same time their costs remain prohibitively high for the rightholders.

To our understanding, the legislative response of Directive 2001/29/EC to the impact of private copying is complicated; while it permits private copying on condition that fair compensation is paid, at the same time it rigorously protects the application of technological protection measures under Article 6.<sup>566</sup> We consider that the co-existence of levy systems and technological protection measures is problematic in two aspects. The first is that end users may be double-charged for a work they buy. This includes a payment through levy systems and a payment to the rightholder to get authorisation to make private copies.<sup>567</sup> The second is that end users may end up paying levies for content that is technologically protected against copying and that they cannot therefore make copies for their private non-commercial use as provided under Article 5(2)(b).<sup>568</sup> In this light, the fact that the private copying limitation is not mandatory against its technological restriction proves problematic in terms that the copyright balance is set to the side of the rightholders.

Our purpose below is to examine the levy-based and the technological approach and evaluate their efficacy to deal with the impact of digital private copying. Throughout this analysis, our focus shall be the copyright balance, a balance that is meant equilibrate the extent of legal protection granted to the rightholders in a way that does not exceed the maximum benefit that such a protection has for society as a whole. This balance is affirmed to be one of the prime objectives of Directive 2001/29/EC which indicates in its 31<sup>st</sup> Recital that *'[a] fair balance of rights and interests between [...] the different categories of rightholders and users of protected subject-matter must be safeguarded.'* While we acknowledge that digital private copying may have a great impact on the interests of the rightholders, we also advocate the maintenance of the private copying limitation in the digital environment as an area of freedom for end users. After all, this limitation demarcates a territory upon which the rightholders have no power and should, therefore, not restrict at will. As a result, we shall attempt to evaluate the efficacy of both the levy-based and the technological approaches with a view to ascertain which is more adequate within the meaning of copyright and more appropriate as regards the viability of the private copying limitation.

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<sup>566</sup> P.B. Hugenholtz, L. Guibault & S. Van Geffen, *The Future of Levies in a Digital Environment*, op. cit., at p. 34. Some commentators have interpreted this approach as seeking to gradually phase out levies. See N. Helberger et al., *Digital Rights Management and Consumer Acceptability: A Multi-Disciplinary Approach of Consumer Concerns and Expectations*, State-of-the-Art-Report, INDICARE, December 2004, p. 68.

<sup>567</sup> P.B. Hugenholtz, L. Guibault & S. Van Geffen, *The Future of Levies in a Digital Environment*, op. cit., at p. ii.

<sup>568</sup> N. Helberger et al., *Digital Rights Management and Consumer Acceptability*, op. cit., p. 68.

## Chapter I: The suitability of the levy-based approach as a response to the digital impact of private copying

Article 5(2)(b) of Directive 2001/29/EC premises the permissibility of private copying ‘*on condition that the rightholders receive fair compensation.*’ The Directive is neutral as to the form of fair compensation. Many Member States have implemented the requirement of ‘fair compensation’ for acts of private copying by means of a private-copying levy on recording equipment and/or blank media, even though alternative forms of compensation exist, such as the state subsidies in Norway.<sup>569</sup> Levies are a form of indirect remuneration payable to the rightholders based on the premise that an act of private copying cannot be licensed for practical reasons and this may cause economic harm to the rightholders; as Christie has rightly put it, levies are meant to ‘*legitimise the inevitable (the private copying) and at the same time provide the owner with the otherwise unobtainable (remuneration for the copying).*’<sup>570</sup> From a legal point of view, they constitute a statutory right of remuneration in respect of acts of private copying and, as a result, an essential element of the legal protection afforded to the rightholders.

Even though levy schemes apply in most EU Member States, there is no uniform levy scheme around Europe and, as a result, those available are all national in scope. An examination of the applicable levy schemes indicates that there are differences in the rates and the method for the calculation of levies, even in respect of identical digital equipment or blank media. As a result, different levies apply in relation to the same products within the Union. Those Member States with a levy scheme, namely 22 out of the 27 Member States, impose levies on manufacturers, importers or distributors of analogue or digital equipment or media that allows consumers to copy. Some Member States even impose private copying levies directly on end users! At the same time, there are five Member States, namely Cyprus, Ireland, Luxembourg, Malta, and the UK, where no levies are imposed in respect of private copying. We consider that the lack of a harmonised framework as regards private-copying levies is problematic since it does not create a level playing field for the rightholders. In some States, rightholders may be adequately compensated for the losses of sales they encounter due to private copying, while in others they may receive no compensation at all. Copyright levies are not paid directly to the rightholders but to the national collecting societies acting on their behalf. Yet, the function of

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<sup>569</sup> The Norwegian Parliament, in order to fulfil its obligations under Directive 2001/29/EC allocated a subsidy to rightholders through the state budget. For more information see European Commission, *Background Document ‘Fair Compensation for Acts of Private Copying’*, Brussels, 14.2.2008, available online at <[http://www.ebu.ch/CMSimages/en/BRUDOC\\_INFO\\_EN\\_415\\_tcm6-60774.pdf](http://www.ebu.ch/CMSimages/en/BRUDOC_INFO_EN_415_tcm6-60774.pdf)>, p. 5.

<sup>570</sup> A. Christie, ‘Private Copying Licence and Levy Schemes: Resolving the Paradox of Civilian and Common Law Approaches’ in D. Vaver & I. Bently (eds.) *Intellectual Property in the New Millennium, Essays in Honour of William R. Cornish*, Cambridge University Press, 2004, pp. 248-258, at 252.

collecting societies remains inextricably territorial and there are no harmonised rules applicable to national levy schemes.

Besides the lack of a harmonised framework both as regards private-copying levies and their administration by collecting societies, there is an increased concern as to how adequate this fiscal approach is in the digital environment. Whereas for many years levies may have been deemed appropriate to deal with the impact of private copying, the Commission estimates that levies in the digital environment shall be gradually phased out and give their regulatory place to the application of technological protection measures.<sup>571</sup> Yet, the very wording of Article 5(2)(b) is not indicative to this end; this article stipulates that private copying is permitted ‘*on condition that rightholders receive fair compensation that takes into account the application or non-application of technological protection measures*’. In our view, this stipulation gives pre-eminence to the levy-based approach. Otherwise, the European legislator would have premised permissible private copying on condition that the rightholders have not applied technological protection measures to their works or that fair compensation is restricted to analogue private copying. This is not the case however. In fact, Recital 38 of Directive 2001/29/EC suggests that ‘*due account should be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them*’, such as the issue of fair compensation.

Whereas the diversity of the national levy schemes and the territorial function of collecting societies manifests a lack of harmonisation which could hinder the proper functioning of the internal market, as acknowledged in Recital 38, this is not, in our view, decisive of the inadequacy of the levy-based approach as regards private copying. It merely manifests that there is a need to harmonise national laws in this respect. Below we examine the concerns as to the diversity of national levy schemes and the territorial function of collecting societies with a view to ascertain whether the levy-based approach is a suitable approach in dealing with the digital impact of private copying.

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<sup>571</sup> Indeed, the Commission estimates that the growing use of technological protection measures should eventually lead to a natural, market-driven phasing-out of levies. Commission of the European Communities, ‘Digital Rights: Background, Systems, Assessment’, *Commission Staff Working Paper*, Brussels, 14.2.2002, SEC(2002) 197, at p. 15.

## Section 1: Statutory licences and levy schemes as a balanced approach in dealing with digital private copying

Levies as a fair compensation for acts of private copying are an invention of the German judiciary. Their origin can be tracked down to two seminal decisions issued by the German Federal Supreme Court in 1955 and 1964 respectively,<sup>572</sup> which formed the basis of the first levy scheme<sup>573</sup> and a source of influence for most EU levy systems. In *Personalausweise*,<sup>574</sup> the German collecting society, *GEMA*, asked the Court to oblige producers of recording equipment to request from their suppliers, upon delivery of such equipment, information on the purchasers' identity, and to issue that information to *GEMA*. In particular, the Court examined whether the producers and suppliers of recording equipment were liable for contributory copyright infringement, especially in the light of the increasing popularity of private copying. Even though it had not been themselves that engaged in the infringing activities, there was a chance that they were still liable for providing purchasers with the means to infringe copyright. Consistent with an earlier ruling regarding the liability of manufacturers of private recording equipment,<sup>575</sup> the Court found the defendants liable of contributory copyright infringement. This holding, however, was not sufficient for the imposition of an obligation to disclose personal data of the purchasers for the purposes of verifying potential infringers. To the Court, despite the potentially unlawful nature of home taping, such monitoring measures would directly infringe the individuals' right to the inviolability of their home<sup>576</sup> and, hence, to their privacy.<sup>577</sup>

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<sup>572</sup> *Personalausweise*, German Federal Supreme Court (Bundesgerichtshof), GRUR 02/1965, p. 104; Also see K.J. Koelman & L. Bygrave, 'Privacy, Data Protection and Copyright: Their Interaction in the Context of Electronic Copyright Management Systems', in P.B. Hugenholtz (ed.), *Copyright and Electronic Commerce*, The Hague, Kluwer Law International, 2000, pp. 59-123, at p. 101; D.J.G. Visser, 'Copyright Exemptions Old and New', in P.B. Hugenholtz (ed.), *The Future of Copyright in a Digital Environment*, The Hague, Kluwer Law International, Informational Law Series – 4, 1996, pp. 49-56, at p. 50.

<sup>573</sup> The first case however that the issue of reproduction for sound recordings has been brought to the German Federal Supreme Court is *Überspielen von Schallplatten auf Magnettonbänder*, BHG, decision of 21 November 1952, GRUR 03/1953, at 140. The focus of examination in this case, however, was not the private copy exception.

<sup>574</sup> *Personalausweise*, German Federal Supreme Court (Bundesgerichtshof), GRUR 02/1965, 104.

<sup>575</sup> *Gema v. Grundig* 1 ZR 8/54, 17 BGHZ 266, [1955] GRUR 492. Also see R. Kreile, 'Collection and Distribution of the Statutory Remuneration for Private Copying with Respect to Recorders and Blank Cassettes in Germany', 23 *Int'l Rev. Indus. Prop. & Copyright L.*, 1992, 449, at 459-460 (on the effects of the *Grundig* decision); J. Weimann, 'Private Home Taping under Sec. 53(5) of the German Copyright Act of 1965', 30 *J. Copyright Soc'y*, 1982, 153, at 154-156 (on the background of *Grundig* decision).

<sup>576</sup> Article 13(1) of the Basic Law of the Federal Republic of Germany (Grundgesetz), 23 May 1949 (first issue of the *Federal Law Gazette*, dated 23 May 1949), as amended up to and including 20 December 1993: 'The home is inviolable.'

<sup>577</sup> A. Christie, 'Private Copying Licence and Levy Schemes', op. cit., pp. 248-258, at 256-257; D.J.G. Visser, 'Copyright Exemptions Old and New: Learning from Old Media Experiences', in P.B. Hugenholtz (ed.), *The future of Copyright in a Digital Environment*, 1996, pp. 49-51, at pp. 49-50; L. Guibault, *Copyright Limitations and Contracts*, op. cit., pp. 47-56.

The 1964 Court recommended that the legislature should insert a remuneration right as regards the importation and sale of home recording equipment. Indeed, a year later, a statutory right to equitable remuneration was introduced.<sup>578</sup> Levies were primarily seen as a compromise between author's rights and end-user freedoms in terms that authors were remunerated and, at the same time, end-user privacy was respected. While levies were initially imposed on the sale of recording equipment, the German Copyright Act in 1985 expanded their application to blank media.<sup>579</sup> The main justification for the blank-tape levy was the presumption that the recording equipment did no longer equal the dimensions assumed by the legislator as early as in 1965. Following a claim from collecting societies, the lawmakers accepted that home taping involved some degree of legal responsibility from the part of the producers of blank tapes and cassettes.

Soon enough, the German example influenced catalytically the lawmakers all around Europe. With the exception of Cyprus, Ireland, Luxembourg, Malta and the UK, all other EU Member States gradually incorporated levy schemes in their copyright systems so as to compensate the rightholders for the harm they may suffer due to private copying. Yet, these schemes are inextricably territorial; and since no uniform Community-wide levy system exists to date diversity pertains, even though the European Commission had pushed in favour of harmonisation of the private-copying levy schemes as of 1988.<sup>580</sup>

Yet, in their diversity all national levy schemes adhere to the principle that private copying levies are in essence compensatory; they are meant to remunerate the rightholders for the prejudicial effects that private copying has to their legitimate interests. In this sense, they are an attempt to ensure that the third condition of the three-step test is met.<sup>581</sup> So, the fact that private copying is statutorily permitted in these States gives rise to a statutory right to fair compensation. In a sense, we feel that the exclusive reproduction right which is limited in respect of private copying is replaced by a statutory right to compensation. Yet, as the German decisions that initiated the levy indicate,<sup>582</sup> copyright enforcement ought to stop where the private sphere begins. In this light, the private copying limitation becomes an embryo of hierarchy between copyright enforcement and the fundamental right to privacy, in terms that the latter prevails. Below we analyse these issues with a view to determine whether

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<sup>578</sup> S.53 *Urhebergesetz* (UrhG) 1965.

<sup>579</sup> The same year a statutory levy was also introduced with respect to photocopying. This initiative followed a relevant Court ruling of 1983. See *Kopierläden*, BGH, 9 June 1983, *GRUR* 1984/1, p. 54.

<sup>580</sup> *Green Paper on Copyright and the Challenge of Technology*, Copyright Issues Requiring Immediate Action. COM (88) 172 final, 7 June 1988.

<sup>581</sup> For an analysis of this condition see earlier, at p. 134 *et seq.*

<sup>582</sup> *Personalansweise*, *op. cit.*, p. 104; *Gema v. Grundig*, *op. cit.*, p. 492.

levies as an entitlement to fair compensation are an adequate approach in dealing with the impact of digital private copying.

## **1. The compensatory nature of levies as a ‘liability rule’**

Levies are a form of remuneration for rightholders based on the premise that acts of private copying cannot be licensed without intruding end-user privacy but may be responsible for losses in the sales of the rightholders. We have seen earlier in this thesis<sup>583</sup> that private copying has a prejudicial effect on the legitimate interests of the rightholders but this prejudice does not reach the ‘unreasonableness’ threshold required so that the private copying limitation fails to satisfy the third condition of the three-step test of Article 5(5). One of the reasons that private copying does not cause unreasonable prejudice is the fact that the private copying limitation is accompanied with an obligation to fairly remunerate the rightholders. In these terms, while the rightholders may suffer economic harm due to lost sales, they receive compensation in return; this makes their entitlement to fair compensation mainly compensatory. Yet, from a legal point of view, one might argue that the reproduction right is substituted by a statutory right to remuneration in respect of private copying. And this would be correct. The question would then be if this approach is adequate in the field of copyright protection. These are the issues that we examine below.

### **1.1. The compensatory nature of fair compensation**

Recital 35 to Directive 2001/29/EC indicates that fair compensation arising due to the application of copyright limitations has a compensatory nature. Indeed, this Recital stipulates that fair compensation is meant *‘to compensate [the rightholders] adequately for the use made of their protected works or other subject-matter’*, and further suggests that the determination of the form and possible level of such compensation should take into account the *‘possible harm to the rightholders resulting from the act in question’*. Despite the diversity of national levy schemes, the element of potential harm to the rightholders in the incidence of private copying is examined in all Member States during the determination of the detailed arrangements for applying a levy.<sup>584</sup> In this respect, it is safe to conclude that private copying levies are in nature compensatory.

Indicative in this respect is the meaning of the newly introduced concept of ‘fair compensation’. This concept was first announced in European copyright law by Directive

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<sup>583</sup> At p. 134 *et seq.*

<sup>584</sup> European Commission, *Background Document “Fair Compensation for Acts of Private Copying”*, Brussels, 14.2.2008, available online at <[http://www.ebu.ch/CMSimages/en/BRUDOC\\_INFO\\_EN\\_415\\_tcm6-60774.pdf](http://www.ebu.ch/CMSimages/en/BRUDOC_INFO_EN_415_tcm6-60774.pdf)>, p. 19-20.

2001/29/EC. Prior to this Directive, mention was made to another compensatory method: 'equitable remuneration'. This was, for instance, the case in Directive 92/100/EC on the rental and lending rights.<sup>585</sup> We consider that the term 'fair compensation' is a clear departure from the notion of 'equitable remuneration'. Whereas 'equitable remuneration' is due irrespective of the element of harm, either actual or potential, 'fair compensation' is mainly linked to harm caused to the rightholders.<sup>586</sup> Some evidence in this respect can be tracked down to Recital 35 of Directive 2001/29/EC which indicates that in determining the level of fair compensation, '*a valuable criterion would be the possible harm to the rightholders resulting from the act in question*'. In this context, harm refers to the damage suffered by rightholders in the presence of private copying as manifested by the loss of sales. Of course, as Arthur rightly notices, the actual extent of these losses has always been an open question.<sup>587</sup> This is probably why Recital 35 makes reference to 'possible harm' rather than to the actual losses of sales, and why Recital 38 of the Directive refers to levy schemes as '*the remuneration schemes to compensate for the prejudice to rightholders*.' This implies that Member States should provide for compensatory schemes where the likelihood of harm can reasonably be established.<sup>588</sup>

At this point, we identify a clear link to the third condition of the three-step test, namely the absence of an unreasonable prejudice to the legitimate interests of the rightholders. As we saw

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<sup>585</sup> Articles 4(4) and 8(2) of the Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property repealing Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, *Official Journal* L 376, 27.12.2006, pp. 28-35; Amongst the Member States where levy schemes are applicable, there has not been an update in the terminology used to refer to the compensation due in the presence of private copying. Instead of referring to 'fair compensation', mention is still made to 'equitable remuneration' in Estonia [Article 26.1 of Copyright Act of Estonia, adopted on 11.11.1992, as amended by Act of 22.9.2004, Riigi Teataja I 1999, 54, 580], Hungary [Article 20 of the Act No. LXXVI. of 1999 on Copyright, as amended by Act No. LXXVIII of 2001 and Act No. CII of 2004], Slovenia [Article 37 of the Copyright and Related Rights Act, as amended on May 11, 2004, Official Gazette RS No. 43/04] and Spain [Article 25(1) of Consolidated Text of the Law on Intellectual Property, regularising, clarifying and harmonising the applicable statutory provisions (approved by Royal Legislative Decree 1/1996 of April 12, 1996, and amended by Law 5/1998 of March 6, 1998, incorporating Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases)]. To 'remuneration' rather than compensation refer the Copyright Acts of the Czech Republic [Article 25], Denmark [Article 39], Latvia [S.34], Lithuania [See Resolution No 1106 on the approval of the procedure for the distribution and payment of remuneration for the reproduction of audiovisual works or works fixed in a phonogram for personal use, 29.8.2003], Slovakia [Article 24(4)].

<sup>586</sup> The difference between the notions of 'fair compensation' and 'equitable remuneration' also flows from their different theoretical basis. As opposed to 'fair compensation', 'equitable remuneration' is semantically based on natural justice arguments as well as on the German copyright theory. The later theory holds that authors are entitled to remuneration for each and every use made of their works. See P.B. Hugenholtz, L. Guibault & S. Van Geffen, *The Future of Levies in a Digital Environment*, op. cit., at p. 36; Also see S. Bechtold, 'Directive 2001/29/EC (*Information Society Directive*) of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society', in Th. Dreier & P.B. Hugenholtz, *Concise European Copyright Law*, Kluwer Law International, 2006, pp. 343-404, at pp. 375-376.

<sup>587</sup> G. Arthur, 'Private Use, Public Consequence?: The Future of the Private Copy Exception in Europe', *CW*, 146, December 2004/ January 2005, pp. 16-20, at p. 17.

<sup>588</sup> P.B. Hugenholtz, L. Guibault & S. Van Geffen, *The Future of Levies in a Digital Environment*, op. cit., p. 36.

earlier,<sup>589</sup> this condition means that a copyright limitation should not unjustifiably cause an actual or potential loss of income to the rightholders. This is probably why this third condition of Article's 5(5) test has been considered to form the basis of statutory licensing. Indeed, as we saw earlier, where fair compensation is paid to the rightholders, private copying is in adherence with the third condition of the three-step test.<sup>590</sup>

Economists indicate that it is difficult to predict and accurately record the prejudicial effects of private copying. Besen and Kirby convincingly demonstrate that the determination of these effects requires an examination of a series of parameters.<sup>591</sup> Those include assumptions both on the substitutability between copies and originals and on the cost involved in the production of copies and originals. The problem, however, is that these parameters are dependent on various factors which complicate the identification of harm further still. For instance, the issue of substitutability between copies and originals may require an examination of the technical quality of the reproduction, the timeliness of the availability of copies and the importance of complementary goods.<sup>592</sup> Given the complexity of this examination, we acknowledge the difficulty in reaching undisputed results.

Certainly, the rightholders would not encounter a loss in sales if a user would have bought a copy instead of making one herself. Since making a copy for private use generally is far cheaper than buying an original, one can assume that many end users who make private copies do not value the product enough to buy it. In our view, therefore, not every private copy made supplants a sale. In calculating the possible lost sales, therefore, Besen and Kirby indicate that we need to assess the number of end users who would have been willing to pay the price of the original but prefer to make a copy for free.<sup>593</sup> In this context, they suggest that the losses in the earnings of the rightholders may be estimated by a variation of the profits of the rightholders before and after the incidence of private copying.<sup>594</sup> Where private copying does not reduce the profits of rightholders, no element of harm may be established.

As the Commission acknowledges,<sup>595</sup> private-copying levies are an imprecise tool to compensate for alleged 'economic harm'. They are imprecise because copying takes place in

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<sup>589</sup> At page 134 *et seq.*

<sup>590</sup> Also see in this respect M. Chesnais, 'La Copie Privée', *Colloque de l'IRPI*, 1985, p. 143, at 150.

<sup>591</sup> St. Besen & S.N. Kirby, 'Private Copying, Appropriability, and Optimal Copying Royalties,' *Journal of Law and Economics*, vol. XXXII, October 1989, p. 270.

<sup>592</sup> *Ibid.*, at p. 258.

<sup>593</sup> *Ibid.*, at pp. 255-280.

<sup>594</sup> *Ibid.*

<sup>595</sup> European Commission, *Stakeholder Consultation on Copyright Levies in a Converging World*, June 2006, available online at <[http://ec.europa.eu/internal\\_market/copyright/docs/levy\\_reform/stakeholder\\_consultation\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/levy_reform/stakeholder_consultation_en.pdf)>, lastly accessible on 9.9.2009, p. 7.

the private sphere, and, as a result, the manufacturers of equipment and media are not in a position to know or control what end users actually do with the equipment and media. What is more, they cannot be aware of how much is being copied or what is being copied. In this light, the Commission indicates that the calculation of harm should not be made on the basis of either the number of copies that consumers produce or the exact copyright protected works that is being copied.<sup>596</sup> While survey evidence from samples of the population is one method used to calculate harm, the Commission rejects the validity of this approach on the ground that neither the proportion nor the scale of copying can be reliably assessed on this basis.<sup>597</sup>

Even though there are many ways of identifying and calculating the harm that rightholders may encounter due to private copying Member States use different approaches as regards its calculation. For instance, they might examine the storage or multifunctional capacity of equipment and media, the compression standards, the potentially re-writable character of the carrier and the application or non-application of technological protection measures.<sup>598</sup> This means that harm is only one criterion in determining the level of fair compensation, as acknowledged by the European author's and performer's societies.<sup>599</sup> Despite the fact that other factors may also be brought in the equation, in our view, the element of harm is, and should be, examined when calculating the amount of fair compensation which is in essence compensatory. Since its determination, however, is practically difficult and no single approach is followed by the Member States to date, we urge for the adoption of a uniform method by all Member States so that no different rates for identical media and equipment apply from one State to another.

## **1.2. Statutory licensing as a 'liability rule'**

Levies are a form of remuneration for rightholders based on the premise that acts of private copying cannot be monitored or enforced without encroaching upon end-user privacy. From a legal point of view, they constitute a statutory right of remuneration for private non-commercial uses of works and, thereby, an essential element of adequate legal protection to the rightholders. Kretschmer and Cohen Jenoram rightly observe that, due to the application of levies, the exclusive reproduction right loses its exclusivity and is replaced by a liability

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<sup>596</sup> *Ibid.*

<sup>597</sup> *Ibid.*

<sup>598</sup> European Grouping of Societies of Authors and Composers (GESAC), *Stakeholder Consultation on Copyright Levies in a Converging World*, June 2006, at p. 14.

<sup>599</sup> European Commission, *Background Document "Fair Compensation for Acts of Private Copying"*, Brussels, 14.2.2008, available online at <[http://www.ebu.ch/CMSimages/en/BRUDOC\\_INFO\\_EN\\_415\\_tcm6-60774.pdf](http://www.ebu.ch/CMSimages/en/BRUDOC_INFO_EN_415_tcm6-60774.pdf)>, p. 19.

claim for remuneration<sup>600</sup> or, otherwise put, a liability rule. Indeed, property rights may be granted either under a property or under a liability rule, as Calabresi and Melamed convincingly indicate.<sup>601</sup> Using their property theory to understand the function of levies in the copyright system, we might well say that exclusive rights, such as the reproduction right, are afforded under a 'property rule' in terms that the rightholders are entitled to prohibit a specific activity, namely an act of reproduction, or to authorise it and set a price for it. The statutory right to fair compensation, on the other hand, is granted under a 'liability rule' in the sense that the rightholder cannot prevent acts of private copying and, due to the loss of control over these acts, he has a mere right to compensation the amount of which he cannot negotiate. The value of the compensation is determined by a public institution, such as a Court. For instance, responsible for the determination of the levies as a liability rule in France is a special Commission.<sup>602</sup> We agree with Montagnani and Borghi that property rules secure both remuneration and control while liability rules secure only remuneration and leave the question of control outside the power of the rightholders.<sup>603</sup>

Yet, in our view, affording a right to statutory remuneration for acts of private copying is a preferable solution for two reasons. The first is that private copying has become a very popular practice, especially in the digital era. Due to the fact that acts of private non-commercial copying are permitted under the limitation of Article 5(2)(b) of Directive 2001/29/EC, the rightholders may encounter losses in sales arising from a perfectly permissible activity. Fair compensation payable to the rightholders through a statutory licensing scheme ensures that the third condition of the three-step test is fulfilled, namely that the rightholders do not suffer an unreasonable prejudice to their legitimate rights.<sup>604</sup> At the

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<sup>600</sup> See S. M. Stewart & H. Sandison, *International Copyright and Neighbouring Rights*, Butterworths, London, 2<sup>nd</sup> ed., 1989, p. 84; Also see M. Kretschmer, 'The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments', in D. Vaver (ed.), *Intellectual Property Rights: Critical Concepts in Law*, Routledge, 2006, pp. 346-361, at 346; H. Cohen Jenoram, 'The Future of Copyright Collection Societies', *EIPR*, 2001, p. 134, at 137-138; N. Van Lingen, 'Collective Copyright Administration: Competition and Supervision', in J.J.C. Kabel (ed.), *Intellectual Property and Information Law: Essays in Honour of Herman Cohen Jenoram*, Kluwer Academic Publishers, 1998, p. 142, at 211; M. Ficsor, 'Collective Management of Copyright and Related Rights in the Digital, Networked Environment: Voluntary, Presumption-Based, Extended, Mandatory, Possible, Inevitable?' in D. Gervais (ed.), *Collective Management of Copyright and Related Rights*, Kluwer Law International, 2006, pp. 37-83, at p. 40.

<sup>601</sup> G. Calabresi & A.D. Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral', *Harvard Law Review*, Vol. 85, April 1972, pp. 1089-1128.

<sup>602</sup> Article L. 311-5 of the French Code de la propriété intellectuelle (partie législative), Première partie - La propriété littéraire et artistique.

<sup>603</sup> M. L. Montagnani & M. Borghi, 'Promises and Pitfalls of the European Copyright Law Harmonisation Process', in D. Ward (ed.), *The European Union and the Culture Industries: Regulation and the Public Interest*, Ashgate, 2008, pp. 213-240, at p. 233 *et seq.*; also see N. Elkin-Koren, 'It's all about Control: Rethinking Copyright in the New Information Landscape', in N. Elkin-Koren & N. Netanel (eds.), *The Commodification of Information*, The Hague, Kluwer, 2002, pp. 76-106, at p. 106.

<sup>604</sup> See earlier at page 134 *et seq.*

same time, it is difficult to control these private uses without encroaching upon end-user privacy. While in the analogue environment this would be realised by searches and seizures at the end-user's home, in the digital context, technology may enable rightholders to monitor whether works have been used, this impinging upon the information privacy of end users, as we shall see later in this thesis.<sup>605</sup> As a result, granting a right to fair compensation for acts of private copying may be preferable for protecting the fundamental right to privacy.

Below we provide a justification for the continuation of the levy schemes as regards digital private copying, since in our view the levitation of copyright is the adequate approach in dealing with the impact of private copying both in terms of preserving end-user privacy and providing rightholders sufficient compensation.

## **2. The adequacy of levy schemes for the preservation of the copyright balance**

In our view, it is extremely difficult to modify a widespread behaviour, such as the use of copyrighted content online. And even though technology might gradually offer the rightholders the tools to technologically control uses, other technologies might give rise to new forms of using copyrighted content. We consider, therefore, that the most appropriate way forward is to permit private copying under Article 5(2)(b) and, at the same time, provide the rightholders with a compensation for the losses in sales that they might suffer due to private copying. This regulatory option has the merit of preserving the copyright balance in a twofold manner. First, it guarantees the unencumbered exercise of the right to privacy, may that be conceived as the inviolability of the home or the informational privacy of end users. Secondly, the processes of levy collection are quite high indeed in terms that rightholders may receive an adequate compensation for the potential losses in sales. We examine these issues below.

### **2.1. Levies as a revenue stream**

Albeit compensatory in nature, levies may constitute an important revenue stream for the rightholders. Indeed, in 2004, more than €550 million in levies was collected on behalf of all collecting organisations in 16 EU Member States. The following table, which we borrow from the Commission's 2008 Background Document,<sup>606</sup> illustrates that the collection of private-copying levies almost doubled from 2002 to 2004. As the Commission indicates in this Document, the ICT industry, namely the manufacturers, importers or distributors of

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<sup>605</sup> At page 200 *et seq.*

<sup>606</sup> European Commission, *Background Document "Fair Compensation for Acts of Private Copying"*, Brussels, 14.2.2008, available online at <[http://www.ebu.ch/CMSimages/en/BRUDOC\\_INFO\\_EN\\_415\\_tcm6-60774.pdf](http://www.ebu.ch/CMSimages/en/BRUDOC_INFO_EN_415_tcm6-60774.pdf)>, p. 9.

equipment or media, estimates that the total amount of levies claimed for private copying in 2005 was €1.2 billion!<sup>607</sup> The table below illustrates the levies collected in million Euros:

	<b>2002</b>	<b>2003</b>	<b>2004</b>
<i>Austria</i>	10.993	16.381	15.897
<i>Belgium</i>	5.058	7.708	16.631
<i>Czech Republic</i>	1.142	1.011	1.159
<i>Denmark</i>	8.000	6.900	7.300
<i>Finland</i>	10.353	10.229	12.120
<i>France</i>	125.566	145.978	167.511
<i>Germany</i>	77.330	101.783	146.751
<i>Hungary</i>	5.832	9.814	10.154
<i>Italy</i>	7.385	18.943	74.049
<i>Latvia</i>	--	0.159	0.310
<i>Lithuania</i>	--	--	0.747
<i>Netherlands</i>	17.978	18.686	29.639
<i>Poland</i>	--	1.940	2.850
<i>Slovakia</i>	0.799	0.511	0.668
<i>Spain</i>	11.077	26.849	72.578
<i>Sweden</i>	7.816	9.082	9.409
<b>Total*</b>	<b>291.335</b>	<b>376.468</b>	<b>567.774</b>
Notes:			
* The total amounts are calculated for information purposes only, by approximating missing values on the basis of levy collection shares in the year 2004.			

As Gaita and Christly convincingly indicate, the remuneration for private copying may sometimes be more interesting financially to the rightholders than the remuneration received as a royalty through the exploitation of exclusive rights!<sup>608</sup> We agree with this view. The figures featured in the aforementioned table are only indicative to what fair compensation may amount in numbers. One should keep in mind at this stage that these figures correspond to the levy proceeds in respect of private copying and do not reflect royalty payments or levies collected for other activities, such as reprographic copying. In this respect, we consider that

<sup>607</sup> *Ibid.*

<sup>608</sup> K. Gaita & A.F. Christie, 'Principle or Compromise? Understanding the Original Thinking behind Statutory License and Levy Schemes for Private Copying', *IPQ*, 2004, p. 426.

levies serve adequately their compensatory function in terms that the rightholders can have no claim that their legitimate interest are unreasonably prejudiced within the meaning of Article 5(5) of Directive 2001/29/EC.

Having concluded that the entitlement to fair compensation in respect of private copying is an adequate method for compensating rightholders vis-à-vis the prejudicial effect of private copying we shall now examine the suitability of the levy-based approach from an end-user perspective.

## 2.2. Levies as a guarantor of the right to privacy

As we illustrated earlier in this thesis,<sup>609</sup> the prime justification behind the private copying limitation of Article 5(2)(b) of Directive 2001/29/EC is the personal enjoyment of, and learning through, copyrighted content without violating the right to privacy. Indeed, levy schemes were originally invented to avoid violations of the right to privacy vis-à-vis copyright enforcement. This was affirmed in the German Court decisions<sup>610</sup> initiating the levy schemes under which it was deemed preferable to offer the rightholders some form of remuneration so as not to encroach upon the users' inviolability of the home. This doctrine even reached the U.S. Supreme Court, which held in *Sony v. Universal studios*<sup>611</sup> that if private copying was actionable, enforcement would be overreaching, since it would involve the monitoring of private behaviours and suing end users for acts committed in the privacy of their homes. In this respect, we consider that private copying has become an embryo of hierarchy between copyright enforcement and fundamental rights, in terms that privacy protection prevails over copyright enforcement.

Still, one might argue that the real scope of the private copying limitation to copyright enforcement was due the material circumstances of the analogue era; indeed, monitoring end users' behaviour in their private house would be unthinkable from a fundamental rights perspective and practically impossible. Leniency was, therefore, a reflection of practical realism. Nowadays, however, technology has the potential to reverse this paradigm and enable

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<sup>609</sup> At page 39 *et seq.*

<sup>610</sup> *Personalausweise*, German Federal Supreme Court (Bundesgerichtshof), GRUR 02/1965, p. 104; Also see K.J. Koelman & L. Bygrave, 'Privacy, Data Protection and Copyright: Their Interaction in the Context of Electronic Copyright Management Systems', in P.B. Hugenholtz (ed.), *Copyright and Electronic Commerce*, The Hague, Kluwer Law International, 2000, pp. 59-123, at p. 101; D.J.G. Visser, 'Copyright Exemptions Old and New', in P.B. Hugenholtz (ed.), *The Future of Copyright in a Digital Environment*, The Hague, Kluwer Law International, Informational Law Series – 4, 1996, pp. 49-56, at p. 50.

<sup>611</sup> *Sony Corp. of America v. Universal City Studios, Inc.* 464 U.S. 417 (1984), known as the 'Betamax' case. For an analysis see J. M. Feder, 'Is Betamax Obsolete: Sony Corp. of America v. Universal City Studios, Inc. in the Age of Napster', *Creighton Law Review*, 2003, 37, 859; W. Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors', 82 *Colum.L.Rev.*, 1982, p. 1600.

forms of control and monitoring of uses which unpeg the validity of the privacy argument. Yet, as we shall see later in this thesis,<sup>612</sup> technological mechanisms that monitor the use of works may impinge upon the informational privacy of end users. Unless privacy protection mechanisms are applied to monitoring devices, end-user privacy still remains a valid justification for the retainment of levy schemes.

In Europe, the payment of fair compensation to the rightholders vis-à-vis private copying takes the form of levies. We have seen that levies have a compensatory nature; they are meant to compensate the rightholders for the harm they suffer due to private copying. Being underlined by a strong privacy rationale, levies legitimise acts of private copying and provide the rightholders with compensation so that their legitimate interests are not unreasonably prejudiced due to private copying in the light of the three-step test. This is affirmed by Directive 2001/29/EC which indicates that fair compensation is meant to serve as a counterweight to the harm caused to the rightholders due to the loss of sales. In these terms, we consider that the exclusive right to authorise or prohibit certain acts of reproduction is replaced with an entitlement to receive fair compensation in respect of acts of private copying, namely by a liability rule. While we agree with this regulatory option, there are many arguments against the application of levies in the digital environment where the application of technological protection mechanisms enables the individual licensing of rights. Yet, in our view, despite the emergence of technological methods in enforcing copyright, levies retain their validity as a means of maintaining the copyright balance; they provide rightholders which adequate compensation and, at the same time, guarantee that end user privacy is not violated.

While we consider that levies are the adequate regulatory solution to deal with the impact of digital private copying, our analysis indicates that the national levy-schemes are largely diverse and inextricably territorial. Practically, this means reflects a lack of uniformity that could hinder the effectiveness of the levy-based approach in dealing with digital private copying. Below we provide an overview of the current regulation of levy-schemes through collecting societies, as the administrators of the levy-schemes, and stress the need for harmonisation at pan-European level.

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<sup>612</sup> At page 201 *et seq.*

## **Section 2: Enhancing the effectiveness of levy-schemes: the need for a uniform pan-European framework**

Collecting societies play an important role in the administration of statutory licensing schemes in respect of private copying. Indeed, they are entrusted with two main tasks: to collect the levies from distributors and manufactures and to distribute the levies to the rightholders they represent. Due to their preeminent role, there is a high expectation as to the possible initiatives that might be undertaken with respect to the rules concerning their governance. While attempts have been made at European level so as to harmonise the function of collecting societies, they were limited in scope, despite the fact that the European Commission had pushed in favour of harmonisation of the private-copying levy schemes as of 1988.<sup>613</sup> Attempts for harmonisation have been mainly undertaken with a view to enhance the efficacy of collective management and to inject uniform rules on good practice, such as rules on transparency and accountability. No real initiative, however, has been undertaken as to the approximation of the function of these societies under common, or at least comparable, standards. Since no real harmonisation has been achieved as regards the collective management of copyright and related rights at EU level,<sup>614</sup> there are significant disparities between the national regulatory systems. In this light, each Member State has enacted its own regulatory regime, as Gendreau rightly observes.<sup>615</sup> As a result, the regulation of the function of collecting societies remains inextricably territorial and largely diverse. Practically, this means that there is no uniform regulation of the levy-schemes which are administered by these collecting societies. This results to a diversity of the rules applicable to the calculation, application, collection and redistribution of levies in each Member State.

We consider that the territorial and un-harmonised function of collecting societies has a negative effect on the smooth functioning of the internal market. In the context of private copying levies, this negative effect is manifested by the fact that no uniform rules apply and, as a result, the setting and calculation of levies present substantial differences. Since the amounts and basis of calculating levies vary, end users in one State may have to pay more on media and equipment while end users in other States pay less for the same media and equipment. From a rightholder perspective, too, there might be negative effects due to the fact that collecting societies follow different methods in determining how to distribute levies to their members.

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<sup>613</sup> *Green Paper on Copyright and the Challenge of Technology*, Copyright Issues Requiring Immediate Action. COM (88) 172 final, 7 June 1988.

<sup>614</sup> P. Gilliéron, 'Collecting Societies and the Digital Environment', *IIC*, Vol. 37, Iss. 8, 2006, pp. 939-969, p. 942.

<sup>615</sup> For a more comprehensive account of certain national regimes on the regulation of collecting societies see Y. Gendreau (ed.) *Copyright Administrative Institutions*, Editions Yvon Blais, Montreal, 2002, 628.

Yet, we have already concluded that levies are an adequate solution to deal with the impact of digital private copying.<sup>616</sup> Discrepancies as to the enforcement of the entitlement to fair compensation due to the unregulated function of collecting societies and the diversity of levy schemes could hinder the efficacy of the levy-based approach in dealing with digital private copying.

Below we examine the current regulatory framework applicable to the administration of private-copying levies both at EU and national level. We shall see that this framework is inefficient and lacks uniformity; at the same time, no mention is made as to common rules in respect of the collection and distribution of private-copying levies. To have effective rights management in the context of private-copying at EU level, we identify a need for the creation of a uniform levy scheme on a pan-European basis. This can be realised by the harmonisation of the national levy schemes through the injection of uniform rules applicable in all Member States and by the possible centralisation of statutory licensing throughout Europe by use of alternative levy-schemes.

## **1. Current regulation of the collective administration of private-copying levies at EU and national levels**

The creation of a level playing field for collecting societies at European level was within the European Commission's agenda as soon as 1995 when the Green Paper was published.<sup>617</sup> Nonetheless, as Cohen Jenoram observes, the structure and function of European collecting societies has never been really harmonised within the EU.<sup>618</sup> All initiatives undertaken at EU level addressed peripheral issues, such as the compliance of collective management with competition rules or the injection of uniform rules on fair practice. As a result, the function of collecting societies and the administration of private-copying levies has been left for Member States to determine. This has resulted to divergent approaches.

Our aim below is to provide an overview of the regulation of collective management both at EU and national level with a view to highlight the lack of a comprehensive and uniform framework as to the administration of private-copying levies.

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<sup>616</sup> At page 145 *et seq.*

<sup>617</sup> Commission of the European Communities, 'Green Paper on Copyright and Related Rights in the Information Society of 19 July 2005', COM(95) 382 final.

<sup>618</sup> H. Cohen Jenoram, 'Harmonizing Intellectual Property Law within the European Community', 23 *Int. R. of Industrial Property and Copyright Law*, 1992, 622. For a more comprehensive account of certain national regimes on the regulation of collecting societies see Y. Gendreau (ed.) *Copyright Administrative Institutions*, Editions Yvon Blais, Montreal, 2002, 628.

## 1.1. Regulation at Community level

The regulation of the activities of collecting societies has so far been realised under the Community rules on competition and, in particular, under Articles 81 and 82 of the EC Treaty.<sup>619</sup> We acknowledge that cross-border licensing may implicate competition law in various ways. Affirmative in this respect are the European Commission's decision in the *IFPI Simulcasting* case<sup>620</sup> and the Commission's announcement to start proceedings on the Santiago Agreement as regards music licensing for internet use.<sup>621</sup> At the international Conference held in 2001 at Santiago de Chile, the representatives of the main European performing-rights societies<sup>622</sup> reached a cooperation agreement to which all the collecting societies in the European Economic Area (EEA)<sup>623</sup> adhered.<sup>624</sup> This Agreement aims to allow each participating collecting society to provide online users of copyrighted content with a 'one-

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<sup>619</sup> Treaty establishing the European Community (EC Treaty), 1997; also see case No. COMP/C2/38.014 – *IFPI Simulcasting*, OJ L107/58, 30.04.03; *Musik-Vertrieb Membran GmbH v. GEMA* (1981) ECR 147; *GVL v. Commission* (1983) ECR 483.

For an overview of the main elements of the European competition rules as applied to collecting societies see I. Govaere, *The Use and Abuse of Intellectual Property Rights in E.C. Law*, Sweet & Maxwell, 1996, 337; F.L. Fine, 'The Impact of EEC Competition Law on the Music Industry', *Ent. L. Rev.*, 1992, 6, at 11; T. Kaufmann, 'Competition Issues Relevant to Copyright and the Information Society', *European Commission Legal Advisory Board Meeting on 'The Information Society: Copyright and Multimedia'*, Luxembourg, 25.4.2005; L. Guibault & S. van Gombel, 'Collective Management in the European Union', in D. Gervais (ed.), *Collective Management of Copyright and Related Rights*, Kluwer Law International, 2006, pp. 117-152, at 120-124. See in general L. Guibault, 'When Will we have Cross-Border Licensing of Copyright and Related Rights in Europe?', *e-Copyright Bulletin*, April-June 2005, pp. 1-10, at 3 *et seq.*

On EU case-law on the compatibility of collecting-society licences with EU competition law see Case No. 127/73 (*BRT v. SABAM*) ECR 1974, p. 313; Cases Nos. 55/80 and 57/80 (*MV Membran and K-Tel International v. GEMA*) ECR 1981, p. 147; Case No. 7/82 (*GVL v. Commission*) ECR 1983, p. 483; Cases C-92/92 and 326/92 (*Phil Collins and Patricia Im – und Export v. EMI*) ECR 1993, p. I-5145.

<sup>620</sup> See case No. COMP/C2/38.014 – *IFPI Simulcasting*, OJ L107/58, 30.04.03.

<sup>621</sup> European Commission Press Release IP/04/586, 3 May 2004; On the Santiago Agreement see L. Guibault, 'When Will we have Cross-Border Licensing of Copyright and Related Rights in Europe?', *op. cit.*, at 7 *et seq.*; J. Becker, 'Santiago Agreement and FastTrack', speech given at the *MIDEM International Music Market* in Cannes on 23 January 2001, GEMA News, Issue No. 163.

Also see a similar Agreement, namely the Barcelona Agreement, Case COMP/C-2/38.377 – BIEM Barcelona Agreements, Notification of Cooperation Agreements, OJ C 132, 04.06.02, p. 18.

<sup>622</sup> For instance, the PRS from the UK, SACEM from France, GEMA from Germany and BUMA from the Netherlands.

<sup>623</sup> The Agreement creating the European Economic Area (EEA Agreement) was signed in May 1992 as a result of negotiations between the European Community, the ten Member States, and the seven member countries of the European Free Trade Association (EFTA). The Agreement on the European Economic Area entered into force on the 1<sup>st</sup> of January 2004 and was last updated on the 5<sup>th</sup> of May 2004.

Following a referendum, Switzerland decided not to participate. Even though Switzerland is not in the EEA, Swiss nationals are provided with similar rights as EEA nationals.

The EEA was preserved due to the wish of Norway, Iceland and Liechtenstein to participate in the Internal Market, while not assuming the full responsibilities of EU membership. Pursuant to the EEA Agreement, these countries have the right to be consulted by the Commission during the formulation of EU legislation. Nonetheless, they do not have a voice to decision-making, this being an exclusive privilege of Member States. See <[http://europa.eu.int/comm/external\\_relations/eea/](http://europa.eu.int/comm/external_relations/eea/)> [5.5.2006].

Further, since the EEA is premised on the principle of homogeneity, the timely implementation of the *acquis communautaire* into the EEA Agreement is essential so that EU legal Acts are simultaneously applied in the EU and the EEA States. See Article 102(1) of the EEA Agreement. Article 65(2) of the Agreement makes mention to the protection of intellectual property rights.

<sup>624</sup> With the exception of the Portuguese collecting society SPA and the Swedish SWISA.

stop' shop for the licensing of the public performance of music on the internet. What is more, the Agreement purports to enable collecting societies to licence the public performance of music on the internet and to distribute the collected royalties.<sup>625</sup> In our opinion, this Agreement does not have much relevance in the field of private-copying levies but lays down rules on online licensing models.

As regards the implication of competition rules in collective rights management, the *GEMA*<sup>626</sup> case is of particular importance. In this case, the European Commission stressed that collecting societies should not discriminate among members as regards the distribution of income.<sup>627</sup> *GEMA* was held to abuse its dominant position by paying supplementary fees, from the proceeds collected from all its respective members, only to those who had been its regular members for a minimum period of three years. Despite the fact that the *GEMA* case was not about private-copying levies, but about royalties in general, we consider that it is relevant in the field of the distribution of private-copying levies. In our opinion, this case highlights the need for the adoption of fair practices as regards the distribution of levy proceeds amongst the rightholders they represent. At present, the most common method that national collecting societies adopt as regards such distribution is by virtue of their respective members' commercial success. Instead of redistributing an equal part of the 'pot' to each respective member they represent, they normally rely on complex and detailed statistics based on radio play-lists or store sales. So, despite the fact that levy schemes *prima facie* seem to embody the collectivisation of copyright, the administrators of these schemes attempt to provide as good mirror image of reality as possible, if that would ever be achievable. Yet, as the *GEMA* case indicates the distribution of income to the rightholders should be made with caution so as to avoid a conflict with the European competition rules. The same ought to apply, in our opinion, as regards the distribution of levy proceeds to the rightholders.

Yet, the application of competition rules has only peripheral application in the context of collective management of private-copying levies. Even though discussions at EU level have intensified on the issue of the collective administration of rights, the issue of private-copying

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<sup>625</sup> T.C. Vinje, D. Paemen & J. Romelsjo, 'Collecting Society Practices Retard Development of On-Line Music Market', paper presented at the *IViR-Buma/Stemra Conference, Copyright and the Music Industry: Digital Dilemmas*, Amsterdam, 4-5 July 2003, p. 4.

The Agreement covers webcastings, streaming, online music on-demand and music included in audiovisual works shown online, with the exception of simulcasting.

<sup>626</sup> *Gesellschaft für Musikalische Aufführungs- und Mechanische Vervielfältigungsrechte (GEMA) v. Commission of the European Communities*, (1971) O.J. L. 134/15.

<sup>627</sup> F.L. Fine, 'The Impact of EEC Competition Law on the Music Industry' (1992), *Entertainment Law Review* 6, at 12.

levies has not been expressly addressed. Indeed, in its 2004 Resolution,<sup>628</sup> the European Parliament stressed out the important social and cultural aspects of collective management and the necessary role of collecting societies. To the Parliament, ‘a Community approach in the area of the exercise and management of copyright and related rights, in particular of effective collective rights management in the internal market, must be pursued’.<sup>629</sup> Following this Resolution, the Commission issued a Communication on the management of copyright and related rights.<sup>630</sup> This rather technically and legally oriented document highlights the importance of establishing a legislative framework on collective management at Community level, without putting aside the complementary application of the EU competition rules. Following this Communication, the Commission announced that the adoption of a legislative approach on collective rights management in the Internal Market would be part of its 2005 Work Programme.<sup>631</sup> This legislative approach would purport, *inter alios*, to enhance the transparency and efficiency of collecting societies through the injection of uniform rules of collective management in all Member States.<sup>632</sup>

In May 2005, the Commission issued a Recommendation on the collective cross-border management of legitimate online music services.<sup>633</sup> This Recommendation urges for the adoption of a pan-European licensing policy that is in line with the challenges of the online

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<sup>628</sup> The European Parliament, ‘European Parliament Resolution on a Community Framework for Collective Management Societies in the Field of Copyright and Neighbouring Rights’, 2002/2274(INI), 15.1.2004, P5\_TA(2004)0036. For a comment see A. Dietz, ‘European Parliament versus Commission: How to Deal with Collecting Societies?’, *Int. R. of IP and Comp. L.*, 804, 809, at 810-814.

<sup>629</sup> The European Parliament, ‘European Parliament Resolution on a Community Framework for Collective Management Societies in the Field of Copyright and Neighbouring Rights’, 2002/2274(INI), 15.1.2004, P5\_TA(2004)0036.

<sup>630</sup> Commission of the European Communities, ‘Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee – The Management of Copyright and Related Rights in the Internal Market’, 16.4.2004, COM(2004) 261 final; also see L. Guibault & S. van Gombel, ‘Collective Management in the European Union’, in D. Gervais (ed.), *Collective Management of Copyright and Related Rights*, Kluwer Law International, 2006, pp. 117-152, at 132.

<sup>631</sup> Commission of the European Communities, ‘Commission Work Programme for 2005 – Communication from the President in agreement with the Vice-President Wallström’, 26.1.2005, COM(2005) 15 final.

<sup>632</sup> Commission of the European Communities, ‘Roadmaps – Commission Work Programme 2005’, 2005, at 35.

<sup>633</sup> Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services, OJ L 276/54-57, 2005/737/EC, 18.5.2005. Under Article 211 of the Treaty establishing the European Community (EC Treaty), the Commission may formulate Recommendations on matters dealt within the Treaty, if this is deemed necessary. The Commission’s action is based on Articles 12 and 49 of the EC Treaty which prohibit discrimination on the basis of nationality and govern the freedom to provide services across national borders.

For the purposes of this Recommendation, an online music service means any music service provided on the internet. It follows that simulcasting, webcasting, downloading, ‘podcasting’ and ‘on-demand’ services provided online, or to mobile telephones, fall within the scope of this definition. The 2006 *IFPI Digital Music Report* illustrates that technologically protected digital sales as well as legitimate online and mobile services are an area of major growth potential. Podcasting is the method of the online distribution and digital recording of multimedia files, such as audio programs or music videos, for downloading on mobile devices, portable digital music players and personal computers. The name association emanates from Apple’s ‘iPod’ portable player which, at the advent of podcasting, was the most popular portable music player; See M. Fox & T. Ciro, ‘The Emerging Legal Environment for Podcasting’ *Ent.L.R.* 2005, 16(8), pp. 215-223.

environment, and puts aside the conclusion of reciprocal representation agreements which was a standard practice for licensing analogue content.<sup>634</sup> Suthersanen and Frabboni indicate that this policy is meant to provide the rightholders with the freedom to authorise a collective rights manager of their choice to manage their works across the entire Union.<sup>635</sup> The Recommendation acknowledges that due to online exploitation of musical works, the need to enhance legal certainty and create a licensing policy that corresponds to the ubiquity of this environment, which is by nature multi-territorial, is immense.<sup>636</sup> While collecting societies consider that the current system of reciprocal representation agreements is effective and should not be further regulated, they have entered into a dialogue with the European Commission and service providers to suggest options in improving collective rights management -insofar as the reciprocal agreements regime is not, however, put into question!<sup>637</sup>

In our view, all attempts to harmonise the framework of collective management have not dealt with the issue of private-copying levies but with other issues in the context of the collective administration of rights. As a result, the relevance of these attempts on the administration of private-copying levies is minimal, since subject to harmonisation have only been rules on good practice and transparency in the context of collective rights management. We observe that no real initiative has been undertaken to approximate the function of collecting societies at pan-European level. As a result, their role and function as regards the administration of private-copying levies remains inextricably territorial and vary from one State to another. We provide some evidence below.

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<sup>634</sup> At an international level, collective management has been dealt in Arts 11bis(2) and 13(1) of the Berne Convention for the Protection of Literary and Artistic Works 1886 (1971 revision with 1979 amendments) and Article 12 of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations adopted by the WIPO on October 26, 1961.

<sup>635</sup> U. Suthersanen, 'Collectivism of Copyright: The Future of Rights Management in the European Union', in M. Barendt & A. Firth (eds.), *Yearbook of Copyright and Media Law*, Oxford University Press, 2000, p. 20; M.M. Frabboni, 'Online Music Licensing: The Calm After the Storm', *Ent. L. Rev.* 2006, 17(2), pp. 65-69, at 65; also M.M. Frabboni, 'European Union: Music – Commission's Impact Assessment on Collective Management', *Ent. L. Rev.* 2006, 17(4), N32-33, at N33.

The introduction of *choice* in the online environment is considered as a policy principle, the exercise of which can enhance competition. E. Lui, 'The Eurovision song contest: A Proposal for Reconciling the National Regulation of Music Collecting Societies and the Single European Market', *Ent.L.Rev.* 2003, 14(4), 67-84, at 72-73.

<sup>636</sup> Recital 8 of the Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services, OJ L 276/54-57, 2005/737/EC, 18.5.2005; N. Davies, 'The Digital Music Revolution – How will Traditional Rights Operate in the Online Music World', *Ent. L. Rev.* 2005, 16(6), 137-143.

<sup>637</sup> Commission of the European Communities, 'Document accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content Online in the Single Market', Commission Staff Working Document, Brussels, 3.1.2008, SEC(2007) 1710, COM(2007) 836 final, p. 25.

## 1.2. Regulation at Member State level

While Directive 2001/29/EC is neutral as to the form of fair compensation that is due for acts of private copying, it indicates in its Recital 38 that *'this may include the introduction or continuation of remuneration schemes to compensate for the prejudice to rightholders.'* Indeed, prior to the adoption of this Directive, most EU Member States already had remuneration schemes in place, in the form of private-copying levy systems on recording equipment and/or blank media. Yet, these systems were largely diverse and since no uniform guideline as to the determination of the form or amount of the levies exists, diversity remains. This is even acknowledged by Recital 38 which indicates that the differences amongst national levy systems may have a more significant impact in the digital environment. In fact, this Recital reads that

*'although differences between those remuneration schemes affect the functioning of the internal market, those differences, with respect to analogue private reproduction, should not have a significant impact on the development of the information society. Digital private copying is likely to be more widespread and have a greater economic impact.'*

In the light of the digital environment, the divergences amongst Member States as to the amount, the basis of calculation, and the debtors of copyright levies have become source of on-going controversy. This is because most Member States have gradually started to extend the application of levies to digital equipment and media without this approach being uniform and without in some cases taking into account the multifunctionality of certain digital carriers. For instance, levies apply to mobile phones in the Czech Republic, France and Spain, without such a levy being imposed by other States.<sup>638</sup> These devices, however, are not 'dedicated' to acts of private copying since they serve a different primary function; as a result, the levies applicable to them are a form of 'rough justice' in terms that some end users may end up paying the mobile-phone levy just to use the phone ordinarily and not to download ringtones or other copyrighted content. Yet, where levies are extended to digital equipment or media, such as mobile phones, the proceeds of levies are increased to the benefit of the rightholders.

### **The diversity of national levy systems**

An examination of the applicable levy schemes indicates that there are differences in the rates and the method for the calculation of levies, even in respect of identical digital equipment or

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<sup>638</sup> Association of European Performers' Organisations (AEPO-ARTIS), *Submission to the Second Call for Comments Fair Compensation for Acts of Private Copying*, April 2008, p. 4.

blank media.<sup>639</sup> For instance, the French Tribunal of Bobigny<sup>640</sup> found a foreign e-commerce website liable for unfair competition for selling levy-free blank CDs online, consequently at a cheaper price. The basis for its reasoning was that end users were not notified that by purchasing those media abroad they became subject to the payment of the copyright levy on behalf of the seller. Indeed, under the French Code of Intellectual Property, failure to liquidate the levy is treated as a criminal offence.

What is more, in certain Member States, copyright levies apply to both equipment *and* media, in other Member States, copyright levies apply to equipment *or* media. To get a grip on this issue, see the following table with data from 2008. Note that there is a trend of treating hard-disk drives -which are integrated within equipment- as media and, therefore, subject to a levy.

MEMBER STATE	Austria	Belgium	Bulgaria	Czech Republic	Germany	Denmark	Estonia	Greece	Spain	Finland	France	Hungary	Italy	Latvia	Lithuania	Netherlands	Poland	Portugal	Romania	Slovakia	Slovenia	Sweden
Media	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
Equipment	-	√	-	√	√	-	√	√	√	√	-	√	√	√	-	-	√	-	-	√	√	-

While levies on blank media are applicable to all Member States with a levy scheme, not all States impose levies on recording equipment. This means that the amount of compensation for private copying varies amongst Member States. What is more, there is large diversity as to which media are subject to a levy. For instance, even though CDs and DVDs are levied in all States, some amongst them, such as Austria, the Czech Republic, France, Hungary and Poland, have extended the application of levies to removable memory cards that can be read by a variety of different devices, such as digital cameras, mobile phones, personal digital assistants (PDAs), video game consoles and MP3 players. Some Member States have extended the application of levies to digital recording equipment, such as personal computers and CD recorders. This is, for instance the case in Germany.<sup>641</sup> In Belgium, on the contrary, CD

<sup>639</sup> For a comparative analysis see W. Wanrooij, 'Remuneration Systems for Private Copying', in *Creator's Rights in the Information Society*, Proceedings of the ALAI Congress, September 2003, Budapest, KJK-Kerszov Legal and Business Publishers Ltd., 2004, p. 371.

<sup>640</sup> Cour d'appel de Paris 8ème chambre, section B, Arrêt du 25 janvier 2007 Rue du commerce / CD folie, available online at <[http://www.legalis.net/jurisprudencedecision.php3?id\\_article=1834](http://www.legalis.net/jurisprudencedecision.php3?id_article=1834)>, lastly accessible on 9.9.2009.

<sup>641</sup> OLG Stuttgart, 4 September 2001 (4 U 142/01).

recorders are not subject to a levy,<sup>642</sup> and in Austria the Supreme Court ruled that levies do not apply to computer hard-disk drives due to their multifunctionality.<sup>643</sup> We consider that this lack of uniformity as to which media and equipment are levitated results to different amounts of fair compensation paid to the rightholders from one Member State to another. Practically, this means that no level playing field is created. In some States, rightholders may be adequately compensated for the losses of sales they encounter due to private copying, whereas in other States, such as the UK where no levy scheme is applicable, they may receive no compensation at all.

### **Rates of levies and basis of calculation**

Diversity also exists as to the rates of the levies and the basis of their calculation. In respect of digital media, some Member States have adopted a uniform rate applicable to a particular device or media, irrespective of its capacity (e.g. per megabyte or gigabyte). Others fix levies as a percentage of the purchase price of the original, *i.e.* as a percentage of the sales price. These varying approaches have resulted to differentiations in the rates as regards identical equipment or media. For instance, the levy rate applicable to digital music players with a 4 gigabyte storage capacity may amount to €12 in Austria, €2.56 in Germany, €15.54 in Greece, €7.77 in Italy and cost nothing in Belgium and the Netherlands!<sup>644</sup>

Of course, judicial practice indicates that setting a levy on digital equipment or media should respect the ordinary use of these devices or media, especially when the latter are multifunctional. For instance, the German Federal Supreme Court, in 2007, held that a printer was neither destined nor suitable to make '*reproductions by means of photocopying or other process producing a similar result*', as indicated by the relevant provision of the German copyright act.<sup>645</sup> Similarly, the Austrian Supreme Court decided in 2005 that no levies are due on personal computers (PCs) since computer hard-disk drives are used in a multifunctional way and not only for the storage of copyrighted content.<sup>646</sup> To the Court, a significant proportion of the uses made of a PC hard-disk drives were unrelated to the copying of protected works. In this light, the Austrian Court held that no levy applies to personal computers. It moved on to

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<sup>642</sup> According to the information available, the 1996 Royal Decree governing reprographic activities has not been modified to include CD writers, printers or personal computers.

<sup>643</sup> See the *GERICOM* case (4 Ob 115/05y).

<sup>644</sup> The figures have been taken from European Commission, *Background Document "Fair Compensation for Acts of Private Copying"*, Brussels, 14.2.2008, available online at <[http://www.ebu.ch/CMSimages/en/BRUDOC\\_INFO\\_EN\\_415\\_tcm6-60774.pdf](http://www.ebu.ch/CMSimages/en/BRUDOC_INFO_EN_415_tcm6-60774.pdf)>, p. 21.

<sup>645</sup> See section 54(a) of the German Law on Copyright and Neighbouring Rights, as amended in 2004; *Bundesgerichtshof*, Press statement No 186/2007, available online at <[http://www.doerre.com/aktuell/20071206\\_bgh\\_drucker.pdf](http://www.doerre.com/aktuell/20071206_bgh_drucker.pdf)>, lastly accessible on 9.9.2009.

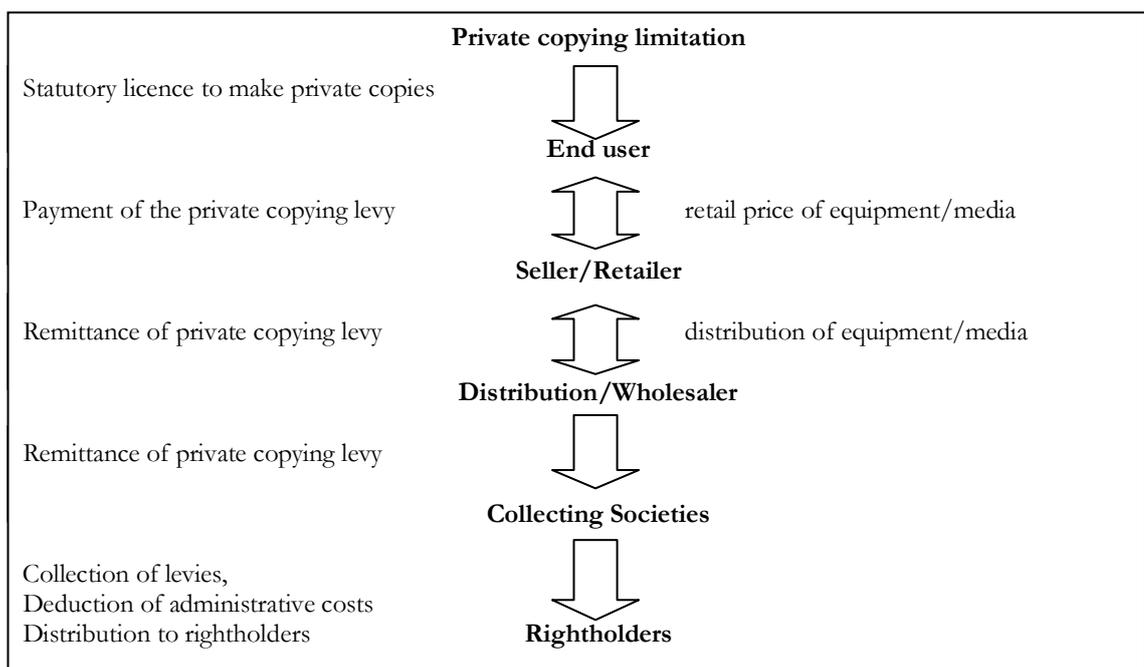
<sup>646</sup> See the *GERICOM* case, *op. cit.*

notice, however, that the situation was different as regards the flash disk memory of MP3 players, which are subject to a levy in Austria. To the Court, this was because MP3 players are, at least to date, overwhelmingly used to copy copyrighted content.

In our view, the aforementioned rulings are indicative of the complexity in setting a levy to multifunctional digital devices which, due to the convergence of digital technology, do not serve a ‘dedicated’ function. At least in theory, this means that when other legitimate uses are possible, the levy should not be imposed. But the boundaries tend to be less sharp. In practice, levy schemes can eventually cover each and every device that includes a memory chip. We therefore consider that some guidance should be given to the Member States as to how levies should be extended to digital media and equipment. Such guidance could harmonise the approaches of Member States, some of which are very conservative and do not provide an adequate level of remuneration, whereas others expand the application of levies to almost all digital media and equipment. Harmonisation in this respect is very important to the rightholders as to the amount of fair compensation they are entitled to, and to users alike which are in essence the debtors of the obligation to pay levies.

### **Debtors of obligation to pay**

While in most Member States levies are imposed on manufacturers, importers or distributors of analogue or digital equipment or media that allows consumers to copy, in some Member States even the obligation to pay private copying levies is imposed directly on end users! Of course, since the manufacturers, importers and distributors of blank media and recording equipment tend to attach the levy to price of their final products those who actually pay the amount of the levy are in any case the end users. The following diagram indicates this point:



## A user right?

In our view, the fact that end users pay for the private-copying levy gives them a good reason to claim their ‘right’ to private copy! This is because they might get the impression of acquiring a licence to copy by paying off the levy. Of course, we have concluded earlier in this thesis<sup>647</sup> that the private copying limitation creates no such right. Yet, it would be interesting to see whether end users can base their defence against allegations for infringement on the payment of the levy. While this type of defence has been invoked at least twice, Courts have been reluctant to accept its validity. For instance, in the Belgian *Test Achats* case,<sup>648</sup> a consumer group sued a record company for restricting the ability to make private copies of CDs by applying technological protection measures on those CDs. To support their claims, the plaintiffs argued that once the consumers paid the levy for private copying, they paid for an activity that they had, consequently, a ‘right’ to undertake. The Brussels Court rejected this argument without, however, referring directly to the issue of the legitimation of private copying through the payment of the levy. It merely stated that the private copying limitation does not give rise to a user right. Similarly, in the French *Mullholland Drive* case,<sup>649</sup> Stéphane P. bought a DVD of the movie ‘Mulholland Drive’ which was technologically protected against copying and, as a result, he could not make a copy for his parents. Together with the French consumer organisation ‘*Que Choisir*’, he started proceedings before the High Court of Paris arguing, *inter alios*, that the payment of the levy creates a ‘right’ to the benefit of end users. Yet, the High Court of Paris<sup>650</sup> rejected the validity of this argument by holding that no ‘right’ to private copy exists under the French copyright law.

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<sup>647</sup> At page 36 *et seq.*

<sup>648</sup> *L’ASBL Association Belge des Consommateurs Test Achats v La SA EMI Recorded Music Belgium et al.*, Tribunal of First Instance of Brussels, 2004/46/A, April 27, 2004; *L’ASBL Association Belge des Consommateurs Test Achats v La SA EMI Recorded Music Belgium et al.*, Brussels Court of Appeal, 9 September 2005, case 2004/AR/1649; N. Helberger, ‘It’s not a Right, Silly! The Private Copying Exception in Practice’, *INDICARE Monitor*, 7 October 2004; N. Helberger et al., *Digital Rights Management and Consumer Acceptability*, op. cit., p. 48 *et seq.*; G. Arthur, ‘Private Use, Public Consequence?: The Future of the Private Copy Exception in Europe’, op. cit., at p. 19.

<sup>649</sup> *Studio Canal et al. V S. Penguin and Union Federale des Consommateurs Que Choisir*, Paris Court of Appeal, 4 April 2007, Gaz. Pal. 18/07/2007 No 199, p23; *Studio Canal et al. V S. Penguin and Union Federale des Consommateurs Que Choisir*, Cour de Cassation, 1<sup>st</sup> civil section, 28 February 2006, case No 549, Bull. 2006 I No 126 p. 115 (‘Mulholland Drive’), which overruled *Studio Canal et al. V S. Penguin and Union Federale des Consommateurs Que Choisir*, Paris Court of Appeal, 22 April 2005. The Court of Appeal held that the application of copy control mechanisms on DVDs deprives users from their consumer right in making a private copy. N. Helberger, ‘It’s not a Right, Silly! The Private Copying Exception in Practice’, op. cit.; N. Helberger et al., *Digital Rights Management and Consumer Acceptability: A Multi-Disciplinary Approach of Consumer Concerns and Expectations*, State-of-the-Art-Report, INDICARE, December 2004, p. 48 *et seq.*; G. Arthur, ‘Private Use, Public Consequence?: The Future of the Private Copy Exception in Europe’, *CW*, 146, December 2004/ January 2005, 16-20, at p. 19.

<sup>650</sup> *Association Union Federale de Consommateurs UFC Que Choisir and others v. SA Films Alain Sarde and others*, Tribunal de Grande Instance de Paris, 03/8500, April 30, 2004.

Based on these rulings, we can safely conclude that judicial practice is reluctant to accept that statutory licensing in the context of private copying creates a subjective right for the benefit of end users. In our view, this is because, even where statutory licensing is applicable, rightholders are still in a position to limit private copying. They can, for instance, use technological protection measures to restrict or prevent acts of copying. What is more, the payment of private-copying levies is not, in our view, a condition for the application of the private copying limitation but a regulatory response to the impact of digital private copying. Indeed, the issue of fair compensation may be judicially examined only in the context of the three-step test and, in particular, with respect to its third condition. In this light, where a levy is applicable, private copying does not unreasonably prejudice the legitimate interests of the rightholders.<sup>651</sup>

### **Diversity as to the regulation of collecting societies**

Having gone through the legislation of the twenty seven EU Member States, we have observed that there is a significant disparity between the national regulatory systems applicable to collecting societies both in terms of scope and efficiency. Each Member State has established its own set of rules as regards the formation and operation of collecting societies. The territorial regulation of collecting societies is reflected in the fact that, even though most States have established control mechanisms to supervise their operation, national supervisory schemes are largely diverse. Indeed, as Guibault and Van Gompel indicate, these regulatory regimes vary from ‘strict supervision’<sup>652</sup> to ‘*de minimis* supervision’.<sup>653</sup> An example of strict supervision, for instance, is the regulation of collecting societies in Germany. There, the 1965 Law on the Administration of Copyright and Neighbouring Rights<sup>654</sup> establishes a regulatory and supervisory legal system that subjects all collecting societies to the control of the *Deutsches Patent- und Markenamt*, the German Patent and Trade Mark Office. In our opinion, this act lays down a comprehensive legislative framework which imposes strict obligations by which collecting societies have to abide. Yet, the vast majority of Member States does not set out

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<sup>651</sup> See earlier at page 134 *et seq.*

<sup>652</sup> Those would be Germany (Law on the Administration of Copyright and Neighboring Rights of 9 September 1965, *Bundesgesetzblatt*, Teil I, 1965, p. 1294 [LACNR]), Austria (Federal Law concerning collecting societies, 1936, BGBl. 112/1936, *Bundesgesetzblatt für die Republik Österreich*) and Portugal (Act No. 83/2001 of 3.8.2001). For an overview of the German regulatory system see A. Dietz, *Copyright Law in the European Community: A Comparative Investigation of National Copyright Legislation, with Special Reference to the Provisions of the Treaty Establishing the European Economic Community*, Sijthoff & Noordhoff, Alphen aan den Rijn, 1978, 312, at 219.

<sup>653</sup> For a comprehensive overview of these control systems see L. Guibault & S. van Gompel, ‘Collective Management in the European Union’, in D. Gervais (ed.), *Collective Management of Copyright and Related Rights*, Kluwer Law International, The Hague, 2006, pp. 117-152.

<sup>654</sup> *Law on the Administration of Copyright and Neighboring Rights of 9 September 1965*, *Bundesgesetzblatt*, Teil I, 1965, p. 1294 [LACNR].

such stringent obligations to collecting societies. Rather, they impose requirements on transparency and accountability through their relevant national laws and subject the activities of collecting societies to the supervision of an administrative body. In addition to these national supervisory authorities, certain Member States have also set up a dispute settlement mechanism, the competence of which varies from one country to another.

### **Member States with no levy scheme**

We should, however, not neglect to examine the situation in the Member States that do not have a levy scheme in place. These are Cyprus, Ireland, Malta, Luxembourg and the United Kingdom. In Ireland and the UK, there is no explicit statutory exception for private copying and, hence, the exclusive reproduction right is fully applicable. Nonetheless, time-shifting of broadcasts is explicitly authorised.<sup>655</sup> In the UK, in particular, there have been discussions recently as to the introduction of a format-shifting exception, without however this exception being accompanied by an obligation to compensate the rightholders.<sup>656</sup> No levy system is applicable in Malta and Luxembourg even though private copying is statutorily exempted from infringement. In fact, the Maltese copyright law stipulates that private copying is permitted ‘*on condition that rightholders receive fair compensation*’;<sup>657</sup> no provision on the detailed arrangements or form of such compensation is made however. Equally, Article 10(4) of the Copyright Act of Luxembourg repeats the exact phrasing of Article 5(2)(b) of Directive 2001/29/EC and, in this, makes a mention to fair compensation. Yet, no levy system is enacted in Luxembourg though.<sup>658</sup> In our view, the situation in Ireland and the UK is less problematic than in the other States which have not introduced a levy scheme. This is because Ireland and the UK provide for limited time-shifting privileges which have little relevance in the digital environment. On the contrary, the situation in Cyprus, Malta and Luxembourg is more problematic since they lay down broader private copying limitations in terms that the

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<sup>655</sup> Copyright, Designs and Patents Act 1988 of the UK, Section 70 (‘Recording for purposes of time-shifting’); Copyright and Related Rights Act 2000 of Ireland, Article 101 (‘Recording for purposes of time-shifting’); Copyright and Related Rights Act 2000 of Ireland, Article 204(4).

<sup>656</sup> UK recently on the introduction of a full exemption to the reproduction right for format-shifting purposes, namely for copying content into other platforms without the seeking permission from the rightholders and with no obligation to pay remuneration. HM Treasury, *The Gowers Review of Intellectual Property*, November 2006, Recommendation 8, points 4.72-4-76; N. Rose, ‘An overview of the proposed introduction of a private copying exception into UK copyright law’, *Ent. L.R.*, 2008, 19(4), pp. 75-76; J. Espantaleon, ‘Does Private Copying need an Update in the UK?’, *op. cit.*, at 115; D. Bainbridge, ‘The Gowers Review of Intellectual Property’, *I.P. & I.T. Law*, 2006, 11(6), pp. 4-10, at 4; B. Hughes, ‘United Kingdom: copyrights - government consults on proposed amendments to copyright regime’, *W.C.R.R.*, 2008, 3(2), pp. 17-19, at 17; C. Angelopoulos, ‘Modern Intellectual Property Legislation: Warm for Reform’, *Ent.L.R.*, 19(2), 2008, 35-40, at pp. 39-40.

<sup>657</sup> Article 9(1)(c) of the Copyright Act XIII of 2000, as amended by Acts VI of 2001 and IX of 2003, Government Gazette of Malta, No. 17467.

<sup>658</sup> Also see Article 46(4) of the Law of April 18, 2001 on Copyright, Neighbouring Rights and Databases, as amended on April 18, 2004 (Memorial A, no. 61 du 29 avril 2004, pp. 942-948).

rightholder's interests are more likely to be affected due to the exercise of these limitations. As a result, we feel that these States may find it difficult to justify the existence of their relevant limitations vis-à-vis the three-step test, as examined earlier,<sup>659</sup> the third condition of which dictates that unreasonable prejudices to the legitimate interests of the rightholders should be avoided.

While our purpose here is not to evaluate the efficacy of the national regulatory options, their diversity is indicative of the fact that the approximation initiatives at European level have not provided sufficient harmonisation. This, however, could prove problematic as regards the proper functioning of the internal market, as acknowledged in Recital 38 to Directive 2001/29/EC. This is because the uses of copyrighted content on the internet are ever increasing, while at the same time the scope of collective rights management remains inextricably territorial. We therefore urge for harmonisation of the rules applicable to private-copying levies and propose the adoption of an alternative system of levy collection at pan-European level.

## **2. The need for a uniform, pan-European levy scheme**

In the confusion as to the scope and application of levies in the digital context, it comes as no surprise that, as early as 2004, and only three years after Directive 2001/29/EC was adopted, the Commission started consulting the Member States and relevant stakeholders as to the scope of the private copying limitation and the existing systems of remuneration!<sup>660</sup> Nonetheless, the Commission has not yet issued the Recommendation on fair compensation for private copying which would inject uniform rules applicable to all national levy-schemes. At the same time, the levy-based approach has influenced many legal scholars, such as Fisher and Netanel,<sup>661</sup> which have started envisaging modern, alternative forms of levy collection based on the function of the internet. And while the French National Assembly was about to introduce the first levy on internet subscriptions in 2005,<sup>662</sup> this proposal failed to make its

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<sup>659</sup> At page 117 *et seq.*

<sup>660</sup> See <[http://ec.europa.eu/internal\\_market/copyright/levy\\_reform/index\\_en.htm#member\\_states](http://ec.europa.eu/internal_market/copyright/levy_reform/index_en.htm#member_states)>, lastly accessible on 9.9.2009.

<sup>661</sup> W. III, Fisher, *Promises to Keep: Technology, Law, and the Future of Entertainment*, Stanford University Press, 2004, ch. 6, available online at <<http://cyber.law.harvard.edu/people/tfisher/PTKChapter6.pdf>>; N.W. Netanel, 'Impose a Non-Commercial Use Levy to All Free Peer to Peer File-Sharing', *Harvard Journal of Law & Technology*, vol. 17, December 2003, pp. 1-84.

<sup>662</sup> Assemblée nationale, *Projet de Loi relative au Droit d'Auteur et aux Droits Voisins dans la Société de l'Information*, *Compte Rendu Analytique Officiel*, Session Ordinaire de 2005-2006, Session ordinaire de 2005-

way into statute. Yet, it is indicative of a trend towards the suggestion of alternative forms of fair compensation. We address these issues below with a view to stress the need for the creation of a uniform levy scheme at pan-European level. In our opinion, such scheme would enhance the efficacy of the levy-based approach and unveil its potential in adequately dealing with digital private copying.

## **2.1. Harmonising national levy schemes: the Recommendation on fair compensation for private copying**

In its 2004 study on the management of copyright and related rights in the internal market, the Commission underscored the need to review the rules and conditions governing rights management.<sup>663</sup> Yet, as we illustrated earlier,<sup>664</sup> no real initiative has been undertaken. In autumn 2006, the Commission was expected to issue a Recommendation on Fair Compensation for private copying which would resolve much of the uncertainty as to the role of collecting societies in this field. Indeed, as early as 2004, and only three years after the adoption of the Directive, the Commission has started consulting Member States about their national regimes on private copying levies.<sup>665</sup> The Commission was concerned about the thorny intersection of private-copying levies and the parallel application of technological protection measures. One of the trickiest issues was how to avoid double payments in the context of private copying, namely through the payment of a levy on media and/or equipment and through a licensing fee in order to use a technologically protected work. And since most Member States had started extending the application of levies to digital media and equipment on the basis of different calculatory methods and basis of application, it was deemed crucial to approximate national practices through a Recommendation. This Recommendation was due in autumn 2006; nonetheless, its final draft was removed from the agenda of the College of Commissioners' meeting on 20 December 2006 after a request of the French Prime Minister to postpone proceedings and consult all relevant stakeholders.<sup>666</sup> The Commission has since delved into a lengthy consultation process with a view to deepen its understanding on the

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2006, 22.12.2005, available online at < <http://www.assemblee-nationale.fr/12/cra/2005-2006/112.asp>>, lastly accessible on 9.9.2009.

<sup>663</sup> European Commission, 'The Management of Copyright and Related Rights in the Internal Market', 2004, COM (2004) 261 final.

<sup>664</sup> At page 159 *et seq.*

<sup>665</sup> See <[http://ec.europa.eu/internal\\_market/copyright/levy\\_reform/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/levy_reform/index_en.htm)>, lastly accessible on 9.9.2009.

<sup>666</sup> Copyright Levies Reform Alliance, *Industry Condemns Commission Backdown on Reform: Reform of Copyright Levies abandoned following Opposition from France*, Press Release, 13.12.2006, available online at <[http://www.eicta.org/fileadmin/user\\_upload/document/document1166542590.pdf](http://www.eicta.org/fileadmin/user_upload/document/document1166542590.pdf)>, lastly accessible on 9.9.2009.

functioning of the national private-copying levy schemes.<sup>667</sup> This was in essence the opening of a dialogue with all relevant stakeholders who had to provide the Commission with information on the national levy schemes. The Recommendation has not been issued to date.

Yet, we anticipate for the issue of this Recommendation, since we consider that the application of uniform rules on fair compensation would enhance the efficacy of levy-schemes in dealing with the impact of private copying. We are aware that Recommendations are soft law and, therefore, not binding to Member States;<sup>668</sup> they are however indicative of some steps that States have to take in a particular field of law. We agree with this regulatory option in the field of levy schemes, since, in their vast majority, Member States already do have a levy scheme in place and it is only the rules applicable to it that vary. This Recommendation is expected to inject uniform rules regarding the application of levies in all Member States so as to minimise possible discrepancies amongst them. These uniform rules should involve both the calculatory basis of levies and their basis of application. This shall increase legal certainty and enhance the proper functioning of the internal market in the field of copyright and related rights.

Through our analysis on the diversity of levy schemes, however, we have identified that even if these schemes are approximated, harmonisation shall not be able to remove the ultimate barrier to market integration in the context of levy administration: territoriality! In our opinion, the fact that the administration of levy schemes remains territorial cannot be shifted only through the injection of uniform rules applicable to all Member States; the internet, where many acts of digital private copying take place, meets no geographical borders whereas levy schemes are subject to the administration of collecting societies located in the various EU Member States. We therefore suggest the creation of a pan-European levy scheme that can heal this inherent weakness of collective management, namely its territorial function. The proposals of alternative levy-schemes as envisaged by some US scholars may be pointing, in our view, to the way forward.

## **2.2. Centralising the application of levies at pan-European level: alternative levy-based systems**

A number of US scholars have floated proposals urging the adoption of levy systems that would legitimise online uses of copyrighted content on the basis of a compensation being paid

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<sup>667</sup> European Commission, *Background Document "Fair Compensation for Acts of Private Copying"*, *op. cit.*, pp. 14-15.

<sup>668</sup> L.A.J. Senden, *Soft Law in European Community Law: Its Relation to Legislation*, Wolf Legal Publishers, Nijmegen, 2003, 558, at 64.

to the rightholders.<sup>669</sup> Netanel proposes the legitimation of file-sharing through the imposition of a levy on the sale of products and services whose value is enhanced due to file-sharing. In essence, he suggests that end users will be able to engage without restrictions to non-commercial use, adaptation, and peer-to-peer exchange of all types of content through the imposition of a non-commercial use levy to compensate copyright owners.<sup>670</sup> Collecting societies would then divide the levy proceeds amongst the rightholders by use of both digital-tracking and sampling technologies.

A proposal, similar to the one suggested by Netanel, was made by Oksanen and Välimäki with a view to update the Finnish levy system. Oksanen and Välimäki propose the extension of the existing levy scheme in Finland to cover broadband internet connections over a flat fee of 5 euros per month.<sup>671</sup> Even though some Finnish collecting societies examine the possibility of starting to levitise mobile phones with an music-playing option, such as mp3 players, for up to 15 Euros per unit sold,<sup>672</sup> the option of applying levies on broadband internet access has not reportedly been put on the table, however.

A similar proposal has not been adopted in France, even though the 2005 National Assembly had voted for it!<sup>673</sup> The debate was as to whether a voluntary 'global licence' scheme would be applied to legitimise online uses of copyrighted content, such as file-sharing. In essence, this scheme consisted in an optional payment of about 5 to 7 Euros added on each internet-connection subscription under which an end user would get a licence to legitimately make use of online content. Immediately after the Assembly's vote, the Government postponed the debates until March 2006 when the global licence proposal was erased!<sup>674</sup>

Fisher sets forth a proposal similar to the one suggested by Netanel.<sup>675</sup> Under his proposal, rightholders of music recordings and films would register their works with the US Copyright Office and get assigned a unique registration number identifying their works. Rightholders would then incorporate these numbers into the names of the digital files containing their

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<sup>669</sup> W. III, Fisher, *Promises to Keep*, op. cit., ch. 6; N.W. Netanel, 'Impose a Non-Commercial Use Levy to All Free Peer to Peer File-Sharing', op. cit., pp. 1-84.

<sup>670</sup> Netanel, *ibid.*, at 35-39.

<sup>671</sup> V. Oksanen & M. Välimäki, 'Copyright Levies as an Alternative Compensation Method for Recording Artists and Technological Development', *Revue of Economic Research on Copyright Issues*, 2005, vol. 2(2), pp. 25-39, at p. 34.

<sup>672</sup> European Commission, *Background Document "Fair Compensation for Acts of Private Copying"*, op. cit., p. 6.

<sup>673</sup> Assemblée nationale, *Projet de Loi relative au Droit d'Auteur et aux Droits Voisins dans la Société de l'Information, Compte Rendu Analytique Officiel, Session Ordinaire de 2005-2006, Session ordinaire de 2005-2006, 22.12.2005*, available online at < <http://www.assemblee-nationale.fr/12/cra/2005-2006/112.asp>>, lastly accessible on 9.9.2009.

<sup>674</sup>For a discussion on the French 'global license' debate see J. P. Hugot & O. Hugot, 'The DADVSI Code: remodelling French copyright law for the information society', *Ent. L.R.* 2006, 17(5), 139-144, p. 143.

<sup>675</sup> W. III, Fisher, *Promises to Keep*, op. cit., at 9-10, 199-258.

registered works. Responsible for the administration of the levy and its distribution among rightholders would be the Copyright Office through a process of tracking which files were downloaded through their registration number and of sampling to estimate their offline consumption. This proposal legitimises online uses and at the same time provides a detailed overview of its function. Yet, it is difficult to estimate how this proposal would be enforceable in the European system. This is because collecting societies in Europe function on a territorial basis and this proposal would require the establishment of a central body entrusted with the task of collecting and distributing the levies to rightholders at pan-European level.

In our view, such an initiative could possibly flourish through the CISAC's Common Information System (*CIS*) project. This project is in essence an online database accessible to any performing-right society through which societies can track down the use of musical works by use of a single identification number in any area of the world.<sup>676</sup> Yet, this project does not refer to the collection and distribution of private-copying levies but is in essence an individual licensing scheme under which each private use is technologically tracked down and licensed under payment. In these terms, it reflects an attempt not to compensate the rightholders for their losses due to private copying but to reward them for each possible private use made of their works. Since the *CIS* is still under construction, it remains to be seen how it will practically function and how efficient it shall be. Nonetheless, the centralisation of levy administration through a system based on the very function of the internet at pan-European level could be the way forward.

The enforcement of the entitlement to private-copying levies is not realised by the rightholders directly but is realised through collecting societies. These societies are, however, territorial in scope and the collection and distribution of levies, such as the proceeds of fair compensation for private copying, becomes more or less a national issue. While attempts have been made at European level towards the introduction of cross-border licensing schemes, these attempts have mainly focused on the governance of collecting societies and the introduction of rules on good practice and respect to the EU competition policy. As a result, the function of collecting societies and their relevant activities are regulated at national level, this creating a mosaic of diverse rules and practices. In our opinion, this could create controversy as to the efficacy of the levy-based approach in dealing with the impact of digital

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<sup>676</sup> On the *CIS* project see M. Ficsor, 'Collective Management of Copyright and Related Rights', *WIPO* Geneva, 111 *et seq.*, 305 *et seq.*; U. Uchtenhagen, 'La gestion collective du droit d'auteur dans la vie musicale', *WIPO* Geneva, 2005, 52 *et seq.*, 252 *et seq.*

private copying, which as we illustrated earlier,<sup>677</sup> is the most adequate way in preserving a regulatory balance between the interests of the rightholders and those of the public. We, therefore, highlight the need for a harmonised framework on fair compensation for private copying. Our analysis indicates that this is neither an eager wish nor wilful thinking; rather, the Commission is already in train of furnishing a Recommendation on this issue with a view to approximate the national approaches in setting, calculating and extending levies to digital media and equipment. As soon as this Recommendation injects uniform rules applicable to the national levy schemes there is good reason to presume that the levy-based approach shall uncover its full potential in adequately dealing with the impact of private copying. Since, in our view, the ultimate barrier to the market integration in the field of the administration of private-copying levies is territoriality, the centralisation of levy administration through a system based on the very function of the internet at pan-European level could be the way forward.

We conclude from the aforementioned analysis therefore that fair compensation in respect of private copying is an efficient approach in dealing with digital private copying. In essence, our main argument is that this approach is a balanced one: it 'legitimises' private copying and at the same time it provides the rightholders with compensation for the potential losses in income that they might encounter. The legitimisation of private copying through levies is appropriate, since the privacy rationale underlying the private copying limitation retains its validity in the digital environment. Of course, levies may be some form of 'rough' justice but they do not encroach upon the privacy of end users, may that be viewed as inviolability of the home or as informational privacy. At the same time, the rightholders get a fair share out of this process by being compensated for the prejudicial effect that private copying may have in their legitimate interests; in this respect, the application of the levy schemes ensures compliance with the third condition of the three-step test of Article 5(5),<sup>678</sup> especially if one considers that the proceeds of levies collected each year are ever increasing. The only obstacle that we identify as regards the efficiency of this approach, which we otherwise consider appropriate and suitable to deal with digital private copying, is the inherently territorial scope and function of levy-schemes. To date, the initiatives undertaken at European level do not strike at the heart of this issue and this, in our view, becomes source of legal uncertainty and might hinder the efficacy of the levy-based approach. Yet, the Recommendation on fair compensation for private copying is expected to respond to these concerns by injecting

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<sup>677</sup> At page 145 *et seq.*

<sup>678</sup> At page 134 *et seq.*

uniform rules on the national levy schemes. Shall this Recommendation be furnished the concerns on the efficacy of the levy-based approach shall be redressed, in our view. What is more, the centralisation of levy administration through a system based on the very function of the internet at pan-European level could remove the territorial barriers within which collective rights management is exercised, without however eliminating the preeminent role of collecting societies in the administration of levies.

Having concluded that fair compensation is an adequate and efficient method in dealing with the impact of digital private copying, it is time to draw our attention to the technological approach and to the way by which levies and technological measures are going to co-exist. As Article 5(2)(b) of Directive 2001/29/EC indicates, permissible private copying is conditional on the premise that the rightholders shall receive fair compensation that takes into account the application or non-application of technological protection measures. In our opinion, the technological protection against private copying is far reaching and inappropriate for policy reasons. Below we express these concerns.

## Chapter II: The inadequacy of the technologically orientated approach to control private copying

The application of technological protection measures as a solution to the impact of private copying was envisaged as early as 1995 in the Green Paper on Copyright and Related Rights in the Information Society.<sup>679</sup> This approach has also been supported by many scholars under whom technological protection measures can ensure that the rightholders are paid for content disseminated online through licensing schemes and restrict unlawful copying.<sup>680</sup> Yet, the emergence of copyright protective techniques that restrict or prevent access to, and use of works has been feared to endanger the exercise of copyright exceptions and limitations, including the private copying limitation of Article 5(2)(b) of Directive 2001/29/EC. As Dusollier, Pouillet and Buydens rightly acknowledge, technology at the current state is ‘blind’<sup>681</sup> in terms that it cannot maintain the balances established by the law; as a result, it may prevent uses that are perfectly permitted by statute, such as the private copying limitation.<sup>682</sup> Nonetheless, Article 5(2)(b) of Directive 2001/29/EC permits private copying ‘on condition that the rightholders receive fair compensation that takes into account the application or non-application of technological protection measures.’ At the same time, this Directive provides strong legal protection against the circumvention of such measures. Indeed, Article 6 of Directive 2001/29/EC stretches the protection afforded to technological protection measures to an extent that an

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<sup>679</sup> Commission of the European Communities, *Green Paper, Copyright and Related Rights in the Information Society*, Brussels, 19 July 1995, COM(95) 382 Final, p. 49.

<sup>680</sup> J. Ginsburg & Y. Gaubiac, ‘Private Copying in the Digital Environment’, op. cit., at p. 151; P. Akester, ‘Survey of Technological Measures for Protection of Copyright’, *Ent.L.Rev.* 12(1), 2001, 36-39, at p. 39; G. Lunney, ‘The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act’, *Virginia L. Rev.*, Vol. 87, No. 5, 2001, pp. 813-920, at p. 827; G. Davies, ‘Technical Devices as a Solution to Private Copying’ in I.A. Stamatoudi & P.C. Torremans, *Perspectives on Intellectual Property: Copyright in the New Digital Environment*, Sweet and Maxwell, 2002, 165-182, at 169; N. Lucchi, ‘The Supremacy of Techno-Governance: Privatization of Digital Content and Consumer Protection in the Globalized Information Society’, *Int. J. of Law and Information Technology*, Vol. 15, No. 2, 2007, pp. 192-225, at 206-207; S. Bechtold, ‘The Present and Future of Digital Rights Management – Musings on Emerging Legal Problems’, in E. Becker et al. (eds.), *Digital Rights Management – Technological, Economic, Legal and Political Aspects*, Springer, 2008, 597-664, at p. 598; N. Helberger et al., *Digital Rights Management and Consumer Acceptability: A Multi-Disciplinary Approach of Consumer Concerns and Expectations*, State-of-the-Art-Report, INDICARE, December 2004.

<sup>681</sup> S. Dusollier, Y. Pouillet & M. Buydens, ‘Copyright and Access to Information in the Digital Environment’, op. cit., at 22-23.

<sup>682</sup> C. Geiger, ‘The Private Copy Exception: An Area of Freedom (Temporarily) Preserved in the Digital Environment’, 37 *IIC* 74, 2006, 74-81, at 75; S. Dusollier, *Droit d’auteur et protection des œuvres dans l’univers numérique*, Larcier, Brussels, 2005, at p. 152; K.J. Koelman, ‘The Protection of Technological Measures vs. The Copyright Limitations’, paper presented at the *ALAI Congress, Adjuncts and Alternatives for Copyright*, New York, June 2001, *CW*, 2002, p. 18; T. Heide, ‘Copyright in the EU and U.S.: What ‘Access Right’’, 48 *J. Copyright Soc’y U.S.A.*, 2001, 363; S. Dusollier, Y. Pouillet & M. Buydens, *ibid.*, at 21; C. Geiger, *Droit d’auteur et droit du public à l’information*, Litec, Paris, 2004, at 229; T.C. Vinje, ‘A Brave New World of Technical Protection Systems: Will there be Room for Copyright?’ *EIPR*, 1996, at 431, 434; P. Akester & R. Akester, ‘Digital Rights Management in the 21<sup>st</sup> Century’, *EIPR*, 28(3), 2006, 159-168, at 161.

‘access right’ is also created!<sup>683</sup> Based on this strong anticircumvention protection, rightholders tend to prevent or restrict perfectly lawful uses which the users have a legal interest to make. For instance, by applying technological protection measures on their works, rightholders may restrict the ability of users to make private copies, an ability ensured by virtue of Article 5(2)(b) of Directive 2001/29/EC. One can only wonder how users are about to benefit from the private copying limitation if the ability of making copies or simply accessing them is technologically restricted.

Fearing that the application of technological protection shall restrict the scope of copyright exceptions, the European legislator set forth Article 6(4). This Article is an attempt to ensure that the beneficiaries of copyright exceptions and limitations shall receive the benefit of these exceptions and limitations. Article 6(4)(2) addresses explicitly the intersection of the private copying limitation of Article 5(2)(b) of Directive 2001/29/EC with the application of technological protection measures. While Article 6(4)(2) indicates that the European legislator favours the retainment of private copying vis-à-vis the application of technological protection measures,<sup>684</sup> judicial practice in Europe does not support the enforceability of this limitation against the application of technological protection measures and this has become a thorny issue in European copyright law.

Taking advantage of the application of technological protection measures on digital works, many rightholders have already started contracting directly with end users. Since the proliferation of digital technology has made personal use easier to track, trace and charge for,<sup>685</sup> many rightholders have already started attaching unilateral licences on their technologically-protected works so that end users accept a contractual obligation not to make private copies; in fact, some commentators have equated the application of technological protection measures as the imposition of unilateral contractual terms and conditions.<sup>686</sup> Nonetheless, we are concerned that the conclusion of online contracts may exclude the ability to make private copies; the question as to whether the private copying limitation can be contractually overridden is an open issue that is far from being settled by statute.

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<sup>683</sup> T. Heide, ‘Copyright in the EU and U.S.: What ‘Access Right’’, 48 *J. Copyright Soc’y U.S.A.*, 2001, 363; S. Dusollier, Y. Pouillet & M. Buydens, ‘Copyright and Access to Information in the Digital Environment’, *op. cit.*, at 21.

<sup>684</sup> S. Rompré, ‘Le régime de la copie privée face à Internet’, *op. cit.*, p. 8.

Contra: T. Hoeren, *Information Management: Copyright on Electronic Services: An Assessment of Long-term Solutions in the Context of Copyright and Electronic Delivery Services and Multimedia Products*, European Commission, Directorate-General, Telecommunications, Information Market and Exploitation Research, 1995, p. 19.

<sup>685</sup> S.K. Katyal, ‘Privacy and Piracy’, 9 *Int’l J. Comm. L. & Policy*, 2004-2005, p. 7; J. Litman, ‘Reforming Information Law in Copyright’s Image’, 22 *Dayton L. Rev.*, 1997, 587, at pp. 602-613.

<sup>686</sup> M.J. Radin, ‘Regulation by Contract, Regulation by Machine’, 160 *J. Inst. Theoretical Econ.*, 2004, 1, 12.

We, therefore, consider essential to address these issues with a view to determine whether this technologically oriented approach is adequate for copyright purposes in the digital environment. Our analysis shall be guided by the suitability of this approach to reflect a balanced copyright protection that respects both the interests of the rightholders and those of end users. In particular, we shall attempt to provide an answer to a critical question, namely whether the exercise of the private copying limitation of Article 5(2)(b) can be restricted by the application of technological protection measures and by unilateral contractual agreements, such as ‘click-wrap’ licences.

### **Section 1: Private copying in the light of the anticircumvention protection of Article 6 of Directive 2001/29/EC**

Article 6 of Directive 2001/29/EC provides strong protection against the circumvention of technological protection measures. Being, in our view, the most controversial article of the entire Directive, this article is rightfully feared to restrict the use of content that users have legally purchased<sup>687</sup> and to jeopardise the exercise of perfectly legitimate uses, such as private copying. Concerned that the application of technological protection measures shall inhibit the exercise of the private copying limitation, the legislator set forth Article 6(4)(2). This article attempts to ensure, through the enactment of appropriate measures at national level, that the exercise of this limitation shall not be technologically excluded. Yet, nowhere in Directive 2001/29/EC is this limitation declared enforceable against the application of technological protection measures. This makes its status and viability highly uncertain in the digital technologically-protected environment.

Albeit rigorously protected under Article 6 of the Directive, the application of technological protection measures may be ill-suited as an approach in dealing with the impact of digital private copying. Indeed, digital rights management information systems are feared to encroach upon the informational privacy of end users, which forms the justificatory basis of the private copying limitation.<sup>688</sup> At the same time, the Directive does not explicitly address the intersection of the applicable levy schemes and the emerging technological protection measures in terms that users may end up paying twice for using copyrighted content.

Our aim below is to examine the scope of the legal protection afforded against the circumvention of technological protection measures under Article 6 of Directive 2001/29/EC

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<sup>687</sup> B. Sookman, ‘Technological Protection Measures (TPMs) and Copyright Protection: The Case for TPMs’, *CTLR*, 11(5), 2005, 143-159, at 150.

<sup>688</sup> See *infra* at p. 200 *et seq.*

and to determine the relationship of that protection with the exercise of the private copying limitation of Article 5(2)(b) of Directive 2001/29/EC.

### **1. The legal protection against the circumvention of technological protection measures under Article 6 of Directive 2001/29/EC**

Article 6 of Directive 2001/29/EC provides legal protection against the circumvention of technological protection measures. In its first paragraph, it reads that ‘*Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.*’ Article 6(2) provides protection against preparatory activities of circumvention, too. In essence, Article 6 of Directive 2001/29/EC implements Article 11 of the WIPO Copyright Treaty and Article 18 of the WIPO Performances and Phonograms Treaty.<sup>689</sup> These latter articles stipulate that contracting parties should provide adequate legal protection and effective legal remedies against the circumvention of technological protection measures used by the rightholders in connection to the exercise of their rights and restricting acts, in respect of their works, which are not authorised by the rightholders concerned nor permitted by the law.

Many scholars consent, and we agree, that Article 6 of Directive 2001/29/EC is a highly complex legal provision and its interpretation raises many issues.<sup>690</sup> For instance, it might be read as creating an access right since it affords legal protection against the circumvention of access-control technologies. What is more, the legal protection of technologies restricting or prohibiting the ability of end users to copy works restricts, unreasonably, in our opinion, the scope of the private copying limitation of Article 5(2)(b).

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<sup>689</sup> Article 11 of the WIPO Copyright Treaty (WCT) adopted by the Diplomatic Conference on December 20, 1996, CRNR/DC/94: ‘*Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law*’; Article 18 of the WIPO Performances and Phonograms Treaty (WPPT) adopted by the Diplomatic Conference on December 20, 1996, CRNR/DC/95: ‘*Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.*’

<sup>690</sup> K.J. Koelman, ‘A Hard Nut to Crack: The Protection of Technological Measures’, *EIPR*, 2000, pp. 272-280, p. 275; A.M.E. de Kroon, ‘Protection of Copyright Management Information’, in P.B. Hugenholz (ed.) *Copyright and Electronic Commerce: Legal Aspects of Electronic Copyright Management*, Kluwer Law International, The Hague, 2000, p. 229, at 250 *et seq*; L. Bygrave, ‘The Technologisation of Copyright: Implications for Privacy and Related Interests’, *EIPR*, 24(2), 2002, 51-57, at 54; K.J. Koelman & N. Helberger, ‘Protection of Technological Measures’, in P.B. Hugenholz (ed.), *Copyright and Electronic Commerce: Legal Aspects of Electronic Copyright Management*, Kluwer Law International, The Hague, 2000, pp. 165-227, at 169 *et seq*.

In order to examine how the application of technological protection measures affects the ability of users to make private copies we shall first define the copyright protective technologies, the circumvention of which is legally protected against by Article 6, and to determine the scope of the legal protection against their circumvention.

### 1.1. Defining digital rights management

Digital Rights Management systems are concerned with the electronic management and marketing of usage rights in the digital environment. They are embedded in both the physical distribution of CDs and DVDs and other media, and in the online distribution of content, such as the online delivery of music files, pay-TV, on-demand videos and e-books.<sup>691</sup> Digital rights management systems provide an infrastructure enabling the rightholders to enforce copyright in their works or other subject-matter when those works are accessed online by third parties. This attribute of technological protection breaks down into several overlapping functions, the most important of which are the control over access to works, the prevention of unauthorised copying, and the identification of the work and of its rightholders. Copyright protective technologies are extremely diverse.<sup>692</sup> They may control access, control use, protect the integrity of works or ensure that the rightholders get paid.<sup>693</sup> They include steganography, namely digital watermarking for the authentication of identification data, encryption, *i.e.* access controls to information products, and other electronic agents, such as web spiders for monitoring information usage.<sup>694</sup>

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<sup>691</sup> N. Helberger et al., *Digital Rights Management and Consumer Acceptability*, op. cit., p. 1.

<sup>692</sup> For a description of TPM, their implications and uses see L.S. Sobel, 'DRM as an Enabler of Business Models: ISPs as Digital Retailers', 18 *Berkeley Tech. L. J.*, 2003, 667, at 667-668; P. Akester, 'Survey of Technological Measures for Protection of Copyright', *Ent.L.Rev.* 12(1), 2001, 36-39; S. Dusollier, *Droit d'auteur et protection des œuvres dans l'univers numérique*, Larcier, Paris, 2005, at p. 39 *et seq.*

Digital watermarks are bits embedded in digital content. Usually they are invisible in the absence of software capable of detecting and decoding it. They can be read by a detection device and may contain information, such as the author's name and contact details, or whether the fee should be paid to use a work.

Encryption techniques are used to obscure the meaning of a message. While there exist various types of encryption, it is only substitution encryption used as regards computerised content. In this type of encryption, the message is encrypted by replacing one character for another. To read the message, the intended recipient is given a key. Encryption has become an important commercial tool for protecting intellectual property against piracy. See E. Kirk, 'Encryption and Competition in the Information Society', 1 *IPQ*, 1999, 37-55, at 39.

For a presentation of the main systems performing DRM functions see Commission of the European Communities, 'Digital Rights: Background, Systems, Assessment', *Commission Staff Working Paper*, Brussels, 14.2.2002, SEC(2002) 197, at pp. 18-23.

<sup>693</sup> J.C. Fernández-Molina, 'Laws Against the Circumvention of Copyright Technological Protection', *Journal of Documentation*, Vol. 59, No. 1, 2003, pp. 41-68, at p. 44.

<sup>694</sup> A detailed overview of technological protection mechanisms can be found at G. Greenleaf, "'IP, Phone Home": ECMS, ©-Tech, and Protecting Privacy against Surveillance by Digital Works', *Proceedings of the 21<sup>st</sup> International Conference on Privacy and Data Protection*, 1999, p. 281, at 282-283; K.J. Koelman & N. Helberger, 'Protection of Technological Measures', op. cit., at 166-169; K.J. Koelman & L. Bygrave, 'Privacy, Data Protection and Copyright: Their Interaction in the Context of Electronic Copyright Management Systems', op.

The legal definition of technological protection measures in the EU is provided under Article 6(3) of Directive 2001/29/EC. This Article stipulates that

*‘the expression ‘technological protection measures’ means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright.’*

In our view, the aforementioned article is the outcome of an unfortunate modification of its earlier version.<sup>695</sup> In this earlier version, anti-circumvention protection was only afforded to measures *‘designed to prevent or inhibit the infringement of any copyright or any rights related to copyright’*; under this definition, anticircumvention protection was only afforded to technological protection measures preventing or inhibiting infringing activities, instead of unauthorised activities in general, as does the current Article 6(3). Indeed, as Fernández-Molina rightly points out, Article 6(3) makes no mention to technological measures impeding copyright infringements;<sup>696</sup> rather, it simply refers to unauthorised activities. One should not neglect, however, that the permissibility of many copyright limitations, such as the private copying limitation of Article 5(2)(b), is not conditional on the prior authorisation of the rightholders. Private copying is permissible irrespective of authorial consent. Yet, if unauthorised activities can be technologically restricted by virtue of Article 6(3) the scope of many copyright limitations is certainly jeopardised.

To our understanding, Article 6(3) is a clear departure from the anticircumvention protection envisioned by the WIPO Treaties which require that the technological measure *‘restricts acts, in respect of their works, which are not authorised by the authors concerned or permitted by law.’*<sup>697</sup> The definition of technological measures under the WIPO Treaties leaves room for the exercise of

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cit., at 61 and 108-110; D.S. Marks & B.H. Turnbull, ‘Technical Protection Measures: The Intersection of Technology Law and Commercial Licences’, *EIPR*, 2000, 198, at 212-213.

<sup>695</sup> European Commission, Amended Proposal for a European Parliament and Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 21.5.1999, COM(1999) 250 final, OJ C 180, European Commission, Brussels, 25.6.1999.

<sup>696</sup> J.C. Fernández-Molina, ‘Laws Against the Circumvention of Copyright Technological Protection’, *op. cit.*, at p. 55.

<sup>697</sup> Article 11 of the WIPO Copyright Treaty (WCT) adopted by the Diplomatic Conference on December 20, 1996, CRNR/DC/94: *‘Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law’*; Article 18 of the WIPO Performances and Phonograms Treaty (WPPT) adopted by the Diplomatic Conference on December 20, 1996, CRNR/DC/95: *‘Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.’*

copyright limitations, as opposed to the restrictive formulation of Article 6(3) of Directive 2001/29/EC. This is because the protection to technological measures does not apply in respect of activities permitted by the law, such as copyright exceptions and limitations. In this respect, Article 6(3) could be read as giving pre-eminence to the application of technological protection measures over copyright limitations, such as the private copying limitation. This is because a user wishing to make a permitted use that falls under the ambit of Article 5 of Directive 2001/29/EC with respect to a technologically protected work can only make it legally if he is authorised by the rightholder. For instance, making a private copy of a technically-protected DVD cannot be realised unless the rightholder authorises it. Yet, the exercise of the private copying limitation is not conditioned on prior authorial consent! The formulation of Article 6(3), in our opinion, restricts unreasonably the scope of digital private copying.

## **1.2. The (over)broad scope of the anticircumvention protection of technological measures under Article 6 of Directive 2001/29/EC**

The scope of the private copying limitation is also restricted by the provision of strong legal protection against the circumvention of technological protection measures under Articles 6(1) and (2) of Directive 2001/29/EC. This is because these Articles provide anticircumvention protection to mechanisms that may restrict or prohibit the ability of end users to make copies and/or access works. In our view, the technological response to the impact of digital private copying is overreaching and does not adequately serve the copyright balance. Before reaching this conclusion with certainty and analysing the intersection of the technological protection measures with the exercise of the private copying limitation, we need to determine the scope of the anticircumvention provisions incorporated in Articles 6(1) and (2) of Directive 2001/29/EC.

### **1.2.1. The anticircumvention provisions of Articles 6(1) and 6(2) of Directive 2001/29/EC**

Article 6(1) of Directive 2001/29/EC reads that

*‘Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.’*

Article 6(2) of Directive 2001/29/EC stipulates that

*Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which: (a) are promoted, advertised or marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent, or (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures.'*

To our understanding, the first two paragraphs of Article 6 imply that it does not matter whether an activity has actually infringed copyright or not; as Gasser and Girsberger rightly indicate, it is only the act of circumvention that matters.<sup>698</sup> Yet, the term 'circumvention' is not defined by the 1996 WIPO Treaties; as a result, many commentators consent that it is not clear which acts of circumvention should be prohibited.<sup>699</sup> Certainly, Article 6(1) applies to intentional acts of circumvention. This is because it requires that the person circumventing technological protection should carry out this activity '*in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective*'. In this respect, we consider that the definition provided under Article 6(1) of Directive 2001/29/EC is intention-dependent. This means that acts of circumvention are prohibited only if they are carried out in bad faith.<sup>700</sup> As a result, a user that accidentally circumvents a technological protection measure so as to copy a work is not liable under Article 6(1) of Directive 2001/29/EC. Nonetheless, a user breaking the technological protection of a work so as to upload it on a file-sharing network is highly likely to do this in bad faith. This being the case she should be aware that acts of circumvention amount to a civil and criminal offence in most EU Member States.

Article 8 of Directive 2001/29/EC obliges Member States to provide effective legal remedies against acts of circumvention. While the WIPO Treaties<sup>701</sup> do not give any details as to the

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<sup>698</sup> U. Gasser & M. Girsberger, 'Transposing the Copyright Directive: Legal Protection of Technological Measures in the EU-Member States, A Genie Stuck in the Bottle?', *The Berkman Center for Internet & Society at Harvard Law School*, Berkman Publication Series No. 2004-10, November 2004, at p. 9; M. Fallenböck, 'On the Technical Protection of Copyright: The Digital Millennium Copyright Act, the European Community Copyright Directive and their Anticircumvention Provisions', 7 *IJCLP*, 2002, 42.

<sup>699</sup> J. De Werra, 'The Legal System of Technological Protection Measures under the WIPO Treaties, the Digital Millennium Copyright Act, the European Union Directives and other National Laws', 189 *Revue Internationale du Droit d'auteur*, 2001, at p. 13; also see I. Brown, 'The Evolution of Anti-Circumvention Law', *Int'l Rev. L. Computers & Tech.*, 2006, 20(3), pp. 239-260, at 242; A. Strowel & S. Dusollier, 'Legal Protection of Technological Systems', *Workshop on Implementation Issues of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)*, World Intellectual Property Organisation, 1999, at pp. 6-7 (failure to define acts of circumvention shall lead to a regulatory variation from jurisdiction to jurisdiction).

<sup>700</sup> J.C. Fernández-Molina, 'Laws Against the Circumvention of Copyright Technological Protection', *op. cit.*, at p. 56; M. Fallenböck, 'On the Technical Protection of Copyright: The Digital Millennium Copyright Act, the European Community Copyright Directive and their Anticircumvention Provisions', 7 *I.J.C.L.P.*, 2002, p. 36.

<sup>701</sup> The silence of the WIPO Treaties on this issue has left significant discretion to contracting parties. U. Gasser, 'Legal Frameworks and Technological Protection of Digital Content: Moving Towards a Best Practice Model', 17 *Fordham Intell. Prop. Media & Ent.L.J.*, 2006, pp. 39-113, at p. 50.

types of remedies that need to be implemented, Ficsor indicates that these remedies ought to be both civil and criminal at least in respect of preparatory activities due to their ‘piratical’ nature.<sup>702</sup> Recital 58 of the Preamble of Directive 2001/29/EC indicates that the sanctions applicable in respect of the circumvention of technological protection measures should be ‘effective, proportional and dissuasive and should include the possibility of seeking damages and/or injunctive relief and, where appropriate, of applying for seizure of infringing material.’ Even though all Member States have enacted civil sanctions where anti-circumvention provisions are violated, national laws differ as to the applicable criminal sanctions.<sup>703</sup> For instance, the Greek Copyright Act prohibits the circumvention of effective technological measures and bans preparatory activities as described under 6(2) of Directive 2001/29/EC.<sup>704</sup> Civil sanctions in Greece include, *inter alios*, payment of damages, pecuniary penalties and personal detention.<sup>705</sup> By contrast, Germany and the UK restrict criminal sanctions to acts of circumvention for public and commercial uses. In particular, the UK Copyright Act provides a civil remedy against a person who ‘does anything which circumvents [technological] measures knowing, or with reasonable grounds to know, that he is pursuing that objective.’<sup>706</sup> The mere circumvention of technological protection measures is not a legal ground for criminal sanctions insofar as it takes place for private and non-commercial use. Nonetheless, where the communication right is infringed in the course of business or to an extent that prejudicially affects rightholders, criminal sanctions are in place.<sup>707</sup> The Danish Copyright Act prohibits the circumvention of effective technological protection measures and outlaws preparatory activities.<sup>708</sup> Violating these provisions creates liability at both civil and criminal level.

In the context of the private copying limitation, the anticircumvention provisions of Article 6 of Directive 2001/29/EC practically mean that rightholders are in a position to restrict the ability of users to make private copies of digitally protected works. At the same time, where users break the technological protection to benefit from the private copying limitation they

<sup>702</sup> M. Ficsor, *The Law of Copyright and the Internet*, op. cit., at § C 11.13.

<sup>703</sup> U. Gasser & M. Girsberger, ‘Transposing the Copyright Directive: Legal Protection of Technological Measures in the EU-Member States, A Genie Stuck in the Bottle?’, op. cit., at pp. 25-29.

<sup>704</sup> Articles 66A(2) and 66A(3) of the Greek Copyright Law 2121/3.3.1993 as amended by Law 3057/2002. Article 66(4) of the Greek Copyright Act mandates that the violation of anti-circumvention provisions is punished by imprisonment of at least one year and a fine of 2.900-15.000 euros.

<sup>705</sup> Article 65 of Copyright Law 2121/3.3.1993 as amended by Law 3057/2002; FIRP, *Implementing the EU Copyright Directive*, Foundation of Information Policy Research Report, prepared by V.D. Maroulis, available online at <<http://www.firp.org/copyright/guide/eucd-guide.pdf>>, lastly accessible on 9.9.2009, at 79-84. Note that the First Instance Court may order an injunction in accordance with the Code of Civil Procedures. This Code also allows seizure of the objects that constitute proof of infringement or the creation of a detailed inventory of such objects.

<sup>706</sup> Copyright and Related Rights Regulations 2003, C. 48, § 296ZA(1)(b).

<sup>707</sup> S. 107 and 198 of the Copyright, Designs and Patents Act 1988 (CDPA).

<sup>708</sup> Danish Copyright Act, Lov nr. 618 of June 27, 2001, as amended by Lov nr. 1051 of December 17, 2002, § 75c(1)-(3).

may face civil and criminal sanctions. In our opinion, the anticircumvention provisions overstretch the scope of copyright protection to an extent that the rightholders actually get a third layer of protection! Indeed, as Gasser convincingly points out, the first layer is the exclusivity of rights afforded by copyright protection, the second is the application of technological protection mechanisms and the third is the legal protection against the circumvention of these mechanisms!<sup>709</sup> One can only wonder whether sufficient room of freedom is left to legitimate private uses once the protection to the rightholders is over-expanding.

### 1.2.2. An access right?

The scope of the protection afforded to the rightholders by virtue of Directive 2001/29/EC is also extended to acts of accessing works, since this Directive makes no systematic distinction between ‘access controls’ and ‘copy controls’.<sup>710</sup> Indeed, Article 6(3) of the Directive reads that

*‘technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.’*

This broad definition of what constitutes a technological protection measure under Article 6(3) of Directive 2001/29/EC has been said to give rise to a new right over access!<sup>711</sup> Yet, as Dusollier rightly observes, in the analogue environment there was no requirement of authorial permission to access a work after its publication;<sup>712</sup> indeed, many copyright scholars consent that the regulation of access has always remained outside the scope of copyright protection.<sup>713</sup> We could not agree more. In our view, copyright owners have always been a unique ‘species’ of owners; while they strongly welcomed the use of, and access to, their works, they did not want this use and/or access to affect their control over that work. Since controls over access,

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<sup>709</sup> U. Gasser, ‘Legal Frameworks and Technological Protection of Digital Content: Moving Towards a Best Practice Model’, 17 *Fordham Intell. Prop. Media & Ent.L.J.*, 2006, pp. 39-113, at p. 49.

<sup>710</sup> For an distinction on these types of control see K.J. Koelman & N. Helberger, ‘Protection of Technological Measures’, *Institute for Information Law*, Amsterdam, November 1998, p. 2 *et seq.*

<sup>711</sup> N. Helberger, *Fence as Fence Can - Why ‘Mind Your Own Fence’ is not Synonymous with Property Regulation*, in L.F. Asscher (ed.), *Coding Regulation. Essays on the normative role of information technology*, Information Technology & Law Series (IT&Law Series) by T.M.C. Asser Press, The Hague, Netherlands, 2005.

<sup>712</sup> S. Dusollier, ‘Incidences et réalités d’un droit de contrôler l’accès en droit européen’, *Le droit d’auteur: un contrôle de l’accès aux œuvres?*, *Cahier du CRID (Bruylant)*, No. 18, 2000; J. Litman, ‘The Exclusive Right to Read’, *Cardozo Arts & Entertainment L. J.*, 1994, 13, p. 42.

<sup>713</sup> T. Heide, ‘The Approach to Innovation under the Proposed Copyright Directive: Time for Mandatory Exceptions’, *IPQ*, 3, 2000, pp. 215-233, at pp. 221; S. Dusollier, ‘Technology as an Imperative for Regulating Copyright: From the Public Exploitation to the Private Use of the Work’, *EIPR*, 27(6), 2005, 201-204, p. 201; J.C. Fernández-Molina, ‘Laws Against the Circumvention of Copyright Technological Protection’, *op. cit.*, at p. 43.

however, were beyond their power of control after the publication of works, granting them such power could have the potential of a very serious shift in copyright law. As Weatherall and Van Caenegem indicate the creation of an access right would go beyond the scope of present copyright law under which the rightholder has no statutory right to deny access to works.<sup>714</sup>

In our opinion, this could actually impact on the legitimate exercise of copyright limitations. As Dusollier convincingly indicates, the legal protection of technological protection measures that prevent access to works endangers the application of copyright limitations.<sup>715</sup> We consider that one of the most highly debated concerns raised with respect to the enactment of an ‘access right’ is that it curtails the accustomed usage expectations of consumers as defined under copyright laws. Those usage expectations normally include private copying, format and time shifting, lending, excerpting, sampling, or other content modification and reselling, as affirmed by a 2004 study of the *INDICARE* Institute.<sup>716</sup> End users who found traditional usages of the analogue environment advantageous are interested to continue exercising these uses in the digital domain.<sup>717</sup> For instance, the application of technological measures may restrict the ability to format-shift due to the regional code embedded in DVD and DVD-players and lead to regional market fragmentation.<sup>718</sup> Nonetheless, technical protection measures are not, at least at this stage, able to identify which uses are lawful or not.<sup>719</sup> Being ‘blind’,<sup>720</sup> technology cannot maintain the balances established by the law, and as a result it may prevent uses that are permitted by statute.<sup>721</sup> Access controls could even inhibit passive private use, which as we indicated earlier in this thesis is perfectly permissible!<sup>722</sup>

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<sup>714</sup> W. Van Caenegem, ‘Copyright, Communication and the New Technologies’, 23 *Federal Law Review*, 1995, 322, at 339; K. Weatherall, ‘An End to Private Communications in Copyright? The Expansion of Rights to Communicate Works to the Public: Part 1’, *EIPR*, 1999, 342, at 345.

<sup>715</sup> S. Dusollier, ‘Tipping the Scale in favour of the Right Holders: the Anti-circumvention Provisions of the European Directive on Copyright and Information Society’, in E. Becker et al. (eds.), *Digital Rights Management. Technological, Economic, Legal and Political Aspects*, Springer-Verlag, Berlin, 2003 pp.462-478, p. 467.

<sup>716</sup> N. Helberger et al., *Digital Rights Management and Consumer Acceptability*, op. cit., pp. 20-21.

<sup>717</sup> Digital Media Project, *Comments on the Informal Consultation of the Final Report of the High Level Group on DRM of the European Commission*, DG Information Society, 2004, available online at <[http://europa.eu.int/information\\_society/eeurope/2005/all\\_about/digital\\_rights\\_man/doc/digital\\_media\\_project\\_dmp.htm](http://europa.eu.int/information_society/eeurope/2005/all_about/digital_rights_man/doc/digital_media_project_dmp.htm)>, lastly accessible on 9.9.2009; Digital Media Project, *A Table of Traditional Rights and Usages (TRU) of Media User*, 2004, available online at <<http://www.chiariglione.org/contrib/040102chiariglione01.htm>>, lastly accessible on 9.9.2009.

<sup>718</sup> European Consumers’ Organisation, *Digital Rights Management*, Position Paper contributed to the informal consultation of the final report of High Level Group on DRM of the European Commission, DG Information Society, Brussels, 2004, BEUC/X/025/2004, at p. 4, available online at <[http://ec.europa.eu/information\\_society/eeurope/2005/all\\_about/digital\\_rights\\_man/doc/beuc.pdf](http://ec.europa.eu/information_society/eeurope/2005/all_about/digital_rights_man/doc/beuc.pdf)>, lastly accessible on 9.9.2009.

<sup>719</sup> S. Dusollier, Y. Pouillet & M. Buydens, ‘Copyright and Access to Information in the Digital Environment’, op. cit., at 22-23; N. Helberger et al., *Digital Rights Management and Consumer Acceptability*, op. cit., p. 21

<sup>720</sup> S. Dusollier, Y. Pouillet & M. Buydens, *ibid.*

<sup>721</sup> C. Geiger, ‘The Private Copy Exception: An Area of Freedom (Temporarily) Preserved in the Digital Environment’, 37 *IIC* 74, 2006, 74-81, at 75; S. Dusollier, *Droit d’auteur et protection des œuvres dans l’univers numérique*,

The expansion of the scope of copyright via the anticircumvention provisions does not in our view respect the exercise of copyright limitations and thereof it is not a balanced approach. One should not neglect that copyright protection is meant to achieve a fair equilibrium between the interests of the rightholders and those of the public. This is affirmed in Recital 31 of Directive 2001/29/EC which stresses the need to safeguard ‘*a fair balance of rights and interests between the different categories of rightholders and users of protected subject-matter*’. We consider, therefore, that desirable protection is one that balances both *intra*-copyright, namely the relationship between the rightholders and users, and *inter*-copyright, *i.e.* the intersection of copyright limitations with the application of technological protection measures. In our opinion, such balanced framework cannot be achieved through the triple layer of protection afforded to the rightholders via Directive 2001/29/EC. When referring to a triple protection-layer we mean that the rightholders benefit from exclusive rights, from the application of technological protection measures and from the legal protection against the circumvention of such measures. At the same time, this protection does not give much room of freedom for the exercise of copyright limitations by the end users. In particular, not only does Article 6 provide protection against the circumvention of access control mechanisms, which were never envisioned as part of copyright protection, but it further stipulates that legal protection is afforded to technological mechanisms protecting or restricting activities which are not unauthorised by the rightholders. Yet, part of these unauthorised by the rightholders acts are activities covered by copyright limitations, such as the private copying limitation; for instance, the private copying limitation is not conditional upon authorial consent, but is actually permitted by the law! Given that Article 6(3) affords protection to technological measures designed to prevent or restrict acts which are not authorised by the rightholders, it might restrict the scope of Article 5(2)(b) of Directive 2001/29/EC which does not subject private copying on prior authorial consent but otherwise permits it.

Nonetheless, the European legislator has afforded a special paragraph in Article 6 of the Directive to ensure, quite unsuccessfully, in our opinion, that the beneficiaries of the private copying limitation shall benefit from it. Below we examine this provision, namely Article

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Larcier, Brussels, 2005, at p. 152; K.J. Koelman, ‘The Protection of Technological Measures vs. The Copyright Limitations’, *op. cit.*, p. 18; T. Heide, ‘Copyright in the EU and U.S.: What ‘Access Right’’, 48 *J. Copyright Soc’y U.S.A.*, 2001, 363; S. Dusollier, Y. Pouillet & M. Buydens, ‘Copyright and Access to Information in the Digital Environment’, *ibid.*, at 21; C. Geiger, *Droit d’auteur et droit du public à l’information*, Litec, Paris, 2004, at 229; T.C. Vinje, ‘A Brave New World of Technical Protection Systems: Will there be Room for Copyright?’ *EIPR*, 1996, at 431, 434; P. Akester & R. Akester, ‘Digital Rights Management in the 21<sup>st</sup> Century’, *EIPR*, 28(3), 2006, 159-168, at 161.

<sup>722</sup> At page 50 *et seq.*

6(4)(2) and its national transposition with a view to ascertain whether the private copying limitation is enforceable against, and viable vis-à-vis, the application of technological protection measures.

## **2. The application of technological protection measures and the private copying limitation**

We consider that the thorniest part of Directive 2001/29/EC is the interface between copyright limitations and technological protection measures capable of extending copyright protection well over its legal boundaries. As early as 2002, the Commission highlighted that the application of digital rights management systems should ensure that the intended user of copyrighted content is not subject to any constraint on their lawful use.<sup>723</sup> Yet, technological protection is, at least to date, too crude to accommodate all the subtleties of the law, as Koelman rightly acknowledges.<sup>724</sup> Such a law subtlety is the private copying limitation of Article 5(2)(b) of Directive 2001/29/EC. Nonetheless, the very wording of this latter article permits private copying ‘*on condition that the rightholders receive fair compensation that takes into account the application or non-application of technological protection measures!*’ As we saw earlier, the application of these measures receive strong protection under Article 6 of Directive 2001/29/EC. Fearing that the application of technological protection shall restrict the scope of copyright exceptions, the European legislator set forth Article 6(4). A special paragraph in this article, namely Article 6(4)(2), addresses directly the interface of the private copying limitation and the application of technological protection measures. Many scholars consent that this unique legislative mechanism of Article 6(4) foresees an ultimate responsibility on the rightholders to accommodate certain copyright limitations<sup>725</sup> with a view to strike a balance between the interests of the rightholders that use technological protection measures and the interests of the public.<sup>726</sup> While Article 6(4)(2) indicates that the European legislator favours the retainment of

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<sup>723</sup> Commission of the European Communities, ‘Digital Rights: Background, Systems, Assessment’, *Commission Staff Working Paper*, Brussels, 14.2.2002, SEC(2002) 197, at p. 13.

<sup>724</sup> K.J. Koelman, ‘The Protection of Technological Measures vs. The Copyright Limitations’, paper presented at the *ALAI Congress, Adjuncts and Alternatives for Copyright*, New York, June 2001, *CW*, 2002, p. 18

<sup>725</sup> U. Gasser, ‘Legal Frameworks and Technological Protection of Digital Content: Moving Towards a Best Practice Model’, 17 *Fordham Intell. Prop. Media & Ent.L.J.*, 2006, pp. 39-113, at p. 76; N. Braun, ‘The Interface between the Protection of Technological Protection Measures and the Exercise of Exceptions to Copyright and Related Rights: Comparing the Situation in the United States and the European Community’, 25 *EIPR*, 11, 2006, 496, at p. 499; WIPO Standing Committee on Copyright and Related Rights, *Current Developments in the Field of Digital Rights Management*, 10<sup>th</sup> Session, November 3-5, 2003, Cunard, 2004, SCCR/10/2 Rev., pp. 1-127, at 72.

<sup>726</sup> S. Dusollier, ‘Exceptions and Technological Measures in the European Copyright Directive of 2001: An Empty Promise’, 34 *IIC*, 2003, 62-75, at 62.

private copying vis-à-vis the application of technological protection measures,<sup>727</sup> judicial practice in Europe does not support the enforceability of this limitation against the application of technological protection measures. At the same time, the technological restriction of the ability to make private copies does not seem to respect the copyright balance as established in the analogue environment. This is illustrated by the fact that there are cases where technological protection measures do not respect the fundamental right to privacy, a right that forms the justificatory basis of the private copying limitation.<sup>728</sup> What is more, the Directive does not address the issue of the interrelationship of the applicable levy schemes and the emerging technological protection measures. As a result, users may end up paying twice for the same content, this disturbing the copyright balance to the detriment of users.

These are the issues that we shall address below with a view to highlight the inadequacy of the technological approach in dealing with impact of digital private copying.

## **2.1. The interface of the private copying limitation and the application of technological protection measures**

Braun indicates that in the context of Article 6(4) of Directive 2001/29/EC copyright exceptions and limitations are divided into three categories.<sup>729</sup> Those are the ‘public-policy’ exceptions,<sup>730</sup> the private copying limitation,<sup>731</sup> and the remainder of copyright exceptions which remain ‘unprotected’ vis-à-vis the application of the technological protection measures.

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<sup>727</sup> S. Rompré, ‘Le régime de la copie privée face à Internet’, op. cit., p. 8. Contra: T. Hoeren, *Information Management: Copyright on Electronic Services*, op. cit., p. 19.

<sup>728</sup> See earlier at p. 39 *et seq.*, and 147 *et seq.*

<sup>729</sup> See N. Braun, ‘The Interface between the Protection of Technological Protection Measures and the Exercise of Exceptions to Copyright and Related Rights: Comparing the Situation in the United States and the European Community’, 25 *EIPR*, 11, 2006, 496, at p. 500; also see L. Guibault & P.B. Hugenholtz, ‘The Nature and Scope of Limitations and Exceptions to Copyright and Neighbouring Rights with Regard to General Interest Missions for the Transmission of Knowledge: Prospects of their Adaptation to the Digital Environment’, *e-Copyright Bulletin*, Unesco, October-December 2003, pp. 1-48, at p. 18 *et seq.*

<sup>730</sup> Article 6(4)(1) of Directive 2001/29/EC: ‘Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.’

<sup>731</sup> Article 6(4)(2) of Directive 2001/29/EC: ‘A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.’

Article 6(4)(1), indeed, covers exceptions that pursue public-policy objectives. This includes reprographic reproductions,<sup>732</sup> reproductions made by publicly accessible libraries, educational establishments or museums and archives,<sup>733</sup> ephemeral recordings made by broadcasters,<sup>734</sup> reproductions of broadcasts made by social institutions,<sup>735</sup> reproductions or communications made for the purpose of illustration for teaching and scientific research,<sup>736</sup> exceptions for the benefit of the disabled,<sup>737</sup> and exceptions for the purposes of public security.<sup>738</sup> With respect to the aforementioned exceptions and limitations, Article 6(4)(1) indicates that

*‘in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law [...] the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.’*<sup>739</sup>

The second paragraph of Article 6(4) of Directive 2001/29/EC reserves a special place for the private copying limitation of Article 5(2)(b). Article 6(4)(2) of this Directive reads that

*‘a Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned’*

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<sup>732</sup> Article 5(2)(a) of Directive 2001/29/EC: ‘Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 [...] in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation.’

<sup>733</sup> Article 5(2)(c) of Directive 2001/29/EC: ‘Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 [...] in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage.’

<sup>734</sup> Article 5(2)(d) of Directive 2001/29/EC: ‘Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 [...] in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted.’

<sup>735</sup> Article 5(2)(e) of Directive 2001/29/EC: ‘Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 [...] in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation.’

<sup>736</sup> Article 5(3)(a) of Directive 2001/29/EC: ‘Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 [in respect of] use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author’s name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved.’

<sup>737</sup> Article 5(3)(b) of Directive 2001/29/EC: ‘Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 [in respect of] uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability.’

<sup>738</sup> Article 5(3)(e) of Directive 2001/29/EC: ‘Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 [in respect of] use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings.’

<sup>739</sup> For a critique on this Article see G. Vercken, ‘La protection des dispositifs techniques, recherche claret désespérément: à propos de l’article 6.4 de la directive du 22 mai 2001’, *Prop. Intell.*, 2002, no. 2, p. 52.

*and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.'*

As opposed to Article 6(4)(1) the implementation of Article 6(4)(2) on the private copying limitation has an optional character. This is affirmed by the permissible 'may' in Article 6(4)(2) which clearly departs from the peremptory 'shall' used in Article 6(4)(1). This means that Member States have the discretion to either apply measures to ensure the exercise of the private copying limitations, or not. What is more, there is no explicit indication in the Directive as to what these measures may be; the Directive only states that these measures ought to be 'appropriate'. The optional character of Article 6(4)(2) and the lack of clarification as to the appropriateness of the measures that Member States may introduce has led to the adoption of divergent approaches in Member States.<sup>740</sup> For instance, some Member States, such as Greece and Lithuania, have enacted a mediation procedure to ensure the exercise of the copyright limitations whereas other States, such as Germany and Spain have introduced a Court procedure.

What is more, if the purpose of the legislator was to strike a proper balance between technological protection and copyright limitations through Article 6(4), this purpose is far from being accomplished. This is because nowhere in the Directive is the private copying limitation declared enforceable against the application of technological protection measures. These are the issues that we shall examine below.

### **2.1.1. The complex provision of Article 6(4)(2) of Directive 2001/29/EC**

As regards the private copying limitation, Directive 2001/29/EC leaves great latitude to the Member States to decide whether to adopt or not the measures of Article 6(4)(2) of the Directive. We consider that Article 6(4)(2) only makes a suggestion to the Member States to take measures in respect of beneficiaries of the private copying limitation but it certainly does not oblige them to. Indicative in this respect is the permissible 'may' of Article 6(4)(2) as opposed to the peremptory 'shall' used in Article 6(4)(1) on public-policy exceptions. This different approach suggests that Member States are in discretion to decide whether or not to safeguard the exercise of the private copying limitation vis-à-vis the application of technological protection measures.<sup>741</sup> We consider, therefore, that the burden on a Member State to intervene under Article 6(4)(2) is less onerous than under Article 6(4)(1) of Directive 2001/29/EC.

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<sup>740</sup> See Annex II at the end of this thesis.

<sup>741</sup> M. Hart, 'The Copyright in the Information Society Directive: An Overview', *EIPR*, 2002, 58, at 63.

One possible reason for the weaker protection of the exercise of the private copying limitation is probably the fact that the beneficiaries of this limitation are not as easily identifiable as those of the ‘public-policy’ exceptions of Article 6(4)(1). While the beneficiaries of the private copying limitation of Article 5(2)(b) are natural persons in general, the ‘public-policy’ exceptions are afforded to institutional users, such as libraries and archives, educational establishments, broadcasting organisations and social institutions. Yet, we do not fully endorse this explanation. This is because Article 6(4)(1) also applies to reprographic reproductions,<sup>742</sup> the benefit of which is afforded to the public at large. At the same time, Article 6(4)(1) of Directive 2001/29/EC does not include other exceptions granted to easily-identifiable users. That would be, for instance, the case of the news reporting exception of Article 5(3)(c), the beneficiaries of which, *i.e.* journalists and reporters, are easily identifiable.

There ought to be another reason, therefore, to explain the optional character of Article 6(4)(2) as opposed to the mandatory provision of Article 6(4)(1). One plausible explanation is provided by Ficsor. Ficsor convincingly argues that the discretionary nature of Article 6(4)(2) can be understood as preferring private ordering, namely contractual licences, in the context of digital private copying.<sup>743</sup> This explanation is affirmed by the stipulation of Article 6(4)(3) which invites the rightholders to voluntarily conclude licensing agreements, insofar as they enable users to benefit from the private copying limitation; it is only when such agreements are not concluded that Member States are at discretion to ensure through appropriate measures that the rightholders enable users to benefit from Article 5(2)(b). Since Member States should only intervene in default of voluntary agreements, we consider that the intervention of national legislators is subsidiary to that of the rightholders, this explaining at least in part the optional character of Article 6(4)(2).

It is probably due to the optional character of this article that its purpose is not accomplished, namely the unencumbered exercise of the private copying limitation. Some Member States, for instance, have not implemented measures ensuring that the private copying limitation shall be exercised, even though they do statutorily provide this limitation. Those are Austria, Bulgaria, the Czech Republic, Poland, Romania and Slovakia.<sup>744</sup> In our opinion, in the aforementioned States end users may find it difficult to receive the full benefit from the private copying

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<sup>742</sup> Article 5(2)(a) of Directive 2001/29/EC: ‘Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 [...] in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation.’

<sup>743</sup> M. Ficsor, *The Law of Copyright and the Internet*, op. cit., at § 11.29 at pp. 560-561. We examine the issue of contractual ordering in copyright later in this thesis, at p. 211 *et seq.*

<sup>744</sup> See Annex II at the end of this thesis.

limitation. We consider that, where no measures have been taken to ensure the legitimate exercise of private copying over the application of technological protection measures, the private copying limitation is not been given some positive meaning but retains only its defensive character. By this we mean that users can only invoke the private copying limitation as a defence against allegations for infringement but cannot benefit from legitimate uses if rightholders decide to technologically restrict them.

Yet, even in Member States where measures have been taken to ensure the exercise of the private copying limitation, harmonisation has been a mixed blessing at best! Since the Directive does not provide guidance as to which measures are deemed to be appropriate, diversity under national law pertains.<sup>745</sup> For instance, in Germany,<sup>746</sup> Luxembourg<sup>747</sup> and Spain<sup>748</sup> end users may seek injunctive relief where technological protection does not enable them to benefit from the exercise of the private copying limitation. By contrast, France has established a regulatory authority to handle claims of end users not being able to make private copies due to the application of technological protection;<sup>749</sup> what is more, users have the possibility to consult a Panel of mediators when technical protection measures prevent them from making private copies.<sup>750</sup> In our opinion, diversity of national laws in this respect is mainly attributed to the lack of clarity in Article 6(4)(2) as to which measures qualify as ‘appropriate’ within its meaning. Some guidance of course can be tracked down to Recital 51 of Directive 2001/29/EC which, to our understanding, indicates that appropriate measures may be either technological or legal. Indeed, this Recital reads that ‘*Member States should take appropriate measures to ensure that rightholders provide beneficiaries of such exceptions or limitations with appropriate means of benefiting from them, by modifying an implemented technological measure or by other means.*’

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<sup>745</sup> For the diverse legislative solutions on the relationship between technological protection measures and copyright exceptions see S. Dusollier, ‘Exceptions and Technological Measures in the European Copyright Directive of 2001: An Empty Promise’, op. cit., at 62. Also see Annex II at the end of this thesis.

<sup>746</sup> §95b(1) of the Act amending the Law on Copyright and Related Rights 1965 of 10 September 2003.

<sup>747</sup> S. 71<sup>quinquies</sup>(2) of the Law of April 18, 2001 on Copyright, Neighbouring Rights and Databases, as amended on April 18, 2004 (Memorial A, no. 61 du 29 avril 2004, pp. 942-948)

<sup>748</sup> Consolidated Text of the Law on Intellectual Property, regularising, clarifying and harmonising the applicable statutory provisions (approved by Royal Legislative Decree 1/1996 of April 12, 1996, and amended by Law 5/1998 of March 6, 1998, incorporating Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases)

<sup>749</sup> Décret no 2007-510 du 4 avril 2007 relatif à l’Autorité par régulation des mesures techniques instituée par l’article L. 331-17 du Code de la propriété intellectuelle (partie législative), Première partie - La propriété littéraire et artistique. Also see Articles L 331-8-3 and L 331-13 of the Code de la propriété intellectuelle (partie législative), Première partie - La propriété littéraire et artistique.

<sup>750</sup> Bill AN No. 1206, 12.11.2003 (Arts L 311-6 and L 311-7). Also see T. Maillard, ‘La réception des mesures techniques de protection des œuvres en droit français’, *Légipresse*, January/February 2004, p. 8; P. Gaudrat, ‘Projet de loi de transposition de la directive du 22 mai 2001 sur le droit d’auteur dans la société de l’information: Quand le numérique permet tout’, *RTD.com*, 2004, 496.

The diversity of national laws as regards the measures adopted to ensure the legitimate exercise of legitimate private copying is not, in our opinion, problematic. This is because in all States that such measures have been taken, the intersection of the private copying limitation with the application of technological protection measures is examined before the enforcement stage, namely at the stage of the exercise of exceptions restrained by a technological protection measure.<sup>751</sup> By this, we mean that the private copying limitation is given a positive meaning rather than a merely defensive character.<sup>752</sup> Yet, Directive 2001/29/EC nowhere declares that this limitation is enforceable against the application of technological protection measures.

### **2.1.2. The enforceability of the private copying exception against the application of technological protection measures**

Directive 2001/29/EC provides no indication as to whether the private copying limitation is enforceable against the application of technological protection measures. It only leaves Member States the discretion to adopt measures ensuring its exercise by virtue of Article 6(4)(2). Yet, the private copying limitation would really have a substantive meaning if it had been given an imperative character vis-à-vis the application of technological protection measures. Such imperative character would mean that the rightholders could not restrict its exercise either technologically or contractually.

The first instance where the issue of the imperative status of copyright limitations has been raised is the Mann Report on the e-Commerce initiative but only as regards contracts.<sup>753</sup> In her Report, Mann asked the Commission to present a proposal on how to solve certain aspects of contract law in view of problems arising in a transfrontier and networked environment. This included a clarification on the laws applicable to contracts, taking into account uniform rules on freedom of choice and the role of mandatory rules.<sup>754</sup> The second instance was the opinion of the Committee on the Environment, Public Health and Consumer Protection on the proposed Directive 2001/29/EC. This Committee suggested the introduction of a general 'fair-use' style approach in Directive 2001/29/EC, any derogation from which would be null and void.<sup>755</sup> None of these proposals, however, was adopted so as to establish the

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<sup>751</sup> S. Dusollier, 'Exceptions and Technological Measures in the European Copyright Directive of 2001: An Empty Promise', op. cit., at 69.

<sup>752</sup> *Ibid.*, at p. 63.

<sup>753</sup> See Point 17 of the European Parliament Report, A4 – 0173/98. See Committee on Economic and Monetary Affairs and Industrial Policy, *Report on the communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on a European Initiative in Electronic Commerce* (COM(97)0157 - C4-0297/97) (A4-0173/98) OJ C 167, 01/06/1998 P. 0203.

<sup>754</sup> *Ibid.*

<sup>755</sup> See Amendment 28, Committee on the Environment, Public Health and Consumer Protection – Opinion for the Committee on Legal Affairs and Citizens' Rights on the Proposal for a European Parliament and Council

enforceability of the private copying limitation against the application of technological protection measures. Rather, Recital 39 of Directive 2001/29/EC indicates that the private copying limitation ‘*should not inhibit the use of technological protection measures or their enforcement against circumvention.*’

### **Not a user right.**

At the same time, there is a judicial trend in Europe supporting that the private copying limitation is not enforceable against the application of technological protection measures. In the Belgian *Test Achats* case,<sup>756</sup> private copying was not considered to constitute an enforceable right. In this case, a consumer group sued a record company for restricting the ability to make private copies of CDs by applying technological protection measures on those CDs. To support their claims, the plaintiffs argued that the private copying limitation has a mandatory character under Belgian Law and that it was a positive ‘right’ of the users. What is more, they argued that once the consumers paid the levy for private copying, they paid for an activity that they had, consequently, a ‘right’ to undertake. The Brussels Court rejected both these arguments and held that private copying was a copyright exception in the form of a legally grounded immunity against prosecution, rather than a positive right to the benefit of the user.

Similarly, in the French *Mullholland Drive* case,<sup>757</sup> the private copying limitation was held to be a statutory limitation rather than a user right and as such it could not be invoked to support an action against the application of technological protection measures, irrespective of the payment of fair compensation.<sup>758</sup> In this case, *Stéphane P.* bought a DVD of the movie ‘Mulholland Drive’ which was technologically protected against copying, so he could not make a copy for his parents. Together with the French consumer organisation ‘*Que Choisir*’, he

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Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, COM(97), 628 final, September 28, 1988 (proposing a general fair-use approach). Also see Amendment 30 (suggesting that any contractual provision contrary to the fair use defence shall be null and void).

<sup>756</sup> *L’ASBL Association Belge des Consommateurs Test Achats v La SA EMI Recorded Music Belgium et al.*, Tribunal of First Instance of Brussels, 2004/46/A, April 27, 2004; *L’ASBL Association Belge des Consommateurs Test Achats v La SA EMI Recorded Music Belgium et al.*, Brussels Court of Appeal, 9 September 2005, case 2004/AR/1649; N. Helberger, ‘It’s not a Right, Silly! The Private Copying Exception in Practice’, op. cit.; N. Helberger et al., *Digital Rights Management and Consumer Acceptability*, op. cit., p. 48 *et seq*; G. Arthur, ‘Private Use, Public Consequence?’, op. cit., at p. 19.

<sup>757</sup> *Studio Canal et al. V S. Penguin and Union Federale des Consommateurs Que Choisir*, Paris Court of Appeal, 4 April 2007, Gaz. Pal. 18/07/2007 No 199, p. 23; *Studio Canal et al. V S. Penguin and Union Federale des Consommateurs Que Choisir*, Cour de Cassation, 1<sup>st</sup> civil section, 28 February 2006, case No 549, Bull. 2006 I No 126 p. 115 (‘Mulholland Drive’), which overruled *Studio Canal et al. V S. Penguin and Union Federale des Consommateurs Que Choisir*, Paris Court of Appeal, 22 April 2005. The Court of Appeal held that the application of copy control mechanisms on DVDs deprives users from their consumer right in making a private copy.

N. Helberger, *ibid.*; N. Helberger et al., *ibid.*; G. Arthur, *ibid.*

<sup>758</sup> *Studio Canal et al. V S. Penguin and Union Federale des Consommateurs Que Choisir*, Paris Court of Appeal, 4 April 2007, Gaz. Pal. 18/07/2007 No 199, p. 23; 39 IIC 360, 2008.

started proceedings before the High Court of Paris. And he lost. The High Court of Paris<sup>759</sup> held that the application of technological protection mechanisms on CD's did not violate the private copying limitation applicable under French law. This was because no 'right' to private copy exists under this law in the light of Directive 2001/29/EC.<sup>760</sup>

Yet, this ruling was rejected on appeal!<sup>761</sup> While the Court of Appeals upheld that the private copying limitation is 'just' an exception, rather than a user right, it was of the view that this limitation is still law. As such, it is not *per se* at the disposal of private parties, such as DVD producers and distributors who must still abide by the law even if end users have no corresponding right. To the Court, the complete restriction of the ability to make private copies was impermissible under the French copyright law. Geiger argues and we agree that, by refusing the application of technological protection measures to prevail over the exercise of the private copying limitation, the Court implicitly indicated that this limitation is not at the disposal of rightholders.<sup>762</sup> Albeit not a fully-fledged user right, therefore, the private copying limitation should be respected by the rightholders when applying technological protection measures.

This has also been affirmed in the *Christophe R.* case.<sup>763</sup> *Christophe R.* bought a CD by *Phil Collins* to discover later that he could neither play it on his laptop nor could he make any copies thereof, due to the application of technological protection measures. The Court upheld *Christophe's* claims and held that the phonogram producers should make sure that the ability to make private copies remains possible, despite the application of technological protection measures. In this light, the High Court of Paris indicated that the application of technological protection measures should be used conservatively in terms that the exercise of the private copying limitation is not hindered.

In our opinion, the fact that the private copying limitation is not a fully-fledged user right, despite its strong justificatory basis on the right to privacy, does not mean that it can be

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<sup>759</sup> *Association Union Federale de Consommateurs UFC Que Choisir and others v. SA Films Alain Sarde and others*, Tribunal de Grande Instance de Paris, 03/8500, April 30, 2004.

<sup>760</sup> Directive 2001/29/EC had not yet been implemented in France when this ruling was issued.

<sup>761</sup> *Studio Canal et al. V S. Penguin and Union Federale des Consommateurs Que Choisir*, Paris Court of Appeal, 22 April 2005.

<sup>762</sup> C. Geiger, 'The Private Copy Exception: An Area of Freedom (Temporarily) Preserved in the Digital Environment', 37 *IIC* 74, 2006, pp. 74-81, at p. 76.

<sup>763</sup> *Christophe R., UFC Que Choisir v. Warner Music France, Fnac*, Tribunal de grande instance de Paris 5ème chambre, 1ère section Jugement du 10 janvier 2006 available at: <<http://www.legalis.net/jurisprudence-decision>>, lastly accessible on 9.9.2009; reversed on appeal: Cour d'appel de Paris 4ème chambre, section A Arrêt du 20 juin 2007 *Fnac Paris v. UFC Que Choisir et autres* available at: <<http://www.legalis.net/jurisprudence-decision>>, lastly accessible on 9.9.2009 (On appeal the Court held that the private copying limitation can only be invoked as a defence against infringement but is no subjective right on which users can substantiate claims against the rightholders); confirmed by Cour de cassation 1ère chambre civile 27 novembre 2008 *UFC Que Choisir v. Fnac, Warner Music France*, available at: <<http://www.legalis.net/jurisprudence-decision>>, lastly accessible on 9.9.2009.

technologically restrained due to the application of technological protection measures. We are of the view that the confines of copyright should be defined by the legislator and should not be left at the disposal of the rightholders to determine. We consider that, by applying technological protection measures that restrict acts of legitimate copying, the rightholders reserve for themselves a use to which they are not entitled; this is because the law has excluded private copying from their power of control by providing a statutory limitation under Article 5(2)(b) of Directive 2001/29/EC! Affirmative in this respect is the mere existence of Article 6(4)(2) of this Directive; even though this article does not explicitly declare the private copying limitation enforceable against the application of technological protection measures, and despite the fact that its implementation was optional, it means to ensure that the interests of the users in making private copies is preserved. Nonetheless, we are seriously concerned as to how viable shall the private copying limitation be vis-à-vis the application of technological protection measures. In its 2009 Communication on Copyright in the Knowledge Economy, the Commission appears to acknowledge this risk by underscoring the proposals of the academia to explicitly declare the private copying limitation mandatory against technological protection measures.<sup>764</sup>

## **2.2. Policy concerns about the application of technological protection measures**

We consider that the endorsement of the technological approach in dealing with the digital impact of private copying under Article 5(2)(b) does not adequately reflect the copyright balance. This balance is one of the prime objectives of Directive 2001/29/EC as affirmed in its Recital 31 which indicates that *'a fair balance of rights and interests between [...] the different categories of rightholders and users of protected subject-matter must be safeguarded.'* Yet, the fact that private copying is premised *'on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures'* under Article 5(2)(b) sets the balance to the side of the rightholders. One can only wonder how much room of freedom is left to end users if private copying is both levitised and at the same time technologically protected against. This is an eminent concern in cases that end users are charged twice for using copyrighted content, *i.e.* through a levy and paying for a technologically protected licence to use works. That would be, for instance, the case of an *iTunes* user who pays a levy to buy the *iPod* and then also buys the *iTunes* licensed tracks. The thorny issue of the co-existence of levies and technological protection is, *inter alios*, one of the reasons why the Commission

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<sup>764</sup> European Commission, Communication on Copyright in the Knowledge Economy, Brussels, 19.10.2009, COM(2009) 532 final.

started a consultation on the levy reform in Europe as early as 2004, and only three years after the adoption of Directive 2001/29/EC.<sup>765</sup>

At the same time, even though technological protection promises the control of private uses, it might impinge on the informational privacy of end users.<sup>766</sup> It is on this privacy however that the permissibility of private copying is premised under the European law.<sup>767</sup> Since digital rights management systems have the potential to generate, transmit and store information on the personal use of copyrighted works,<sup>768</sup> the justification for the private copying limitation retains its validity in the digital environment too! Many scholars consent that this represents an unprecedented level of usage monitoring in a way that is more comprehensive than what hitherto has been usual;<sup>769</sup> the Commission itself has acknowledged that the collection and processing of personal data for purposes of customer profiling and other uses could endanger the privacy of consumers.<sup>770</sup> Yet, Article 7 of the Directive<sup>771</sup> provides anticircumvention protection to rights management information, namely information attached to digital works so as to identify these works and their respective rightholders. It is possible however that personal information of the end users fall under the European concept of rights management information. This practically means that by applying rights management information on their works rightholders can trace or monitor some personal data of end users, this impinging upon

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<sup>765</sup> See earlier at page 172 *et seq.*

<sup>766</sup> L. Bygrave, 'The Technologisation of Copyright: Implications for Privacy and Related Interests', *EIPR*, 24(2), 2002, 51-57, at 54; P.B. Hugenholtz, 'Code as Code, or the End of Intellectual Property as we Know it', 6 *Maastricht Journal of European and Comparative Law*, 1999, 308, at 314-315; P. Samuelson, 'Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised', 14 *Berkeley Technology Law Journal*, 1999, 519.A. Odlyzko, 'Privacy, Economics, and Price Discrimination on the Internet', *ACM International Conference Proceeding Series; Vol. 50, Proceedings of the 5th international conference on Electronic commerce*, 2003, pp. 355 – 366, p. 360.

<sup>767</sup> See earlier at page 39 *et seq.*

<sup>768</sup> S. Bechtold, 'The Present and Future of Digital Rights Management – Musings on Emerging Legal Problems', in E. Becker et al. (eds.), *Digital Rights Management – Technological, Economic, Legal and Political Aspects*, Springer, 2008, 597-654, at 617; J.E. Cohen, 'A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace', *Connecticut Law Review*, 1996, p. 981 *et seq.*

<sup>769</sup> J.E. Cohen, 'A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace', *op. cit.*, p. 981 *et seq.*; G. Greenleaf, "'IP, Phone Home": ECMS, ©-Tech, and Protecting Privacy against Surveillance by Digital Works', *Proceedings of the 21<sup>st</sup> International Conference on Privacy and Data Protection*, 1999, p. 281; K.J. Koelman & L. Bygrave, 'Privacy, Data Protection and Copyright', *op. cit.*, at 77; L. Bygrave, 'The Technologisation of Copyright: Implications for Privacy and Related Interests', *EIPR*, 24(2), 2002, 51-57, at 53.

<sup>770</sup> Commission of the European Communities, 'Digital Rights: Background, Systems, Assessment', *Commission Staff Working Paper*, Brussels, 14.2.2002, SEC(2002) 197, at p. 14.

<sup>771</sup> This Article reads that: 'Member States shall provide for adequate legal protection against any person knowingly performing without authority any of the following acts:

(a) the removal or alteration of any electronic rights-management information;

(b) the distribution, importation for distribution, broadcasting, communication or making available to the public of works or other subject-matter protected under this Directive or under Chapter III of Directive 96/9/EC from which electronic rights-management information has been removed or altered without authority,

if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or any rights related to copyright as provided by law, or of the *sui generis* right provided for in Chapter III of Directive 96/9/EC.'

their informational privacy. At the same time, the alteration or erasure of such data by end users is a civil or criminal offence by virtue of the anticircumvention protection that rights management information receives under Article 7(1) of Directive 2001/29/EC.

Below we examine these concerns against the technological approach in dealing with the impact of digital private copying, namely the privacy considerations and the complex intersection of technological protection and levies.

### **2.2.1. Technological protection measures and privacy**

Article 7 of Directive 2001/29/EC provides protection against the circumvention of rights management information. A definition of what rights management is under this Directive is provided in Article 7(2). This article repeats Article 12(2) of the WIPO Copyright Treaty and Article 19 of the WIPO Performances and Phonograms Treaty by defining rights management information as *'any information provided by rightholders which identifies the work or other subject-matter referred to in this Directive [...], or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information.'*<sup>772</sup> One can only wonder whether the term 'rights management information', as used under Article 7, includes information identifying individual end-users. Since rights management information by virtue of this Article includes information about the terms and conditions of the use of copyrighted content, it does not comfortably cover information identifying end users, such their usernames and passwords.<sup>773</sup> However, given that some information usage licences may be quite user-specific, it is arguable that such data may be covered, as Bygrave rightfully observes.<sup>774</sup> Support for this argument can be tracked down to Recital 57 of the Directive which recognises that rights-management-information systems may *'process personal data about the consumption patterns of protected subject-matter by individuals and allow for tracing of on-line behaviour.'*

Yet, if the personal data of private copiers are included within the European concept of rights management information, this could not only encroach upon end-user informational privacy but at the same time users cannot modify or alter such data without infringing Article 7(1). Recital 57 addresses, but does not sufficiently respond to, this concern. Under this Recital, technological systems processing personal data, especially those tracing online behaviour,

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<sup>772</sup> The exact same definition on what constitutes rights management information has been also initiated by Article 12(2) of the WIPO Copyright Treaty (WCT) adopted by the Diplomatic Conference on December 20, 1996, CRNR/DC/94; Article 19 of the WIPO Performances and Phonograms Treaty (WPPT) adopted by the Diplomatic Conference on December 20, 1996, CRNR/DC/95.

<sup>773</sup> K.J. Koelman & L. Bygrave, 'Privacy, Data Protection and Copyright', op. cit., at p. 115.

<sup>774</sup> L. Bygrave, 'The Technologisation of Copyright: Implications for Privacy and Related Interests', op. cit., at 55.

should incorporate privacy safeguards in accordance with Directive 95/46/EC.<sup>775</sup> It is well accepted by the academia that privacy-enhancing technologies could ‘anonymise’ users and, thereby, mitigate the loss of privacy.<sup>776</sup> While we agree with this view, we also acknowledge that Recital 57 does not lay down a mandatory rule of law, despite its unquestionable interpretative value. By this, we mean that this Recital merely provides guidance to Member States, without being equally binding as is Article 7 of the Directive. By the time that privacy-enhancing mechanisms receive the same statutory backing as the application of technological protection management and rights management information, we have reason to concern about their encroachment upon end-user privacy.

At the same time, Directive 95/46/EC, to which Recital 57 refers, lays down general rules on privacy protection in Europe, without, however, specifying how privacy concerns are to be reconciled with the use of technological protection measures.<sup>777</sup> In this respect, we consider that it does not effectively respond to concerns on the impingement on the informational privacy of end users. This is because under its Article 7a, it permits the collection and procession of information where the user unambiguously consents<sup>778</sup> or where such consent is implicit due to the design of information transactions. Some user-specific licences of copyrighted content require that the user agrees with the terms of these licences, including the

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<sup>775</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data, *OJ L* 281/31, 23.11.95; S. Bechtold, ‘The Present and Future of Digital Rights Management – Musings on Emerging Legal Problems’, in E. Becker et al. (eds.), *Digital Rights Management – Technological, Economic, Legal and Political Aspects*, Springer, 2008, 597-654, at 617; J.E. Cohen, ‘A Right to Read Anonymously’, op. cit., p. 981 *et seq.* For an overview on privacy-enhancing technologies see H. Burkert, ‘Privacy-Enhancing Technologies: Typology, Critique, Vision’, in P.E. Agre & M. Rotenberg (eds.), *Technology and Privacy: The New Landscape*, The MIT Press, 1997, at pp. 125-142.

Consumer groups have urged for the enhancements of privacy safeguards in this context and have suggested that DRM systems should generate no more data than necessary, and store such data for no longer than necessary to execute their rule enforcement functions. European Consumers’ Organisation, *Digital Rights Management*, Position Paper contributed to the informal consultation of the final report of High Level Group on DRM of the European Commission, DG Information Society, Brussels, 2004, BEUC/X/025/2004, at p. 6, available online at <[http://ec.europa.eu/information\\_society/europe/2005/all\\_about/digital\\_rights\\_man/doc/beuc.pdf](http://ec.europa.eu/information_society/europe/2005/all_about/digital_rights_man/doc/beuc.pdf)>, lastly accessible on 9.9.2009.

<sup>776</sup> H. Burkert, ‘Privacy-Enhancing Technologies’, op. cit., at pp. 125-142; P.B. Hugenholtz, L. Guibault & S. Van Geffen, *The Future of Levies in a Digital Environment*, Institute for Information Law, 2003, pp. 33-34; L.A. Bygrave & K.J. Koelman, ‘Privacy, Data Protection and Copyright: Their Interaction in the Context of Electronic Copyright Management Systems’, in P.B. Hugenholtz (ed.), *Copyright and Electronic Commerce, Legal Aspects of Copyright Management*, Kluwer, The Hague/London/Boston, 2000, pp. 95-97.

<sup>777</sup> The European Consumers’ Organisation has sought guidance as to the interpretation of EU Privacy protection in the light of TPMs. See European Consumers’ Organisation, *Digital Rights Management, BEUC Comments on the 95/46/EEC Directive on Data Protection*, Brussels, February 2003, p. 4, available online at <[http://www.europa.eu.int/comm/internal\\_market/privacy/docs/lawreport/paper/beuc\\_en.pdf](http://www.europa.eu.int/comm/internal_market/privacy/docs/lawreport/paper/beuc_en.pdf)>, lastly accessible on 9.9.2009.

<sup>778</sup> Article 7(a) of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data, *OJ L* 281/31, 23.11.95: ‘Member States shall provide that personal data may be processed only if [...] the data subject has unambiguously given his consent.’

collection of personal data. In this respect, Directive 95/46/EC does not efficiently respond to privacy concerns related to digital copyright. What is more, this Directive leaves room for the collection of personal information where this is necessary for the conclusion of a contract;<sup>779</sup> this could include the possibility of monitoring acts of private use and, hence, encroaching upon the informational privacy of end users. For instance, when a rightholder and a user conclude an online contract for the use of a copyright work by way of a ‘click-wrap’ licence, a clause requiring payment for the creation of a home copy, could enable control over private copying. In these terms, we consider that the privacy of the end-user is not sufficiently safeguarded. Even though data on an individual’s information usage could fall within the definition of ‘sensitive data’ within the meaning of Directive 95/46/EC, and be therefore subject to protection, the collection of such data is permitted for the purposes of establishing a legal claim under Article 8(1).<sup>780</sup> This could include a rightholder’s claim against the legitimacy of private copying.<sup>781</sup>

In our view, by the time that privacy enhancing mechanisms receive the same statutory support as technological protection measures there is reason to fear that rights management information may impinge upon end user privacy. We do question the possibility of incorporating privacy enhancing mechanisms in rights management information in the absence of an explicit legal requirement. At the same time we identify the need for an update in European privacy protection law to deal with concerns on the informational privacy of end users in online transactions. We are therefore of the view that for the time being the privacy considerations on which the private copying limitation is premised do retain their validity in the digital environment vis-à-vis the application of digital rights management systems. Even though the technological approach in dealing with the impact of private copying may be effective in terms that the rightholders are in a position to control every possible use of their works, and despite the fact that it is statutorily protected under Articles 6 and 7 of Directive 2001/29/EC, we do not consider that it is adequate for policy reasons. In particular, since digital rights management may impinge on the information privacy of end users by monitoring

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<sup>779</sup> Article 7(b) of Directive 95/46/EC stipulates that ‘Member States shall provide that personal data may be processed only if [...] processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract.’

<sup>780</sup> Article 8(1) of Directive 95/46/EC reads: ‘Member States shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life.’ However, the second paragraph, section (e) of the same Article indicates that ‘Paragraph 1 shall not apply where [...] the processing relates to data which are manifestly made public by the data subject or is necessary for the establishment, exercise or defence of legal claims.’

<sup>781</sup> L.A. Bygrave & K.J. Koelman, ‘Privacy, Data Protection and Copyright’, op. cit., pp. 75-81.

their usage habits they implicate the right to privacy, *i.e.* the theoretical basis of the private copying limitation.

Yet, there is another reason why the application of technological protection measures as envisioned under Directive 2001/29/EC may be ill-suited to deal with the digital impact of private copying. This is its co-existence with levy schemes in terms that end users may end up paying twice to use copyrighted content.

### **2.2.2. Technological protection measures and levies**

Article 5(2)(b) of Directive 2001/29/EC premises the permissibility of private copying ‘*on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures.*’ The intersection of levy schemes and the application of technological protection measures has become source of on-going controversy ever since. In fact, as early as 2004, and only three years after the adoption of the Directive, the Commission<sup>782</sup> has started consulting Member States and the relevant stakeholders as to how they do take account of the application of technological protection measures when appointing the private-copying levies. One of the main fears was that users may end up paying twice while engaging in private copying; that would be through the payment of a levy on media and/or equipment and through a licensing fee to use a technologically protected work. For instance, an end user may pay a levy for his *iPod* and a licence to download *iTunes*. Recital 35 of Directive 2001/29/EC responds to these concerns by indicating that no compensation is required ‘*in cases where rightholders have already received payment in some other form, for instance as part of a licence fee.*’ In our view, this is a clear attempt to ensure that end users shall not pay twice for copyrighted content they download from legitimate online services in which copying is governed by licensing agreements between end users and service providers. The Commission appears to acknowledge this risk and urges Member States to prevent the possibility of double payments over the same work.<sup>783</sup> Yet, the Recommendation on fair compensation for private copying was not issued in autumn 2006, as expected; the final draft was removed from the agenda of the College of Commissioners’ meeting on 20 December 2006 after a request of the French Prime Minister to postpone proceedings and consult all relevant stakeholders.<sup>784</sup>

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<sup>782</sup> See <[http://ec.europa.eu/internal\\_market/copyright/levy\\_reform/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/levy_reform/index_en.htm)>, lastly accessible on 9.9.2009.

<sup>783</sup> European Commission, *Background Document “Fair Compensation for Acts of Private Copying”*, op. cit., pp. 14-15.

<sup>784</sup> Copyright Levies Reform Alliance, *Industry Condemns Commission Backdown on Reform: Reform of Copyright Levies abandoned following Opposition from France*, Press Release, 13.12.2006, available online at <[http://www.eicta.org/fileadmin/user\\_upload/document/document1166542590.pdf](http://www.eicta.org/fileadmin/user_upload/document/document1166542590.pdf)>, lastly accessible on 9.9.2009.

At the same time, Hugenholtz, Guibault and Van Geffen suggest that Article 5(2)(b) of Directive 2001/29/EC indicates that ‘fair compensation’ is not justified where technical measures prevent the ability to make private copies.<sup>785</sup> To these authors, the stipulation of this article implies that compensation would be wholly unjustified in cases where private copying has been made technically impossible, or at least practically infeasible. This is because Article 5(2)(b) indicates that fair compensation should take into account the application or non-application of technologically protected measures. We do not endorse this view. In our opinion, this article gives pre-eminence to the applicable levy schemes rather than to the application of technological protection measures, despite the fact that Directive 2001/29/EC rigorously protects such measures. If the technological approach in dealing with the impact of private copying was to prevail over the levy schemes, the European legislator would have chosen a different formulation. For instance, permissible private copying would be permitted on condition that the rightholders have not applied technological protection measures to their works and fair compensation would be restricted to analogue private copying. This is not the case however. In fact, Recital 38 of Directive 2001/29/EC suggests that ‘*due account should be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them*’, such as the issue of fair compensation.

What is more, the stipulation of the current Article 5(2)(b) is a clear departure from its counterpart included in the 1999 Amended Proposal preceding Directive 2001/29/EC. In this Proposal, the Commission conditioned private copying on the payment of fair compensation to the rightholders ‘*without prejudice to operational, reliable and effective technical means capable of protecting [their] interests*’.<sup>786</sup> To our understanding, this stipulation acknowledges that certain copyright levies may eventually be replaced by the application of technological measures.<sup>787</sup> No wonder why, in its 2002 Working Paper, the Commission estimates that the growing use of technological protection measures should eventually lead to a natural, market-driven phasing-out of levies.<sup>788</sup> Yet, the term ‘without prejudice’ used in the Amended Proposal was eventually replaced by the instruction that fair compensation should ‘take into account’ the application or non-application of technological protection measures, as incorporated in the current Article 5(2)(b). If fair compensation should just take into account the applicable

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<sup>785</sup> P.B. Hugenholtz, L. Guibault & S. Van Geffen, *The Future of Levies in a Digital Environment*, op. cit., at p. 37.

<sup>786</sup> Article 5(2)*bis* of the Amended Proposal for a European Parliament and Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society Directive, COM(99) 250 final, 1999, OJ C 180/6. Also see Recital 27 of the Amended Proposal.

<sup>787</sup> Questioning on how TPM and levies shall coexist: G. Davies, ‘A Technical Solution to Private Copying: The Case of Digital Audio Tape’, op. cit., at p. 158.

<sup>788</sup> Commission of the European Communities, ‘Digital Rights: Background, Systems, Assessment’, *Commission Staff Working Paper*, Brussels, 14.2.2002, SEC(2002) 197, at p. 15.

technological measures and should not avoid prejudicing them, this means that levies are the leading way of dealing with the impact of digital private copying! We consider, therefore, that the current formulation of this Article gives pre-eminence to the fair compensation as a method for compensating the rightholders, despite the fact that technological protection measures may also be applied by the rightholders.

We have seen that the application of technological protection measures may not be the adequate method to deal with the impact of digital private copying. Indeed, the concerns that copyright protective technologies that restrict or prevent access to, and use of works may endanger the exercise of the private copying limitation are plausible and valid. This is due to two prime policy reasons. The first is that the application of rights management information may encroach upon the informational privacy of end users. In this context, we have concluded that the justificatory basis of the private copying, namely the right to privacy, retains its validity in the digital technologically-protected environment. The second reason is the complex approach of Article 5(2)(b) which premises the permissibility of private copying on both the levitation of private copying and the application of technological protection measures, without, however, determining how these two regulatory approaches shall co-exist. Even though, to our understanding, the Directive gives pre-eminence to the existing levy schemes in the regulation of digital private copying, it rigorously protects the application of technological protection measures. Indeed, Article 6 of Directive 2001/29/EC provides protection against the circumvention of such measures to an extent that an ‘access right’ is also created! Controls over access, however, inhibit passive private use and copy-controls restrict or prohibit perfectly permissible dynamic private uses. Fearing that the application of technological protection shall restrict the scope of the copyright limitation, the European legislator set forth Article 6(4). This article is an attempt to ensure that the private copiers shall benefit from legitimate private copying through appropriate measures taken by the Member States. While the existence of this article *per se* implies that the European legislator favours the retainment of private copying vis-à-vis the application of technological protection measures,<sup>789</sup> nowhere in Directive 2001/29/EC is the private copying limitation declared enforceable against the application of such measures. This has led to divergent judicial rulings by national courts.

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<sup>789</sup> S. Rompré, ‘Le régime de la copie privée face à Internet’, op. cit., p. 8. Contra: T. Hoeren, *Information Management: Copyright on Electronic Services*, op. cit., p. 19.

In this confusion, many rightholders have started contracting directly with end users taking advantage of the application of technological protection measures. Indeed, the emergence of digital rights management systems has brought more individualised contracts; as a result, some have equated the application of technological protection measures as the imposition of unilateral contractual terms and conditions.<sup>790</sup> Yet, through online contracts rightholders may exclude the ability of end users to make private copies. Is the contractual exclusion of copyright exceptions and limitations valid and lawful? We provide an answer to this question to the section below.

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<sup>790</sup> M.J. Radin, 'Regulation by Contract, Regulation by Machine', 160 *J. Inst. Theoretical Econ.*, 2004, 1, 12.

## Section 2: Contractual restrictions on the ability to make private copies

The emergence of digital rights management has enabled the conclusion of more individualised contracts, making it possible to offer more specific content uses. Nonetheless, online contracts are feared to practically exclude legitimate uses of content by consumers. Indeed, as Dreier rightly observes, the rightholders are in a position to apply contractual clauses that restrict activities which are statutorily exempted from infringement and which exceed the boundaries of their exclusive rights.<sup>791</sup> That would be, for instance, the private copying limitation of Article 5(2)(b) of Directive 2001/29/EC. Yet, this Directive does not afford an imperative status to any copyright limitation, including the private copying limitation. That could have been made, for example, through a Recital indicating that any contractual restriction of copyright limitations shall be null and void. No such indication can be found in Directive 2001/29/EC. Rather, Recital 45 of this Directive indicates that the optional copyright limitations enumerated under Article 5<sup>792</sup> ‘*should not prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law.*’ While this clearly suggests that contractual relationships prevail over copyright limitations, Article 6(4)(4) of the Directive confirms this suggestion. Under this article, the measures that Member States have to apply to ensure the benefit of copyright limitations under Articles 6(4)(1) and 6(4)(2) ‘*shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.*’<sup>793</sup> To our understanding, this article affirms the prevalence of online contracts against the application of copyright limitations which are not enforceable against their possible contractual restriction. We consider that this prejudices the legitimate exercise of copyright limitations, including the private copying limitation. As a result, the fact that these limitations do not have an imperative status against their contractual overridability makes them vulnerable vis-à-vis their contractual restriction.

Yet, judicial practice in Europe affirms the imperative status of copyright limitations against contractual clauses. One should keep in mind, however, that this judicial trend reflects contractual practices of the offline environment. By this, we mean that the copyright

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<sup>791</sup> T. Dreier, ‘Contracting Out of Copyright in the Information Society: The Impact on Freedom of Exception’, in J. Griffiths & U. Suthersanen (eds.), *Copyright and Free Speech: Comparative and International Analyses*, Oxford University Press, Oxford, 2005, pp. 385-400, at p. 389.

<sup>792</sup> The mandatory exemption on temporary acts of reproduction of Article 5(1) of Directive 2001/29/EC is not included.

<sup>793</sup> For a comment on this Article see A.M. Casellati, ‘The Evolution of Article 6.4 of the European Information Society Directive’, 24 *Colum.-V.L.A. J.L. & Arts*, 2001, 369, at 386-390; J. De Werra, ‘The Legal System of Technological Protection Measures under the WIPO Treaties, the Digital Millennium Copyright Act, the European Union Directives and other National Laws’, 189 *Revue Internationale du Droit d’auteur*, 2001, at p. 30.

limitations have been judicially affirmed as prevalent over contractual notices attached to copyright materials in tangible form, either analogue or digital. In this respect, we identify a distinctive line between online contracts regulating the dissemination of content and contractual clauses applicable to the offline use of works. Since Directive 2001/29/EC does not declare copyright limitations imperative against their contractual restriction, as does the European legislator in other contexts, such as copyright limitations in the field of computer programs and databases, the exercise of copyright limitations is highly uncertain in the online environment which is increasingly being governed by contract.

So, if contractual restrictions of the private copying limitation are enforceable, does this also mean that they are valid, too? To answer this question we shall revert to the relevant provisions incorporated in other EU Directives which examine the status of contractual clauses from a consumer perspective. In our view, this examination is necessary since ‘users’ and ‘rightholders’ in the field of copyright protection qualify as ‘consumers’ and ‘sellers/distributors’ in different context of law. By this, we mean that even though the private copying limitation may not be set as a user right in terms of copyright protection, end users may have consumer rights against the contractual restriction of their statutorily prescribed ability to make private copies. These are the issues that we shall examine below.

### **1. The uncertain status of the private copying limitation of Article 5(2)(b) of Directive 2001/29/EC against contractual overridability**

Due to the emergence and the development of technological protection measures, rightholders have started contracting directly with end users. In principle, rightholders and users are free to negotiate the terms of a licensing agreement so as to best suit their respective needs and to ensure the most efficient exploitation of copyrighted content. In this respect, users are free to decide whether they wish to benefit from a particular copyright limitation or to give up their interest in exercising it. Yet, the impossibility of negotiating different licensing terms with every potential end user in mass-market transactions has led to the development of unilateral contracting practices due to the high costs involved in individual licensing. Such practice is, for instance, the attachment of ‘notices’ or ‘licences’ inside the cover of books or on the label of sound recordings. On the internet still, many websites contain standard terms and conditions of use that involve the licensing of rights on a per-transaction, per-use or, other basis, and in some cases they might require users to waive ‘rights’ that they otherwise enjoy under copyright. For instance, they may contain clauses that restrict or inhibit the ability of end users to make private copies. One can, therefore, question whether these clauses are

valid and legally binding to end users and whether copyright limitations prevail over contractual restrictions.

As Dusollier, Poulet and Buydens rightly acknowledge, the relationship between copyright limitations and their contractual overridability is not yet set and represents a rather thorny legal issue.<sup>794</sup> Directive 2001/29/EC neither clarifies the relationship between copyright exceptions and contract nor does it determine whether the private copying limitation of Article 5(2)(b) has a mandatory character, or not. Equally silent are most national legislations of Member States. This could prove problematic vis-à-vis the increasing popularity of online contracts which may include licensing terms that set aside the statutorily permitted copyright activities. The only national exceptions are Belgium and Portugal. In particular, the Belgian copyright act recognises the imperativeness of all copyright exceptions and limitations, including the private copying limitation!<sup>795</sup> Similarly, in Portugal any contractual provision that eliminates or impedes the normal exercise of copyright limitations is null and void.<sup>796</sup>

We consider that the lack of a clarification in Directive 2001/29/EC on the issue of the contractual overridability of the private copying limitation is problematic due to the amplification of online contractual practices. Nonetheless, two earlier Directives dealing with ‘digital’ issues have shed some light on the issue.<sup>797</sup>

### 1.1. Imperative copyright exceptions for computer programs and databases

Most computer users are quite familiar with the so-called ‘shrink-wrap’ licences that are attached to software. These licences, which have become the legal licensing paradigm of the software industry, purport to create legally binding agreements between the rightholders and the user. There might be cases, however, where these licences contain clauses restricting the ability of users to legitimately exercise activities falling under the scope of copyright limitations. Directive 91/250/EC on the legal protection of computer programs responds to these concerns by explicitly declaring the mandatory nature of some copyright exceptions.<sup>798</sup> Indeed, Article 9(1) of that Directive stipulates that ‘*any contractual provisions contrary [...] to the*

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<sup>794</sup> S. Dusollier, Y. Poulet & M. Buydens, ‘Copyright and Access to Information in the Digital Environment’, *op. cit.*, at 12.

<sup>795</sup> See Article 23bis of Belgian Copyright Act of June 30, 1994, inserted by an Act of August 31, 1998 implementing the Database Directive into national law. The mandatory status of Belgian copyright limitations was maintained in the Act of May 22, 2005 (M.B., 27 May 2005, 24997). See M.-C. Janssens, ‘Implementation of the 2001 Copyright Directive in Belgium’, 37 *IIC*, 2006, p. 50.

<sup>796</sup> L. Guibault *et al.*, ‘Study on the Implementation and Effect in Member States’ Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society’, *Report to the European Commission*, 2007, pp. 160-161.

<sup>797</sup> *Ibid.*, p. 160 *et seq.*

<sup>798</sup> Council Directive 91/250/EC of 14 May 1991 on the legal protection of computer programs, *OJ* No. L 122/42.

*exceptions provided for in Article 5(2) [back-up copying] and (3) [observing, studying or testing the functioning of a computer program] shall be null and void.* Explanatory in this respect is Recital 26 of this Directive; it reads that the *'any contractual provisions contrary [...] to the exemptions provided for in Article 5(2) and (3) should be null and void.'* To our understanding, this Recital explicitly declares the imperative status of certain copyright limitations against their contractual restriction. This practically means acts of back-up copying and observation of the functioning of computer programs cannot be contractually overridden and any restrictive contractual clauses may be nullified.

A similar clarification on the imperative status of copyright limitations against their contractual restriction is provided in Directive 96/9/EC on the legal protection of databases.<sup>799</sup> Article 15 of this Directive mandates that *'any contractual provision contrary to Articles 6(1) [access to database for the normal use of the lawful user] and 8 [extraction and reutilisation of insubstantial parts of a database protected under the sui generis right] shall be null and void.'* Directive 96/9/EC recognises the imperative character of certain exceptions to rights in databases and thereof declares their mandatory effect. As a result, any contractual restrictions of these exceptions are not legally binding and can be nullified.

In our opinion, by being declared imperative, the exceptions of both aforementioned Directives are given some substantive meaning; they do not merely possess a defensive character but they further form the basis of full-fledged end-user rights! We consider that it would make no sense to provide end users with legal freedoms which can be contractually waived. Despite the desire of the European legislator to guarantee the mandatory character of statutory exceptions as regards computer programs and databases, the threshold of 'imperativeness' varies amongst Member States. For instance, the French law<sup>800</sup> imposes stricter provisions than Directive 96/9/EC on databases and the Dutch Copyright Act raises the degree of imperativeness of exceptions related to computer programs.<sup>801</sup>

Yet, while some limitations in the field of computer programs and databases are mandatory and can be seen as user rights this is not the case with the private copying limitation of Article 5(2)(b) of Directive 2001/29/EC. This practically means that a contractual restriction of the ability to make private copies prevails despite the fact that an end user wishes to make legitimate exercise of the private copying limitation.

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<sup>799</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, *OJ* No. L 77/20 of 27 March 1996.

<sup>800</sup> L. 122-6 & L. 122-6-1 of the Code de la propriété intellectuelle (partie législative), Première partie - La propriété littéraire et artistique.

<sup>801</sup> Article 45j of the Copyright Act of 1912 of the Netherlands as amended on July 6, 2004 and January 20, 2006.

## 1.2. The private copying limitation

Even though online contracts of copyrighted content are becoming overwhelmingly popular, Directive 2001/29/EC has not regulated the threshold of imperativeness of copyright limitations. Recital 45 indicates that *'the exceptions and limitations referred to in Article 5(2), (3) and (4) should not prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law.'* In our opinion, this Recital indicates that contractual relationships prevail over copyright limitations.<sup>802</sup> Affirmative in this respect is Article 6(4)(4) of Directive 2001/29/EC. Under this article, the measures that Member States have to apply to ensure the legitimate exercise of copyright limitations by virtue of Articles 6(4)(1) and 6(4)(2) *'shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.'*<sup>803</sup> This means that where interactive on-demand services are governed by contract, Member States are not obliged to provide the beneficiaries of limitations with the means to benefit from them. In these terms, the conclusion of licensing agreements in the context of online services prevails over the exercise of copyright limitations, including the private copying limitation of Article 5(2)(b). Practically, this means that end users downloading works online under a licensing agreement, such as *iTunes*, are legally bound by this licence and ought to abide by its terms. Amongst these terms, there might be a clause prohibiting acts of private copying. Since Member States are not given authority to intervene when online licences contain clauses restricting the scope of copyright limitations, the legitimate exercise of these limitations is unprecedentedly locked-up.<sup>804</sup> Netanel foresees that if contractual licenses are enforceable, the copyright industry's ability to side-step copyright limitations shall increase dramatically due to the overwhelming popularity of online licensing.<sup>805</sup> It is probably on these grounds that Hugenholtz and Fisher envisage that in the near future much of the protection afforded to the rightholders shall emanate from contract law.<sup>806</sup>

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<sup>802</sup> To Dusollier this is a confirmation rather than an indication. See S. Dusollier, 'Exceptions and Technological Measures in the European Copyright Directive of 2001: An Empty Promise', 34 *IIC*, 2003, 62-75, at 72.

<sup>803</sup> For a comment on this Article see A.M. Casellati, 'The Evolution of Article 6.4 of the European Information Society Directive', 24 *Colum.-V.L.A. J.L. & Arts*, 2001, 369, at 386-390; J. De Werra, 'The Legal System of Technological Protection Measures under the WIPO Treaties, the Digital Millennium Copyright Act, the European Union Directives and other National Laws', 189 *Revue Internationale du Droit d'auteur*, 2001, at p. 30.

<sup>804</sup> See S. Dusollier, 'Exceptions and Technological Measures in the European Copyright Directive of 2001: An Empty Promise', *op. cit.*, at 74.

<sup>805</sup> N.W. Netanel, *Copyright's Paradox*, Oxford University Press, Oxford, 2008, p. 70.

<sup>806</sup> P.B. Hugenholtz, 'Fierce Creatures – Copyright Exemptions: Towards Extinction?', *op. cit.*, p. 14; W.W. Fisher, 'Property and Contract on the Internet', *Chicago-Kent Law Review*, 73, 1998, 1203; T. Bell, 'Fair Use v. Fared Use', *op. cit.*, p. 101.

We consider that if the decision of rightholders to disseminate works under an online contract prevails over the exercise of copyright limitations, the scope of these limitations is severely restricted. In this case, copyright limitations retain a practical significance only in the offline environment, both analogue and digital, and not on the internet where online licences on a mass scale are likely to take place. In our view, there is a distinctive line between online uses of copyrighted content and offline uses. In these terms, online contracts prevail over copyright limitations while the issue of offline uses remains unregulated in the context of contractual derogations from statutory limitations. Some commentators have argued that this represents a shift in copyright law to a system of private ordering that is enabled both by contractual agreements and by the application of technological protection measures.<sup>807</sup> We acknowledge that the internet has transformed the way of using copyrighted content in terms that works disseminated online may be accompanied by licensing terms, a practice which is not common as regards the distribution of tangible copies of works. This takes us back to the distinction between the tangible copy of a work and its contents thereof, a distinction that first made its appearance in the networked environment. As we saw earlier in this thesis the separation of the intellectual object from its physical embodiment,<sup>808</sup> has conceptually transformed the definition of what constitutes a copy. The legislator appears to consent to this reality and affords a differential treatment to the dissemination of tangible copies of works and to their contents thereof. While copyright limitations are not enforceable through adequate national measures when the permissible uses of copyrighted content are contractually restrained in online services, at the same time, the relationship of contractual clauses and copyright limitations involving the use of tangible copies is not set. In this light, it would not be premature to conclude that the dissemination of contents of works under licensing agreements prevails over copyright limitations, such as the private copying limitation, whereas the contractual restriction of uses of tangible copies remains unsettled.

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<sup>807</sup> Proponents of private ordering as a solution to the market failure that copyright alone cannot resolve in the occurrence of private copying: T.I.T. Hardy, 'Property (and Copyright) in Cyberspace', *U.Chi.Legal F.*, 1996, 217; R. Merges, 'Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations', 84 *California L. Rev.*, 1996, p. 1293; K.W. Dam, 'Self-Help in the Digital Jungle', in R. C. Dreyfuss, D. L. Zimmerman & H. First (eds.), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society*, Oxford University Press, Oxford, 2001, pp. 103-122.

Against private ordering in copyright: Y. Benkler, 'Taking Stock: The Law and Economics of Intellectual Property Rights: An Unhurried View of Private Ordering in Information Transactions', 53 *Vand.L.Rev.*, 2000, 2063; N. W. Netanel, 'Copyright and a Democratic Civil Society', 105 *Yale L. J.*, 1996, 283; J. E. Cohen, 'Lochner in Cyberspace: The New Economic Orthodoxy of 'Rights Management'', *op. cit.*, pp. 462-563; W.J. Gordon, 'An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory', 41 *Stanford L. Rev.*, 1989, 1343.

<sup>808</sup> At pp. 25-26.

## The imperativeness of the private copying limitation as regards tangible copies

Indicative of the controversy as to the imperativeness of copyright limitations against their contractual restriction with respect to physical copies of works is national case law. As we indicated earlier, with the exception of the Belgian and Portuguese statutes which declare the mandatory character of copyright limitations, all other national laws remain silent on this issue. This has resulted to divergent national rulings.<sup>809</sup> For instance, contractual clauses restricting private use have been deemed void in Germany. In *Vermietung von Tonträgern*, a record producer sued a store for renting second-hand sound recordings in breach of a copyright notice appearing on each record. The District Court of Munich held that no express contractual stipulation could prevent the rental of recordings that had been made available to the public under the rightholder's consent.<sup>810</sup> This decision was affirmed both by the Supreme Court<sup>811</sup> and by the Constitutional Court.<sup>812</sup> The record producer's argument that the rental of recordings eventually lead to home copying and, thereby, affected his economic interests was rejected by the Court. This rejection was based on the argument that private copying could not legally or practically be prevented as soon as the work had been brought to the market via an act of distribution. At the same time, considerations related to the privacy of end users and to the protection of the domestic sphere were primary to the reasoning of the court; monitoring or preventing private uses would not be feasible unless the user's private sphere was encroached.<sup>813</sup> In this light, the contractual restriction of the ability to use copyrighted materials in private was not valid.

In the *Vermande* case,<sup>814</sup> a publisher sued a student for posting parts of a CD-ROM containing Dutch legislation on his website. To the plaintiff, the student had violated a notice printed on the CD-ROMs packaging that forbade any unauthorised downloading or any other kind of copying of the contents of that CD-ROM. The Court held that placing such notice may be a common practice but, at the same time, the restrictions included in such notices are usually

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<sup>809</sup> For instance, in the 1979 *SNEPA* case, the Court overruled the validity of labels on phonogram records that imposed restrictions on how these records should be used. See *Syndicat National de l'Édition Phonographique et Audiovisuelle (SNEPA) v. Société Nationale de Radiodiffusion Radio France*, Court of Appeals of Paris, decision of 2 March 1979, in *IIC* 1981/04, 587. In 1985, in *Stemra v. Free Record Shop*, a Dutch Court found a notice placed on records that forbade consumers from further transferring those records to others in compliance with the exhaustion doctrine. *Stichting Stemra v. Free Record Shop B.V.*, HR 20 November 1987, *NJ* 1988, p. 280, *AA* 1989/38, p. 941-948.

<sup>810</sup> *Vermietung von Tonträgern*, LG München, decision of 9 June 1983, in *GRUR* 12/1983, p. 763.

<sup>811</sup> *Shallplattenvermietung*, BGH, decision of 6 March 1986, in *GRUR* 1986, p. 736.

<sup>812</sup> *Vermietungsvorbehalt*, BVerfGE, decision of 30 October 1989, 1 BvR 775/86, in *GRUR* 1990, p. 183.

<sup>813</sup> *Gema v. Grundig* 1 ZR 8/54, 17 BGHZ 266, [1955] *GRUR* 492; *Personalweise*, BGH, decision of 29 May 1964, *Aktz.*: Ib ZR 4/63, in *GRUR* 1965/02, p. 104.

<sup>814</sup> *Vermande v. Bojkowski*, District Court of the Hague, decision of March 20, 1998, in *Informatierecht/AMI*, 1998, pp. 65-67.

broader than what is legally prescribed.<sup>815</sup> To the Court, therefore, end users should interpret the term ‘unauthorised’ as ‘legally unauthorised’, *i.e.* conceive the notice as a reminder of legal consequences, rather than a contractual derogation from the law. Yet, in our opinion, this case is not really useful in ascertaining whether contractual clauses prevail over copyright limitations since the clause in question was not copyright-restrictive but rather a reminder of copyright law. As such, the only safe conclusion we can reach at this stage is that the contractual clause in question was held valid since it was not in contradiction with copyright law.

The controversy as to the imperativeness of copyright limitations against their contractual restriction is, in our opinion, an issue that ought to be determined at European level, for instance, through a new Recital in Directive 2001/29/EC. We cannot defend the legitimacy of the contractual exclusion of statutorily permitted activities, such as private copying through unilateral contractual terms. Certainly, the freedom of contract dictates that the parties should be free to conclude any agreement relating to the use of copyrighted material that they perceive to be in their best interest.<sup>816</sup> Standard form contracts, however, contain clauses which end users are not in a position to negotiate; they either accept the contract as is, and abide to its terms, or they do not accept it at all.

Even though copyright limitations, such as the private copying limitation, do not create rights to the benefit of end users, they still are pieces of law in the shape of legal derogations from exclusive rights; in these terms, they are not, and should not be, at the disposal of the rightholders without prior negotiation. As Dusollier rightly argues, the exclusive rights provided under copyright stop where copyright limitations start, the private copying limitation of Article 5(2)(b) included.<sup>817</sup> We could not agree more. Copyright limitations demarcate an area upon which the rightholders cannot touch; it is kept beyond their power of their control. This is affirmed by the stipulation used in many Member States when laying down copyright limitations: ‘*the author is not entitled to prohibit*’ the activities statutorily exempted from infringement! For instance, in France, the imperative character of the private copying limitation can be deduced from the very wording of Article L 122-5 of Intellectual Property Code which stipulates that the author ‘cannot prohibit’ the acts stated in it.<sup>818</sup> In this light, the

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<sup>815</sup> *Ibid.*, at p. 67.

<sup>816</sup> L. Guibault, *Copyright Limitations and Contracts*, *op. cit.*, p. 197.

<sup>817</sup> S. Dusollier, ‘Exceptions and Technological Measures in the European Copyright Directive of 2001: An Empty Promise’, *op. cit.*, at 73.

<sup>818</sup> See L 122-5, Code de la propriété intellectuelle, Première partie.

rightholders are not entitled to interfere with the legitimate exercise of these limitations; they do not have a power to prohibit or thereof restrict these activities.

This is particularly important as regards copyright limitations pursuing public-policy objectives.<sup>819</sup> We consider that these limitations should explicitly be given an imperative status. Vinje and Dreier provide support to this argument by holding that exceptions safeguarding fundamental freedoms, such as the freedom of speech and expression, should be declared mandatory.<sup>820</sup> Janssens goes further still by supporting that uses ensuring public security, education and science, or necessary for the preservation of historical and cultural heritage, should be imperative against contractual restriction.<sup>821</sup> We have already seen earlier in this thesis that the justificatory basis of the private copying limitation is the fundamental right to privacy in terms that end users should be able to consume works in the privacy of their home and with no invasions in their informational privacy.<sup>822</sup> While this is no public-policy objective, it certainly reflects a fundamental freedom of end users, namely their right to privacy. The privacy rationale underlying acts of private copying does not lose its relevance in the digital environment where invasions to the information privacy of end users may be made, either by rights management information monitoring online uses and users, or by orders to disclose personal data of alleged infringers.<sup>823</sup> As a result, we feel that the private copying limitation should be set as a user right, enforceable against its contractual exclusion. We suggest that an extra Recital could be included in Directive 2001/29/EC indicating that contractual clauses restricting the legitimate exercise of copyright limitations shall be null and void.

We have seen that Directive 2001/29/EC does not declare any copyright limitation imperative against their possible contractual restriction. At the same time, through its Article 6(4)(4) it indicates that contractual licences made in the context of interactive on-demand services prevail over the legitimate exercise of copyright limitations, including the private copying limitation. We consider that this restrictive position as to the exercise of limitations, however, is limited to the licensing of online content, rather to the contractual dissemination of works in tangible form. This creates a two-tiers approach which can generate legal controversy as to

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<sup>819</sup> See earlier at p. 191 *et seq.*

<sup>820</sup> T. Vinje, 'Copyright Imperilled', *op. cit.*, pp. 192-207, at p. 196; T. Dreier, 'Regulating Competition by Way of Copyright Limitations and Exceptions', in P. Torremans (ed.), *Copyright Law: A Handbook of Contemporary Research*, Series Research Handbooks in Intellectual Property, Edward Elgar, 2007, 232, at p. 235.

<sup>821</sup> M.C. Janssens, 'The Issue of Exceptions: Reshaping the Keys to the Gates in the Territory of Literary, Musical and Artistic Creation', in E. Declaye (ed.), *Research Handbook on the Future of EU Copyright*, Research Handbooks in Intellectual Property, Edward Elgar Publishing Ltd, 2009, pp. 317-348, at p. 343.

<sup>822</sup> See earlier at p. 39 *et seq.*

<sup>823</sup> At pp. 39 *et seq.*, 168 *et seq.*, 200 *et seq.*

which contractual restrictions are permitted and which are not. With the exception of Belgium and Portugal, all other Member States have refrained from declaring the imperativeness of copyright exceptions. National case-law on this issue suggests that the private copying limitation may prevail over its contractual restriction as regards acts of copying works in tangible form, either analogue or digital ones. Yet, we are of the view that the private copying limitation should be declared mandatory at European level, perhaps through an additional Recital, due to the fact that it has a strong justificatory basis on the fundamental right to privacy. This is because this right, as we have seen earlier,<sup>824</sup> may be affected by user-specific licences the conclusion of which requires the collection of the personal data of end users or through orders to ISPs to disclose personal data of alleged infringers. In these terms, the privacy rationale underlying the private copying limitation does not lose its relevance in the digital environment.

Since the contractual delimitation of the private copying limitation may be possible under the copyright maximalistic lines of Article 6(4)(4), however, it is essential to guarantee that it respects the rules of fair practice in online contracts and of EU contract law.

## **2. Determining the validity of contractual restrictions to private copying under EU contract and consumer law**

Since the status of the private copying limitation against its contractual overridability is not settled we shall revert for some answers to other EU Directives to see whether these contracts are valid and binding to end users. Article 9 of Directive 2001/29/EC mandates that the provisions of this Directive are without prejudice to ‘the law of contract’. Yet, contract law in Europe has only partially been harmonised. Indeed, there are many EU Directives laying down provisions on the regulation of contractual agreements, such as Directive 1999/44/EC on the sale of consumer goods,<sup>825</sup> Directive 2001/31/EC on e-commerce,<sup>826</sup> Directive 97/7/EC on the protection of consumers in respect of distance contracts,<sup>827</sup> Directive 93/13/EEC on unfair terms in consumer contracts,<sup>828</sup> and Directive 2005/29/EC on unfair

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<sup>824</sup> At p. 200 *et seq.*

<sup>825</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7.7.1999, p. 12–16.

<sup>826</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’), OJ L 178, 17.7.2000, p. 1–16.

<sup>827</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 04/06/1997 P. 0019 – 0027.

<sup>828</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29–34.

commercial practices.<sup>829</sup> We will go through the relevant provisions of these Directives to ascertain whether contractual restrictions of the private copying limitation are legitimate and valid and, if so, under which circumstances.

## 2.1. The contractual restriction of private copying as an unfair term

The contractual restriction of acts of private copying may constitute an unfair licensing term and be therefore nullified under certain conditions. Practically, if such contractual restriction is deemed unfair it shall not be binding on the consumer. We shall revert to Directive 93/13/EEC on Unfair Terms in Consumer Products<sup>830</sup> to get some answers. This Directive purports to maintain fairness in the commercial dealings between suppliers and consumers, namely a balance of the parties' rights and obligations that arise under a contract.<sup>831</sup> This balancing act is in essence one that equilibrates the reasonable expectations of consumers and the legitimate interests of the rightholders, as affirmed by many scholars.<sup>832</sup> Under Article 3(1) of this Directive, '[a] contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'

A list of unfair terms is enumerated under the Annex of the Directive. Nonetheless, as Guibault rightly observes, this Annex does not provide guidance as to whether contractual restrictions of private copying are unfair.<sup>833</sup> Yet, paragraph 1(b) of this Annex suggests that an unfair term is one '*inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier*'. Nonetheless, we have already concluded earlier in this thesis<sup>834</sup> that the private copying limitation does not confer a subjective right to the benefit of end users. Therefore,

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<sup>829</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149, 11.6.2005, p. 22–39.

<sup>830</sup> Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, Official Journal L 095, 21/04/1993, p. 0029 – 0034. For an analysis of this Directive see A. Hatzis, 'An Offer You Cannot Negotiate: Some Thoughts on the Economics of Standard Form Consumer Contracts', in H. Collins (ed.) *Standard Contract Terms in Europe: A Basis for and Challenge to European Contract Law*, Kluwer Law International, 2008, pp. 43-56.

<sup>831</sup> Article 3(1) of the Unfair Terms Directive, Council Directive 93/13/EEC.

<sup>832</sup> L. Guibault, *Copyright Limitations and Contracts*, op. cit., pp. 256 ff and 263 ff; N. Helberger & P.B. Hugenholtz, 'No Place like Home for Making a Copy: Private Copying in European Copyright Law', *Berkeley Tech. L. J.*, Vol. 22, 2007, pp. 1061-1098, at. 1080; M. Schaub, 'A breakdown of consumer protection law in the light of digital products', 5 *INDICARE Monitor*, 29 July 2005, available at <<http://www.indicare.org>>; C. Girot, *User Protection in IT Contracts. A Comparative Study on the Protection of the User against Defective Performance in Information Technology*, Doctoral Thesis, Catholic University of Brabant, Tilburg, 2001, pp. 62-66.

<sup>833</sup> L. Guibault, *ibid.*, p. 254.

<sup>834</sup> At pp. 39 *et seq.*, 168 *et seq.*

the contractual restriction of private copying cannot be considered as an unfair term under paragraph 1(b) of the Annex.

There is, however, yet another paragraph in the Annex which may be relevant in this respect. This is paragraph 1(k) of the Annex, under which unfair is a term *'enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided.'* Grøndal suggests that such terms and conditions could include the number of copies that may be made.<sup>835</sup> Yet, Directive 2001/29/EC gives enough room to rebut this argument. Article 6(4)(2) of this Directive, which we examined earlier,<sup>836</sup> indicates that when Member States adopt appropriate measures to ensure that end users benefit from the private copying limitation they need not prevent the *'rightsholders from adopting adequate measures regarding the number of reproductions.'* In these terms, restrictions as to the number of the copies made are not unfair.

We conclude from this analysis that there is no sufficient evidence to hold that terms restricting the ability to make private copies in standard-form contracts shall be considered to be unfair within the meaning and for the purposes of Directive 93/13/EEC. Yet, end users have grown accustomed to make private copies of copyrighted content they legally purchase in terms that one may argue that they do have a reasonable expectation to make such copies. If this argument is valid any contractual constraint that is not compliant with this reasonable expectation may be null and void. We examine this issue below.

## **2.2. Contractual conformity with consumer's reasonable expectation to make private copies**

To be valid, contractual restrictions on the ability of end users to make private copies should be compliant to the reasonable expectation of end users to make private copies. This is affirmed by Directive 1999/44/EC on the Sale of Consumer Goods<sup>837</sup> which introduces the rule of reasonable expectation in the quality of products; this reasonable expectation should not be restricted or abrogated by contract. Indeed, Article 7(1) of this Directive reads that *'[a]ny contractual terms or agreements concluded with the seller before the lack of conformity is brought to the*

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<sup>835</sup> L. Grøndal, 'DRM and Contract Terms', 12 *Indicare Monitor*, 27 January 2006, available online at <<http://www.indicare.org>>.

<sup>836</sup> At p. 193 *et seq.*

<sup>837</sup> Articles 3(1) and 2(2)(d) of the Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *OJ L 171*, 7.7.1999, p. 12–16.

Article 3(1): *'The seller shall be liable to the consumer for any lack of conformity which exists at the time the goods were delivered.'*  
Article 2(2)(d) reads that *'Consumer goods are presumed to be in conformity with the contract if they show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.'*

*seller's attention which directly or indirectly waive or restrict the rights resulting from this Directive shall, as provided for by national law, not be binding on the consumer.* In its 2006 Green Paper, the Commission observed that the provisions on product conformity apply only to goods, *i.e.* commodities and do not cover services.<sup>838</sup> This means that they cannot apply to contractual licenses online but can apply to contractual restrictions on private copying of works in tangible form, either analogue or digital.

To determine whether consumers have a legitimate expectation to make private copies we have consulted the relevant market surveys on the issue. Recent surveys on European consumer trends illustrate that users have associated private copying with the use of digital works; in this context, private copying involves acts of copying for friends and family, back-up copying and time-shifting.<sup>839</sup> Based on the results of these surveys, we observe that end users have grown accustomed to acts of private copying in terms that they reasonably expect to be able to make such copies when purchasing copyrighted content. As we saw earlier in this thesis too, the application of levy systems could give consumers a reasonable impression that private copying is a user 'right'.<sup>840</sup> What is more, as we have concluded earlier, users have a legitimate interest or, otherwise put, an objective right to private copy.<sup>841</sup> Even though users do not have an affirmative right to make copies, this legitimate interest that arises from the private copying limitation may form a ground for a reasonable expectation to make copies.

As a result, where the exercise of the private copying limitation is contractually restricted, users are provided with a series of remedies. Affirmative in this respect is Directive 1999/44/EC under which where a product does not meet up with reasonable consumer expectation, consumers are provided with a series of remedies. For instance, the product may

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<sup>838</sup> European Commission, *Green Paper on the Review of the Consumer Acquis*, COM(2006) 744 final, Brussels, 8 February 2007, p. 24.

<sup>839</sup> N. Dufft *et al.*, *Digital Video Usage and DRM, Results from a European Consumer Survey*, INDICARE, Berlin, 23 February 2006, available online at <<http://indicare.org>>, pp. 26-28; N. Dufft *et al.*, *Digital Video Usage and DRM, Results from a European Consumer Survey*, INDICARE, Berlin, 24 May 2005, available online at <<http://indicare.org>>, pp. 26-28.

<sup>840</sup> *Christophe R.*, Tribunal de Grande Instance [T.G.I.] Paris, 5<sup>th</sup> ch., 1<sup>st</sup> sec., January 10, 2006, available at <<http://www.legalis.net>>. In this case the court ruled that private copying does not compete with the legitimate interests of the rightholders since the latter are being remunerated through levies. A different view as expressed in *Stéphane P.*, Tribunal de Grande Instance [T.G.I.] Paris, 3<sup>rd</sup> ch., April 30, 2004, available at <<http://www.legalis.net>> and in Tribunal de Première Instance [T.P.I.] Brussels, May 25, 2004, *Rôle de Réfères* 2004, 46. In these cases it was held that levies could not indicate the existence of a statutory 'right to private copying'.

<sup>841</sup> See page 36 *et seq.*; L. Guibault, *Copyright Limitations and Contracts*, op. cit, p. 95. Also see C. Geiger, 'The Private Copy Exception: An Area of Freedom (Temporarily) Preserved in the Digital Environment', op. cit., at 78. For a distinction between rights and interests see A. Gervais, 'Quelques réflexions à propos de la distinction des "droits" et "interest"', *Mélanges en l'honneur de Paul Roubier*, Dalloz, 1961, 243.

be restored in conformity with the contract free of charge, or it may also be replaced.<sup>842</sup> Where defective quality is attributed to the application of digital rights management which impede the production of private copies, consumers may seek as a remedy the removal of the technical protection, or the replacement of the product with a new one without copy control.<sup>843</sup> In cases where this option imposes a disproportionately high cost to the seller, price deductions, or even the return of the product against the purchase price, are even possible.<sup>844</sup>

We conclude from the aforementioned analysis that where contractual restrictions inhibit the ability of end users to make private copies, this may not be in conformity with Directive 1999/44/EC. This is because end users have a reasonable expectation to make private copies which cannot be contractually prohibited. Yet, the rightholders may avoid liability if they provide end users with an explicit notice that the copy they purchase cannot be further reproduced. Where such notice is attached to a product, such as a CD or DVD, end users cannot substantiate a claim that product expectation has not been met.<sup>845</sup> This is the issue we examine below.

### **2.3. The obligation to inform consumers over restrictions on the ability to make private copies**

There is yet another issue that we need to examine as to the legitimacy of contractual restrictions of the ability of end users to make private copies. This is the obligation of the rightholders to inform end users over such restriction. This has become particularly eminent in EU law in the aftermath of the ECJ ruling in *GB-INNO vs Federation du Commerce*

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<sup>842</sup> Article 3(2) of Directive 1999/44/EC: *'In the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement [...] or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods.'* Also see Recital 10 of Directive 1999/44/EC: *'in the case of non-conformity of the goods with the contract, consumers should be entitled to have the goods restored to conformity with the contract free of charge, choosing either repair or replacement, or, failing this, to have the price reduced or the contract rescinded.'*

<sup>843</sup> Article 3(3)(a) of Directive 1999/44/EC: *'In the first place, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate.'* Also see Recital 11 of Directive 1999/44/EC: *'the consumer in the first place may require the seller to repair the goods or to replace them unless those remedies are impossible or disproportionate.'*

<sup>844</sup> Article 3(3)(c) of Directive 1999/44/EC: *'Any repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required the goods.'* Also see Recital 12 of Directive 1999/44/EC suggests that *'in cases of a lack of conformity, the seller may always offer the consumer, by way of settlement, any available remedy.'*

<sup>845</sup> Article 2(3) of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *OJ L 171*, 7.7.1999, p. 12–16. Also see P. Rott, 'Die Privatkopie aus der Perspektive des Verbraucherechts', in R. Hilty & A. Peukert (eds.), *Interessenausgleich Im Urheberrecht (Balance of Interests in Copyright Law)*, Nomos, Baden Baden, 2004, p. 267, at 283.

*Luxembourgise*, where the provision of product information to consumers was held to be one of the principal requirements under community law in consumer protection.<sup>846</sup>

The obligation of suppliers to provide consumers with information is imposed both under Directive 97/7/EC on distance contracts<sup>847</sup> and Directive 2000/31/EC on e-commerce.<sup>848</sup> Both these Directives indicate that the obligation to provide information extends to both products and services. Practically, means that end users of copyrighted materials should be notified over a possible restriction of their ability to make private copies both in online and offline contracts. The provisions of the Directive 2000/31/EC are applicable to a variety of electronic services. These services could include music download stores, electronic newspapers and video-on-demand providers as well as online retail stores of copyright material, such as books, music and software. Directive 97/7/EC incorporates provisions on contracts for the purchase of products and services that are concluded electronically, for instance, via e-mail or online ordering.<sup>849</sup>

Articles 4(1)(b) and 12(1) of Directive 97/7/EC<sup>850</sup> provide consumers with the unwaivable right to be informed *inter alia* about prices and main characteristics of products and services. Article 4(1)(b) of this Directive mandates that '*in good time prior to the conclusion of any distance contract, the consumer shall be provided with [...] information [on] the main characteristics of the goods or services.*' To our understanding, 'main characteristics' are those attributes of a product or service that may determine consumer choice; in absence of these attributes, the consumer would probably opt in a different product or service. In the context of the dissemination of copyrighted works under a license, such 'main characteristics' could be features related to the functionality or possibilities of usage. One can wonder however whether contractual or technical restrictions on digital works constitute main features of products or services so that an obligation to inform consumers is borne.

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<sup>846</sup> *GB-INNO vs Federation du Commerce Luxembourgise*, European Court of Justice, Case 362/88, 7 March 1990, E.C.R. 1990 I-00667, para. 18.

<sup>847</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, *OJ L 144*, 4.6.1997, p. 19–27.

<sup>848</sup> Articles 5, 6 & 10 of Directive 2000/31/EC, *op. cit.*

<sup>849</sup> Sanctions for failing to comply with this obligation to inform consumers about the products or services are found in the relevant non-conformity of Directive 2000/31/EC and Directive 97/7/EC as well as in Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005, Concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, *OJ L 149*, 11.6.2005, pp. 22–38, see Articles 5(3)(a) and 5(1).

<sup>850</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, *OJ L 144*, 4.6.1997, pp. 19–27.

French case-law responds affirmatively to this question. In the *CLCV* case,<sup>851</sup> *EMI* had published a technologically protected CD which restricted end users from listening to it in their car stereos. The Nanterre Court found *EMI* guilty for failing to inform consumers through a product label for the ‘faults’ of the CD! While the Court did not explicitly affirm that the application of technological protection was a fault as such, it held that the main issue was the failure to notify users on potential usability restrictions. In our view, this decision highlights a very important parameter as regards the intersection of the private copying limitation and its potential restriction via technological or contractual means. It indicates that the ability of end users to copy for private use should not be restricted without them being notified. A similar ruling was also issued in *Stephane P*, where the Court confirmed that the ability to make private copies is an essential characteristic of a DVD. To the Court, labelling the DVD with the notice ‘CP’ (‘copie prohibée’ - copying prohibited) does not comply with a supplier’s obligation to inform consumers about copy restrictions. The notice had to be explicit to avoid consumer confusion.<sup>852</sup> As Helberger and Hugenholtz rightly acknowledge, however, is important to underline that the ability to make private copies and its legitimacy thereof are two different things in the context of consumer notification on copy restrictions.<sup>853</sup>

We conclude from the aforementioned analysis that contractual restrictions on the ability of end users to make private copies have to abide by certain conditions to be legitimate. First, they should conform to the reasonable expectation of end users to make private copies. We illustrated that end users have grown accustomed to making private copies of works they legitimately purchase. This is both due to the levitation of private copies which gives them the impression that they have a ‘right’ in making copies and due to the statutory exemption of

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<sup>851</sup> *Logement et Cadre de Vie (CLCV) v. EMI France*, Tribunal de Grande Instance de Nanterre, June 24, 2003.

<sup>852</sup> *Stéphane P.*, Cour d’Appel [C.A] Paris, 4<sup>th</sup> ch., sec. B, April 22, 2005, available at <<http://www.legalis.net>>. Also see Federal Trade Commission (F.T.C), Complaint in the Matter of *SONY BMG Music Entertainment*, Docket No. C-0623019, 20 January 2007.

*Studio Canal et al. V S. Penguin and Union Federale des Consommateurs Que Choisir*, Paris Court of Appeal, 22 April 2005, overruled by *Studio Canal et al. V S. Penguin and Union Federale des Consommateurs Que Choisir*, Cour de Cassation – Supreme Court, 1<sup>st</sup> civil division, 28 February 2006, case No 549, Bull. 2006 I No 126 p. 115 (‘*Mullbolland Drive*’). (there is a need for a DRM notice where the application of a technological protection measure restricts the ability to produce private copies. The indication ‘copy forbidden’ was not sufficient to comply with the information duty towards consumers when implementing technological protection measures). For an analysis of this decision see P. Amblard, ‘La cour d’appel de Paris confirme l’exception de copie privée sur support numérique’, *Juricom.net*, 2005, available online at <<http://www.juricom.net/actu/visu.php?ID=689>>, lastly accessible on 9.9.2009, pp. 1-2.

For a different opinion see: Tribunal de Grand Instance [T.G.I], Paris, 3<sup>rd</sup> ch., 2<sup>nd</sup> sec., April 30, 2004, available at <<http://www.legalis.net>>. In this case the Court ruled that since consumers cannot invoke the private copying exception, the ability to make private copies is not an essential characteristic of a DVD.

<sup>853</sup> N. Helberger & P.B. Hugenholtz, ‘No Place like Home for Making a Copy: Private Copying in European Copyright Law’, op. cit., at 1082.

private copying from infringement which confers to them a legitimate interest to make private copies. Contractual restrictions on the exercise of the private copying limitation are therefore void under Directive 1999/44/EC on the Sale of Consumer Goods. Yet, the rightholders may avoid liability if they apply a notice on their works through which they explicitly inform consumers that private copying is prohibited. Being notified, end users no longer have a reasonable expectation to make private copies. So, if they decide to buy the licensed content they ought to abide by its restrictive conditions.

This conclusion appears to narrow the scope of the private copying limitation. Rightholders may impose unilateral restrictions on end-user reasonable expectations and these restrictions be sanctioned by way of a notice informing end users that copying is prohibited! One can only wonder whether private copying under Article 5(2)(b) of Directive 2001/29/EC has any substantive meaning if the prohibition of its exercise is at the disposal of the rightholders. At the same time, we have seen that Directive 2001/29/EC does not declare any copyright limitation imperative against their possible contractual restriction. Through its Article 6(4)(4) it indicates that contractual licences made in the context of interactive on-demand services prevail over the legitimate exercise of copyright limitations, including the private copying limitation. If contractual clauses prohibiting the exercise of copyright limitations are valid and enforceable the viability of these limitations is certainly imperilled. Yet, there is substantial reason to support the maintenance of these limitations in the digital environment. Indeed, the public policy justification of many copyright limitations remains unaltered in the digital context. The same ought to apply to the private copying limitation which is based on the fundamental right to privacy. This right, as we have seen earlier,<sup>854</sup> may be affected by user-specific licenses the conclusion of which requires the collection of the personal data of end users. We therefore urge for the declaration of the imperative character of the private copying limitation at European level, perhaps through a Recital indicating that the contractual restrictions of copyright limitations shall be null and void.

In our view, the technological approach to deal with the impact of digital private copying is ill-suited; it is a manifestation of copyright imperialism and as such it is neither balanced nor adequate. We consider that copyright limitations are not, and should not, be at the disposal of rightholders to unilaterally restrict either by way of technological measures or contractual clauses. Copyright limitations, such as the private copying limitation, demarcate an area which exceeds the boundaries of copyright protection and upon which the rightholders do not have control. Yet, the fact that the law does not declare the imperativeness of these limitations

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<sup>854</sup> At page 200 *et seq.*

against the application of technological protection measures or contractual restrictions becomes source of legal uncertainty as to whether there is any room for user freedom left in the digital networked environment. The concerns that copyright protective technologies and contractual clauses restricting acts of private copying may endanger the exercise of the private copying limitation are plausible and valid. This is for two prime policy reasons. The first is that the application of rights management information included in many user-specific licences may encroach upon the informational privacy of end users. In this context, we have concluded that the justificatory basis of the private copying, namely the right to privacy, retains its validity in the digital technologically-protected environment. The second reason is the complex approach of Article 5(2)(b) which premises the permissibility of private copying on both the application of levy-schemes and the application of technological protection measures, without, however, determining how these two regulatory approaches shall co-exist. Even though, to our understanding, the Directive gives pre-eminence to the existing levy schemes in the regulation of digital private copying, at the same time, it rigorously protects the application of technological protection measures. Indeed, Article 6 of Directive 2001/29/EC provides protection against the circumvention of such measures to an extent that an ‘access right’ is also created! Controls over access, however, inhibit passive private use and copy-controls restrict or prohibit perfectly permissible dynamic private uses. Article 6(4)(2) of the Directive is a complex response to these concerns, however. While it attempts to ensure that the private copiers shall benefit from legitimate private copying through appropriate measures taken by the Member States, it is not a mandatory provision for Member States to implement. As a result, the degree of harmonisation around Europe has been a mixed blessing at best! What is more, nowhere in Directive 2001/29/EC is the private copying limitation declared enforceable against the application of such measures and imperative against its contractual restriction. This has generated legal uncertainty and, as a result, national laws vary. For all these reasons, we consider that the technological approach to deal with private copying is unbalanced within the meaning of copyright protection which principally purports to equilibrate the interests of the rightholders against those of the users. We consider that desirable and adequate copyright protection is one that balances both *intra*-copyright, namely the relationship between the rightholders and users, and *inter*-copyright, *i.e.* the intersection of copyright limitations with the application of technological protection measures or contractual licenses. If end users may be technologically or contractually excluded from perfectly legitimate uses, for which they are also subjected to the payment of a levy, the copyright balance is not preserved either at *inter*-copyright or *intra*-copyright level. The protection

afforded to the rightholders is overreaching if no safety valves are attached to copyright limitations, such as their declaration as imperative against technological or contractual restrictions.

We conclude from the aforementioned analysis that no constraints should be imposed on the private copying limitation, either technological or contractual. Rather, the private copying limitation should be preserved as an area of freedom for end users upon the condition that the rightholders should be fairly compensated. While the legislator attempts through Article 6(4)(2) to ensure the enforceability of the private copying limitation against the application of technological restrictions, this effect is likely to be hindered due to the lack of an explicit declaration of the imperativeness of this limitation against its contractual restriction. We therefore urge for such declaration and are of the view that the levitation of copyright is an adequate and efficient solution in dealing with digital private copying. In essence, our main argument is that this approach is a balanced one: it 'legitimises' private copying and, at the same time, it provides the rightholders with compensation for the potential losses in income that they might encounter.

## CONCLUSION

As its title indicates, this thesis has examined the thorny issue of private copying in the digital environment through an analysis of the relevant copyright limitation included in Article 5(2)(b) of Directive 2001/29/EC. Even though private copying is permitted in Europe by virtue of this article, and the respective national provisions which implemented it, it does not receive sufficient support from the EU legislator and may be either technologically restricted or contractually overridden.

Certainly, the legitimacy of acts of private copying in the digital environment has become source of controversy. Article 5(2)(b) of Directive 2001/29/EC mainly indicates that reproductions for the private non-commercial use of natural persons are exempted from infringement. In lack of some guidance on how the terms ‘private’ and ‘non-commercial’ should be interpreted, there is ambiguity as to which activities are covered by the private copying limitation. This is mainly due to the emergence of new forms of using works, such as downloading content from file-sharing networks or uploading videoclips on *facebook*. National judges face difficulties in determining the legitimacy of these activities under the private copying limitation and, as a result, they confine this limitation either broader or narrower definitions. We acknowledge that the terms ‘private’ and ‘non-commercial’ may not translate well in the digital environment. For instance, it is not clear whether a group of *facebook* friends qualifies as a private circle and whether downloading works for free is a non-commercial use. We have addressed these issues and provided interpretational guidance as to how the conceptual contours of the private copying limitation should be defined.

First, we determined which activities fall under the scope of the private copying limitation. We have concluded that, even though the private copying limitation of Article 5(2)(b) is organically set as a statutory limitation to the reproduction right, it does not only cover acts of reproduction. Indeed, this article also permits acts of private use made by natural persons, without however defining the scope of private use. We have, nonetheless, identified that there are actually two kinds of private use: passive and dynamic. Passive private use refers to the mere consumption of works, such as reading articles on online news-sites or watching *youtube* videos, and it is covered by Article 5(2)(b). The status of dynamic private uses is on a tightrope, however; since this kind of use is realised through activities resembling acts reserved by copyright it may have an impact on exclusive rights and be infringing. For instance, dynamic private use could involve acts of giving a book to a friend, or in digital analogy, sending an e-book to an *msn* contact. This activity is covered by Article 5(2)(b), in our opinion, if realised within a private circle, irrespective of whether it involves the use of tangible copies

or their contents thereof. Indeed, most rights in copyright are addressed to or involve a public in their statutory description; as a result, we identified that a free zone of uses is created when the exact same activities are realised within a private circle!

Having determined which activities fall into the scope of permissible private copying, we then analysed which uses should be considered 'private' and developed a method for identifying them. In essence, we have built a test which can be used as a rule of judicial interpretation. In particular, we have concluded that purely personal uses, namely uses made by a single individual, are certainly covered by Article 5(2)(b). In this context, we have illustrated that the legitimacy of copying made by third parties on behalf of beneficiaries of the private copying limitation is uncertain; yet, it ought to be permitted as long as the 'physical copier', namely the person pushing the 'record' button is a natural person and not a legal entity. We have observed that national laws on this issue are largely diverse and have suggested that a clarification at EU level might be necessary. In our opinion, it would be absurd to restrict permissible private copying only to the 'physical' copier and not to the individual who orders a copy to be made for private use, insofar as both parties are natural persons. We have further identified a grey zone of uses created when uses are made by, or addressed to, an audience. While public uses are certainly infringing, there is no clear distinction between what is considered to be a private and a public audience. To address this issue, we built a test based on the interpretations of the term 'private' under national legislation and case-law. This test comprises a dual set of criteria that need to be examined so as to ascertain which audiences qualify as a private circle and which do not. First, for the use to be lawful, the audience making the use has to be personally related to the copier and should not be considered a public from which the rightholder expects to make a profit by exercising his exploitation rights. If the audience qualifies as a private circle of recipients we then 'localise' the use. Albeit not decisive, the place where the use is made is an important factor in determining the legitimacy of private copying. One should bear in mind that a place which may be considered as private for the purposes of the protection of fundamental human rights may not be considered as such within the meaning of copyright protection! A place is private in the context of copyright where an audience is spatially connected to it and the public cannot successively access it; this applies to both geographical and cyber places, such as websites. If the place where the use is made does not qualify as private the legitimacy of the use is put at blunders.

Once the private character of a use is established, it is then essential to examine whether the use in question is commercial or not. We have observed that there is no interpretative

standard on the determination of which uses are commercial and, as a result, national legislations and case-law vary. On top of this national diversity, the traditional definition of ‘commerciality’ does not translate well in the digital environment where almost all private uses are made essentially for free! We have therefore delved into an in-depth analysis of the concept of commerciality in the light of Directive 2004/48/EC on the enforcement of intellectual property rights and have identified the criteria that comprise this concept: commercial uses in copyright are those which accumulatively entail a ‘trade’ and a profit element. While uses involving the dissemination of copies to the public may be infringing on other grounds, such as the violation of exclusive rights, they cannot be considered to be commercial, unless they are profit-making. One could eagerly conclude that non-commercial activities are the exact inverse of commercial uses, in terms that -where a trade or a profit element is not established- a use is non-commercial. Yet, Courts in Europe do not seem to examine these conditions to determine the lack of commerciality in permissible private copying. Rather, their main focus is the commercial intent of the copier and the number of the copies of the exact same work produced. Neither of these criteria, in our opinion, however, can lead to safe conclusions. This is because establishing intent is a complex issue and the number of the copies is only indicative, yet not decisive, as to the existence of a trading element in a use. We therefore suggest that non-commercial uses should be those which do not involve the ‘trading’ of works and are not made for profit. Still, one should not neglect that most uses realised online are not made for profit; they merely save users from the cost of the original! These uses may have an economic significance for the user but are not excluded from the scope of Article 5(2)(b) and are therefore permitted. In our opinion, this article would lose much of its significance if it deprived users from economically advantageous copying since, in our view, every private copy, analogue or digital, is beneficial to end users.

We acknowledge, however, that economically significant uses, such as private copying, may cause irreparable harm to the rightholders. Yet, our analysis indicates that it does not! To reach this conclusion we have subjected digital private copying to the scrutiny of the three-step test of Article 5(5) of Directive 2001/29/EC. This test is, in essence, a guide for legislative action under which legislators should respect a threefold set of conditions when introducing copyright limitations: they have to appoint limitations (a) to certain special cases, (b) which do not conflict with a normal exploitation of the work and (c) which do not unreasonably prejudice the legitimate interests of the rightholders. Despite the fact that the true addressees of the test are the legislators, Article 5(5) of Directive 2001/29/EC could be read as addressing the test to national judges. This means that national judges have to examine

activities covered by copyright limitations through the spectrum of the three-step test; in our opinion, this means that the test is set as yet another condition to the permissibility of private copying! Yet, we consider that the test is ill-suited in this context of judicial application. This is manifested both by the diversity of national case-law and by the fact that the test sets the balance to the side of the rightholders by measuring the economic prejudice that copyright limitations have on the rightholders' interests. Nonetheless, by its origin, this test was formulated as legislative tool, namely an instrument of determining the impact of limitations at the stage of introducing them into law, and not as an extra condition for the application of copyright limitations by courts! Yet, we have subjected digital private copying to the three-step test to examine whether it satisfies its conditions. First, digital private copying qualifies as a 'certain special case' since it is based on a specific and sound legal-political justification, namely the enhancement of learning from, and enjoyment of, works in private. Secondly, it does not come in conflict with a normal exploitation of the copied works since it does not deprive the rightholders of potential or actual markets of practical and economic importance, irrespective of whether the source copy is lawfully acquired or not. This is mainly because permissible private copying under Article 5(2)(b) ought to be non-commercial. Finally, in our view, digital private copying does not prejudice the legitimate interests of the rightholders to an unreasonable level since it is accompanied by an obligation to fairly remunerate the rightholders.

Indeed, the payment of fair compensation to the rightholders is provided as a condition for the permissibility of private copying under Article 5(2)(b). Most EU Member States have translated this requirement as a levy imposed on media and equipment. Even though there is national diversity as to the scope and application of levies, all States adhere to the compensatory nature of levies, which are meant to compensate for the decrease in sales that private copying might cause. In essence, what levies do is to legitimise acts of private copying and provide the rightholders with compensation so that their interests will not be unreasonably prejudiced due to private copying. In our opinion, they are a compromise solution that preserves the copyright balance; they provide rightholders with adequate compensation and, at the same time, guarantee that end user privacy is not violated. The legitimisation of private copying through levies is appropriate, since the privacy rationale underlying the private copying retains its validity in the digital environment; indeed, levies do not encroach upon the privacy of end users, may that be viewed as inviolability of the home or as informational privacy. At the same time, the rightholders get a fair share out of this

process by being compensated adequately for the potential losses they might encounter due to private copying.

The only obstacle that we identify as regards the efficacy of the levitation of private copying, which we otherwise consider appropriate and suitable to deal with the digital impact of this phenomenon, is the inherently territorial scope and function of the levy-schemes. To date, the initiatives undertaken at European level do not strike at the heart of this issue and this, in our view, could hinder the proper functioning of the internal market. All attempts that have been made at European level to harmonise the function of the administrators of levies, namely collecting societies, have been partial and unsuccessful. This is because they mainly focus on peripheral issues, such as the introduction of rules on good practice and respect to the EU competition policy. As a result, the function of collecting societies and their relevant activities are regulated at national level, this creating a mosaic of diverse rules and practices. Yet, the Recommendation on fair compensation for private copying is expected to respond to these concerns by injecting uniform rules on the national levy schemes. Shall this Recommendation be furnished, the concerns on the efficacy of the levy-based approach shall be redressed, in our view, and the levy-based approach shall uncover its full potential. At the same time, we have suggested that the centralisation of levy administration through a system based on the very function of the internet at pan-European level could be the way forward.

Despite the fact that private copying may be perfectly permissible if it satisfies the conditions confined in Article 5(2)(b), it is not declared mandatory and, as a result, it may be technologically or contractually overridden. As we have illustrated, the application of technological protection measures receives rigorous protection under Article 6 of Directive 2001/29/EC and this, in our opinion, reflects a maximalistic tendency in modern copyright. We consider that the concerns that copyright-protective technologies may endanger the exercise of the private copying limitation are plausible and valid. This is for two prime policy reasons. The first is that the application of rights management information may encroach upon the informational privacy of end users. In this context, we have concluded that the justificatory basis of the private copying, namely the right to privacy, retains its validity in the digital technologically-protected environment. The second reason is the complex approach of Article 5(2)(b) which premises the permissibility of private copying on both the application of levy-schemes and the application of technological protection measures, without, however, determining how these two regulatory approaches shall co-exist. Even though, to our understanding, the Directive gives pre-eminence to the existing levy schemes in the regulation of digital private copying, at the same time it rigorously protects the application of

technological protection measures. Indeed, Article 6 of Directive 2001/29/EC provides protection against the circumvention of such measures to an extent that an ‘access right’ is also created! Controls over access, however, inhibit passive private use and copy-controls restrict or prohibit perfectly permissible dynamic private uses. Concerned that the application of technological protection shall restrict the scope of the private copying limitation, the European legislator set forth Article 6(4)(2). This article is an attempt to ensure that the private copiers shall benefit from the exercise of legitimate private copying through appropriate measures taken by the Member States. While the existence of this article *per se* implies that the European legislator favours the retainment of private copying vis-à-vis the application of technological protection measures, Article 6(4)(2) was not mandatory for Member States to implement and, as a result, its national transposition did not yield an expected degree of harmonisation. What is more, Directive 2001/29/EC does not explicitly declare the private copying limitation enforceable against the application of technological protection measures and this has become source of controversy.

In this confusion, many rightholders have started to avail themselves by contracting directly with end users through licences applied to technologically-protected works or to content that is disseminated online. Sometimes, these licences restrict or prohibit the ability of end users to make copies, such as back-ups. Since Directive 2001/29/EC has neither settled the relationship of the private copying limitation with contractual restrictions nor has it declared this limitation enforceable against contract, the scope of this limitation is unprecedentedly restricted. Since unilateral contractual clauses prohibiting private copying may be valid if they are accompanied by a notice explicitly informing consumers that private copying is prohibited, one can only wonder whether private copying under Article 5(2)(b) of Directive 2001/29/EC has any substantive meaning if the prohibition of its exercise is at the disposal of the rightholders. At the same time, we have seen that Directive 2001/29/EC does not declare any copyright limitation imperative against their possible contractual restriction. Rather, through its Article 6(4)(4), it indicates that contractual licences made in the context of interactive on-demand services prevail over the legitimate exercise of copyright limitations, including the private copying limitation. If contractual clauses prohibiting the exercise of copyright limitations are valid and enforceable the viability of these limitations is certainly imperilled in the online environment where licensing tends to become the leading way of exploiting works. Yet, there is substantial reason to support the maintenance of these limitations in the digital environment. Indeed, the public policy justification of many copyright limitations remains unaltered in the digital context. The same ought to apply to the private copying limitation

which is based on the fundamental right to privacy; this right may be affected by user-specific licenses, the conclusion of which requires the collection of the personal data of end users.

In our view, the technological approach to deal with the impact of digital private copying is ill-suited; it is a manifestation of copyright imperialism and as such it is neither balanced nor adequate. We consider that desirable and adequate copyright protection is one that balances both *intra*-copyright, namely the relationship between the rightholders and users, and *inter*-copyright, *i.e.* the intersection of copyright limitations with the application of technological protection measures or contractual licenses. If end users are technologically or contractually excluded from perfectly legitimate uses, for which they are also subjected to the payment of a levy, the copyright balance is not preserved either on *inter*-copyright or *intra*-copyright level. The protection afforded to the rightholders is overreaching if no safety valves are attached to copyright limitations, such as their declaration as imperative against technological or contractual restrictions. In our opinion, copyright limitations should not be at the disposal of rightholders to unilaterally restrict either by way of technological measures or contractual clauses, since by statute they demarcate an area exceeding the boundaries of exclusive rights; rather, we feel that the confines of copyright should be defined by the legislator. Yet, the fact that the law does not declare the imperativeness of these limitations against the application of technological protection measures or contractual restrictions becomes source of legal uncertainty as to whether there is room for user freedom left in the digital networked environment. We therefore urge for an explicit declaration of the private copying limitation as imperative so as to preserve as an area of freedom for end users upon the condition that the rightholders should be fairly compensated.

**Appendix I - Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society**

(Official Journal L 167, 22/06/2001, p. 0010)

THE EUROPEAN PARLIAMENT AND  
THE COUNCIL OF THE EUROPEAN  
UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the Economic and Social Committee(2),

Acting in accordance with the procedure laid down in Article 251 of the Treaty(3),

Whereas:

(1) The Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the laws of the Member States on copyright and related rights contributes to the achievement of these objectives.

(2) The European Council, meeting at Corfu on 24 and 25 June 1994, stressed the need to create a general and flexible legal framework at Community level in order to foster the development of the information society in Europe. This requires, inter alia, the existence of an internal market for new products and services. Important Community legislation to ensure such a regulatory framework is already in place or its adoption is well under way. Copyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content.

(3) The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property,

and freedom of expression and the public interest.

(4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.

(5) Technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation.

(6) Without harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency. The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased transborder exploitation of intellectual property. This development will and should further increase. Significant legal

differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights.

(7) The Community legal framework for the protection of copyright and related rights must, therefore, also be adapted and supplemented as far as is necessary for the smooth functioning of the internal market. To that end, those national provisions on copyright and related rights which vary considerably from one Member State to another or which cause legal uncertainties hindering the smooth functioning of the internal market and the proper development of the information society in Europe should be adjusted, and inconsistent national responses to the technological developments should be avoided, whilst differences not adversely affecting the functioning of the internal market need not be removed or prevented.

(8) The various social, societal and cultural implications of the information society require that account be taken of the specific features of the content of products and services.

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

(11) A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of

safeguarding the independence and dignity of artistic creators and performers.

(12) Adequate protection of copyright works and subject-matter of related rights is also of great importance from a cultural standpoint. Article 151 of the Treaty requires the Community to take cultural aspects into account in its action.

(13) A common search for, and consistent application at European level of, technical measures to protect works and other subject-matter and to provide the necessary information on rights are essential insofar as the ultimate aim of these measures is to give effect to the principles and guarantees laid down in law.

(14) This Directive should seek to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching.

(15) The Diplomatic Conference held under the auspices of the World Intellectual Property Organisation (WIPO) in December 1996 led to the adoption of two new Treaties, the "WIPO Copyright Treaty" and the "WIPO Performances and Phonograms Treaty", dealing respectively with the protection of authors and the protection of performers and phonogram producers. Those Treaties update the international protection for copyright and related rights significantly, not least with regard to the so-called "digital agenda", and improve the means to fight piracy world-wide. The Community and a majority of Member States have already signed the Treaties and the process of making arrangements for the ratification of the Treaties by the Community and the Member States is under way. This Directive also serves to implement a number of the new international obligations.

(16) Liability for activities in the network environment concerns not only copyright and related rights but also other areas, such as defamation, misleading advertising, or infringement of trademarks, and is addressed horizontally in Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ("Directive on electronic commerce")(4), which clarifies and harmonises various legal issues relating to information society services

including electronic commerce. This Directive should be implemented within a timescale similar to that for the implementation of the Directive on electronic commerce, since that Directive provides a harmonised framework of principles and provisions relevant inter alia to important parts of this Directive. This Directive is without prejudice to provisions relating to liability in that Directive.

(17) It is necessary, especially in the light of the requirements arising out of the digital environment, to ensure that collecting societies achieve a higher level of rationalisation and transparency with regard to compliance with competition rules.

(18) This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences.

(19) The moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive.

(20) This Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular Directives 91/250/EEC(5), 92/100/EEC(6), 93/83/EEC(7), 93/98/EEC(8) and 96/9/EC(9), and it develops those principles and rules and places them in the context of the information society. The provisions of this Directive should be without prejudice to the provisions of those Directives, unless otherwise provided in this Directive.

(21) This Directive should define the scope of the acts covered by the reproduction right with regard to the different beneficiaries. This should be done in conformity with the *acquis communautaire*. A broad definition of these acts is needed to ensure legal certainty within the internal market.

(22) The objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works.

(23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a

broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.

(24) The right to make available to the public subject-matter referred to in Article 3(2) should be understood as covering all acts of making available such subject-matter to members of the public not present at the place where the act of making available originates, and as not covering any other acts.

(25) The legal uncertainty regarding the nature and the level of protection of acts of on-demand transmission of copyright works and subject-matter protected by related rights over networks should be overcome by providing for harmonised protection at Community level. It should be made clear that all rightholders recognised by this Directive should have an exclusive right to make available to the public copyright works or any other subject-matter by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterised by the fact that members of the public may access them from a place and at a time individually chosen by them.

(26) With regard to the making available in on-demand services by broadcasters of their radio or television productions incorporating music from commercial phonograms as an integral part thereof, collective licensing arrangements are to be encouraged in order to facilitate the clearance of the rights concerned.

(27) The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.

(28) Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the Community. This right should not be exhausted in respect of the original or of copies thereof sold by the rightholder or with his consent outside the Community. Rental and lending rights for authors have been established in Directive

92/100/EEC. The distribution right provided for in this Directive is without prejudice to the provisions relating to the rental and lending rights contained in Chapter I of that Directive.

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

(30) The rights referred to in this Directive may be transferred, assigned or subject to the granting of contractual licences, without prejudice to the relevant national legislation on copyright and related rights.

(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.

(32) This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at the

same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future.

(33) The exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are transient or incidental reproductions, forming an integral and essential part of a technological process and carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made. The acts of reproduction concerned should have no separate economic value on their own. To the extent that they meet these conditions, this exception should include acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information. A use should be considered lawful where it is authorised by the rightholder or not restricted by law.

(34) Member States should be given the option of providing for certain exceptions or limitations for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for purposes of news reporting, for quotations, for use by people with disabilities, for public security uses and for uses in administrative and judicial proceedings.

(35) In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The

level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.

(36) The Member States may provide for fair compensation for rightholders also when applying the optional provisions on exceptions or limitations which do not require such compensation.

(37) Existing national schemes on reprography, where they exist, do not create major barriers to the internal market. Member States should be allowed to provide for an exception or limitation in respect of reprography.

(38) Member States should be allowed to provide for an exception or limitation to the reproduction right for certain types of reproduction of audio, visual and audio-visual material for private use, accompanied by fair compensation. This may include the introduction or continuation of remuneration schemes to compensate for the prejudice to rightholders. Although differences between those remuneration schemes affect the functioning of the internal market, those differences, with respect to analogue private reproduction, should not have a significant impact on the development of the information society. Digital private copying is likely to be more widespread and have a greater economic impact. Due account should therefore be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them.

(39) When applying the exception or limitation on private copying, Member States should take due account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological protection measures are available. Such exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention.

(40) Member States may provide for an exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions, as well as archives. However, this should be limited to certain

special cases covered by the reproduction right. Such an exception or limitation should not cover uses made in the context of on-line delivery of protected works or other subject-matter. This Directive should be without prejudice to the Member States' option to derogate from the exclusive public lending right in accordance with Article 5 of Directive 92/100/EEC. Therefore, specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve.

(41) When applying the exception or limitation in respect of ephemeral recordings made by broadcasting organisations it is understood that a broadcaster's own facilities include those of a person acting on behalf of and under the responsibility of the broadcasting organisation.

(42) When applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect.

(43) It is in any case important for the Member States to adopt all necessary measures to facilitate access to works by persons suffering from a disability which constitutes an obstacle to the use of the works themselves, and to pay particular attention to accessible formats.

(44) When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject-matter. The provision of such exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter.

(45) The exceptions and limitations referred to in Article 5(2), (3) and (4) should not,

however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law.

(46) Recourse to mediation could help users and rightholders to settle disputes. The Commission, in cooperation with the Member States within the Contact Committee, should undertake a study to consider new legal ways of settling disputes concerning copyright and related rights.

(47) Technological development will allow rightholders to make use of technological measures designed to prevent or restrict acts not authorised by the rightholders of any copyright, rights related to copyright or the sui generis right in databases. The danger, however, exists that illegal activities might be carried out in order to enable or facilitate the circumvention of the technical protection provided by these measures. In order to avoid fragmented legal approaches that could potentially hinder the functioning of the internal market, there is a need to provide for harmonised legal protection against circumvention of effective technological measures and against provision of devices and products or services to this effect.

(48) Such legal protection should be provided in respect of technological measures that effectively restrict acts not authorised by the rightholders of any copyright, rights related to copyright or the sui generis right in databases without, however, preventing the normal operation of electronic equipment and its technological development. Such legal protection implies no obligation to design devices, products, components or services to correspond to technological measures, so long as such device, product, component or service does not otherwise fall under the prohibition of Article 6. Such legal protection should respect proportionality and should not prohibit those devices or activities which have a commercially significant purpose or use other than to circumvent the technical protection. In particular, this protection should not hinder research into cryptography.

(49) The legal protection of technological measures is without prejudice to the application of any national provisions which may prohibit the private possession of devices, products or components for the circumvention of technological measures.

(50) Such a harmonised legal protection does not affect the specific provisions on protection provided for by Directive 91/250/EEC. In particular, it should not apply to the protection of technological measures used in connection with computer programs, which is exclusively addressed in that Directive. It should neither inhibit nor prevent the development or use of any means of circumventing a technological measure that is necessary to enable acts to be undertaken in accordance with the terms of Article 5(3) or Article 6 of Directive 91/250/EEC. Articles 5 and 6 of that Directive exclusively determine exceptions to the exclusive rights applicable to computer programs.

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

(52) When implementing an exception or limitation for private copying in accordance with Article 5(2)(b), Member States should likewise promote the use of voluntary measures to accommodate achieving the objectives of such exception or limitation. If, within a reasonable period of time, no such voluntary measures to make reproduction for private use possible have been taken, Member States may take measures to enable beneficiaries of the exception or limitation concerned to benefit from it. Voluntary measures taken by rightholders, including agreements between rightholders and other

parties concerned, as well as measures taken by Member States, do not prevent rightholders from using technological measures which are consistent with the exceptions or limitations on private copying in national law in accordance with Article 5(2)(b), taking account of the condition of fair compensation under that provision and the possible differentiation between various conditions of use in accordance with Article 5(5), such as controlling the number of reproductions. In order to prevent abuse of such measures, any technological measures applied in their implementation should enjoy legal protection.

(53) The protection of technological measures should ensure a secure environment for the provision of interactive on-demand services, in such a way that members of the public may access works or other subject-matter from a place and at a time individually chosen by them. Where such services are governed by contractual arrangements, the first and second subparagraphs of Article 6(4) should not apply. Non-interactive forms of online use should remain subject to those provisions.

(54) Important progress has been made in the international standardisation of technical systems of identification of works and protected subject-matter in digital format. In an increasingly networked environment, differences between technological measures could lead to an incompatibility of systems within the Community. Compatibility and interoperability of the different systems should be encouraged. It would be highly desirable to encourage the development of global systems.

(55) Technological development will facilitate the distribution of works, notably on networks, and this will entail the need for rightholders to identify better the work or other subject-matter, the author or any other rightholder, and to provide information about the terms and conditions of use of the work or other subject-matter in order to render easier the management of rights attached to them. Rightholders should be encouraged to use markings indicating, in addition to the information referred to above, *inter alia* their authorisation when putting works or other subject-matter on networks.

(56) There is, however, the danger that illegal activities might be carried out in order to

remove or alter the electronic copyright-management information attached to it, or otherwise to distribute, import for distribution, broadcast, communicate to the public or make available to the public works or other protected subject-matter from which such information has been removed without authority. In order to avoid fragmented legal approaches that could potentially hinder the functioning of the internal market, there is a need to provide for harmonised legal protection against any of these activities.

(57) Any such rights-management information systems referred to above may, depending on their design, at the same time process personal data about the consumption patterns of protected subject-matter by individuals and allow for tracing of on-line behaviour. These technical means, in their technical functions, should incorporate privacy safeguards in accordance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data(10).

(58) Member States should provide for effective sanctions and remedies for infringements of rights and obligations as set out in this Directive. They should take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for should be effective, proportionate and dissuasive and should include the possibility of seeking damages and/or injunctive relief and, where appropriate, of applying for seizure of infringing material.

(59) In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States.

(60) The protection provided under this Directive should be without prejudice to national or Community legal provisions in other areas, such as industrial property, data protection, conditional access, access to public documents, and the rule of media exploitation chronology, which may affect the protection of copyright or related rights.

(61) In order to comply with the WIPO Performances and Phonograms Treaty, Directives 92/100/EEC and 93/98/EEC should be amended,

HAVE ADOPTED THIS DIRECTIVE:

## CHAPTER I

### OBJECTIVE AND SCOPE

#### Article 1

##### Scope

1. This Directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society.

2. Except in the cases referred to in Article 11, this Directive shall leave intact and shall in no way affect existing Community provisions relating to:

- (a) the legal protection of computer programs;
- (b) rental right, lending right and certain rights related to copyright in the field of intellectual property;
- (c) copyright and related rights applicable to broadcasting of programmes by satellite and cable retransmission;
- (d) the term of protection of copyright and certain related rights;
- (e) the legal protection of databases.

## CHAPTER II

### RIGHTS AND EXCEPTIONS

#### Article 2

##### Reproduction right

Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

- (a) for authors, of their works;
- (b) for performers, of fixations of their performances;
- (c) for phonogram producers, of their phonograms;
- (d) for the producers of the first fixations of films, in respect of the original and copies of their films;
- (e) for broadcasting organisations, of fixations of their broadcasts, whether those

broadcasts are transmitted by wire or over the air, including by cable or satellite.

#### Article 3

##### Right of communication to the public of works and right of making available to the public other subject-matter

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

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

- (a) for performers, of fixations of their performances;
- (b) for phonogram producers, of their phonograms;
- (c) for the producers of the first fixations of films, of the original and copies of their films;
- (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.

#### Article 4

##### Distribution right

1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.

2. The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.

#### Article 5

##### Exceptions and limitations

1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

(a) a transmission in a network between third parties by an intermediary, or

(b) a lawful use

of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

(a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;

(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;

(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;

(d) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;

(e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation.

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;

(b) uses, for the benefit of people with a disability, which are directly related to the

disability and of a non-commercial nature, to the extent required by the specific disability;

(c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

(e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;

(f) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;

(g) use during religious celebrations or official celebrations organised by a public authority;

(h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;

(i) incidental inclusion of a work or other subject-matter in other material;

(j) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;

(k) use for the purpose of caricature, parody or pastiche;

(l) use in connection with the demonstration or repair of equipment;

(m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;

(n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;

(o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

4. Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

### CHAPTER III

## **PROTECTION OF TECHNOLOGICAL MEASURES AND RIGHTS-MANAGEMENT INFORMATION**

### Article 6

#### **Obligations as to technological measures**

1. Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.

2. Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which:

(a) are promoted, advertised or marketed for the purpose of circumvention of, or

(b) have only a limited commercially significant purpose or use other than to circumvent, or

(c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures.

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

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

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

The technological measures applied voluntarily by rightholders, including those applied in implementation of voluntary agreements, and technological measures

applied in implementation of the measures taken by Member States, shall enjoy the legal protection provided for in paragraph 1.

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

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

Article 7

#### **Obligations concerning rights-management information**

1. Member States shall provide for adequate legal protection against any person knowingly performing without authority any of the following acts:

(a) the removal or alteration of any electronic rights-management information;

(b) the distribution, importation for distribution, broadcasting, communication or making available to the public of works or other subject-matter protected under this Directive or under Chapter III of Directive 96/9/EC from which electronic rights-management information has been removed or altered without authority, if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or any rights related to copyright as provided by law, or of the *sui generis* right provided for in Chapter III of Directive 96/9/EC.

2. For the purposes of this Directive, the expression "rights-management information" means any information provided by rightholders which identifies the work or other subject-matter referred to in this Directive or covered by the *sui generis* right provided for in Chapter III of Directive 96/9/EC, the author or any other rightholder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information.

The first subparagraph shall apply when any of these items of information is associated with a copy of, or appears in connection with the communication to the public of, a work or other subject-matter referred to in this Directive or covered by the *sui generis* right

provided for in Chapter III of Directive 96/9/EC.

CHAPTER IV

### **COMMON PROVISIONS**

Article 8

#### **Sanctions and remedies**

1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.

2. Each Member State shall take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2).

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

Article 9

#### **Continued application of other legal provisions**

This Directive shall be without prejudice to provisions concerning in particular patent rights, trade marks, design rights, utility models, topographies of semi-conductor products, type faces, conditional access, access to cable of broadcasting services, protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract.

Article 10

#### **Application over time**

1. The provisions of this Directive shall apply in respect of all works and other subject-matter referred to in this Directive which are, on 22 December 2002, protected by the Member States' legislation in the field of copyright and related rights, or which meet the criteria for protection under the provisions of this Directive or the provisions referred to in Article 1(2).

2. This Directive shall apply without prejudice to any acts concluded and rights acquired before 22 December 2002.

Article 11

#### **Technical adaptations**

1. Directive 92/100/EEC is hereby amended as follows:

(a) Article 7 shall be deleted;

(b) Article 10(3) shall be replaced by the following: "3. The limitations shall only be applied in certain special cases which do not conflict with a normal exploitation of the subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder."

2. Article 3(2) of Directive 93/98/EEC shall be replaced by the following: "2. The rights of producers of phonograms shall expire 50 years after the fixation is made. However, if the phonogram has been lawfully published within this period, the said rights shall expire 50 years from the date of the first lawful publication. If no lawful publication has taken place within the period mentioned in the first sentence, and if the phonogram has been lawfully communicated to the public within this period, the said rights shall expire 50 years from the date of the first lawful communication to the public.

However, where through the expiry of the term of protection granted pursuant to this paragraph in its version before amendment by Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society(11) the rights of producers of phonograms are no longer protected on 22 December 2002, this paragraph shall not have the effect of protecting those rights anew."

Article 12

#### **Final provisions**

1. Not later than 22 December 2004 and every three years thereafter, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, in which, inter alia, on the basis of specific information supplied by the Member States, it shall examine in particular the application of Articles 5, 6 and 8 in the light of the development of the digital market. In the case of Article 6, it shall examine in particular whether that Article confers a sufficient level of protection and whether

acts which are permitted by law are being adversely affected by the use of effective technological measures. Where necessary, in particular to ensure the functioning of the internal market pursuant to Article 14 of the Treaty, it shall submit proposals for amendments to this Directive.

2. Protection of rights related to copyright under this Directive shall leave intact and shall in no way affect the protection of copyright.

3. A contact committee is hereby established. It shall be composed of representatives of the competent authorities of the Member States. It shall be chaired by a representative of the Commission and shall meet either on the initiative of the chairman or at the request of the delegation of a Member State.

4. The tasks of the committee shall be as follows:

(a) to examine the impact of this Directive on the functioning of the internal market, and to highlight any difficulties;

(b) to organise consultations on all questions deriving from the application of this Directive;

(c) to facilitate the exchange of information on relevant developments in legislation and case-law, as well as relevant economic, social, cultural and technological developments;

(d) to act as a forum for the assessment of the digital market in works and other items, including private copying and the use of technological measures.

Article 13

#### **Implementation**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 22 December 2002. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of domestic law which they adopt in the field governed by this Directive.

Article 14

#### **Entry into force**

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 15

**Addressees**

This Directive is addressed to the Member States.

Done at Brussels, 22 May 2001.

For the European Parliament

The President

N. Fontaine

For the Council

The President

M. Winberg

(1) OJ C 108, 7.4.1998, p. 6 and OJ C 180, 25.6.1999, p. 6.

(2) OJ C 407, 28.12.1998, p. 30.

(3) Opinion of the European Parliament of 10 February 1999 (OJ C 150, 28.5.1999, p. 171), Council Common Position of 28 September 2000 (OJ C 344, 1.12.2000, p. 1) and Decision of the European Parliament of 14 February 2001 (not yet published in the Official Journal). Council Decision of 9 April 2001.

(4) OJ L 178, 17.7.2000, p. 1.

(5) Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ L 122, 17.5.1991, p. 42). Directive as amended by Directive 93/98/EEC.

(6) Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ L 346, 27.11.1992, p. 61). Directive as amended by Directive 93/98/EEC.

(7) Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ L 248, 6.10.1993, p. 15).

(8) Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (OJ L 290, 24.11.1993, p. 9).

(9) Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 77, 27.3.1996, p. 20).

(10) OJ L 281, 23.11.1995, p. 31.

(11) OJ L 167, 22.6.2001, p. 10.

## **Appendix II – Schematic Overview of the National Transposition of Articles 2, 5(2)(b), 5(5) and 6(4) of Directive 2001/29/EC**

The following table summarises how EU Member States transposed into national law Articles 5(2)(b), 5(5) and 6(4) of Directive 2001/29/EC. Since no real harmonisation has been achieved at a national level, this table overviews the national laws with a view to highlight the different approaches adopted. The different sections of the table can be read as follows:

The ‘Member State’ column lists the Member States and the acts by which they implemented Directive 2001/29/EC;

The ‘Private copying’ column shows how the concerned legislators have transposed into national law the private copying limitation of Article 5(2)(b) of Directive 2001/29/EC’

The ‘Three-step test’ column lays down the diverse approaches adopted at national level as regards the application of the three-step test incorporated into Article 5(5) of Directive 2001/29/EC;

Finally, the ‘TPM and private copying’ column illustrates the ways by which national legislators have responded to the optional provision of Article 6(4)(2) of Directive 2001/29/EC in ensuring that the private copying limitation shall not be technologically restricted.

Member State	Private copying	Three-step test	TPM and private copying
<b>AUSTRIA</b> <i>Federal Law on Copyright in Works of Literature and Art and on Related Rights (BGBl. No. 111/1936, as last amended [BGBl. I No. 25/1998], Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte i.d.F. der UrbG-Novelle 2003</i>	§§ 42, 42a (third party copying is permitted for private copying defence, uncertainty as to legality of source copy)	Applied in practice	--
<b>BELGIUM</b> <i>Loi du 22 mai 2005 transposant en droit belge la Directive européenne 2001/29/CE du 22 mai 2001 sur l'harmonisation de certains aspects du droit d'auteur et des droits voisins dans la société de l'information, Moniteur Belge, 27/05/2005, p. 24997.</i>	Article 22(1)(5) (legality of source copy undecided)	Applied in practice	Articles 79bis, §2-3 and 87bis: Voluntary measures; judicial enforcement
<b>BULGARIA</b> <i>Law on Copyright and Neighbouring Rights, Published in State Gazette No. 56/1993, lastly amended on January 1, 2003</i>	Article 25	Article 23(2)	--
<b>CYPRUS</b> <i>Copyright and Related Rights (Amendment) Law of 2004 (Law n° 128(I)/2004, Official Gazette of the Republic of Cyprus, n° 3850, 30.04.2004)</i>	Article 7(2)(a) (no levy system in place for private uses)	Applied in practice	Article 14B(3): obligation to provide means
<b>CZECH REPUBLIC</b> <i>Law No. 131/2000 Coll. of 7 April 2000 on Copyright, Rights related to Copyright and on the Amendment of Certain Laws.</i>	Article 30(1), 30(3) (Broad private use exception which permits copies made on demand by third parties)	Article 29	--

<b>DENMARK</b> <i>Act no 1051 of 17 December 2002</i>	Article 12, 39(1)	--	Article 75d; Danish copyright licensing tribunal to “order” right holders
<b>ESTONIA</b> <i>Act of 22 September 2004 (RT I 1999, 54, 580) which came in force 29 October 2004, to amend the Copyright Act of 11 November 1992 (RT2 1992, 49, 615, consolidated text RT I 2000, 16, 109)</i>	Article 18(1)(5)	Article 17	Article 80 (3)(4) [foresees obligation to adjust measures to allow free use; measures must be applied within reasonable time; beneficiaries may instigate proceedings before copyright committee]
<b>FINLAND</b> <i>Law 14.10.2005/821, amending the Copyright Act (8.7.1961/404); Law 14.10.2005/822 amending chapter 49 in the Criminal Code; decree 1036/2005, amending the Copyright Decree.</i>	Article 12 (Legal source copy requirement for private copying; third party copying permitted; private copying not deemed subjective right: Article 11(5)	Applied by courts	Article 50c
<b>FRANCE</b> <i>LOI n° 2006-961 du 1er août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information (1), J.O. no. 178, du 3 août 2006 page 11529.</i>	Article L-122-5 2°	Article L-122- 5, 9° al. 4.	Article L-331-6 Authority of Regulation of Technological Measures to resolve disputes; authority has competence to issue binding orders & may determine scope of use according to Article 5(5).
<b>GERMANY</b> <i>Act amending the Law on Copyright and Related Rights 1965 of 10 September 2003, lastly amended on 26.10.2007</i>	§§53(1), 53(2) (Source copy must not be obviously illegal for private copy limitation)	Status is debated	§ 95b Immediate access to courts if voluntary measures are not applied; does not cover private copying; obligation to mark copy-control tools on products.
<b>GREECE</b> <i>Article 81 of Law 3057/2002 (Amendment and Completion of Law 2725/1999, regulation of matters pertaining to the Ministry of Culture and other provisions) (Official Gazette A' 239/10.10.2002)</i>	Article 18(1) [covers all private uses; un- amended]	Article 18(2) & 28C	Article 66A (5) Mediation procedure
<b>HUNGARY</b> <i>Act CII amending the Copyright Act 1999 (Act No. LXXXVI of 1999, Official Gazette (Magyar Közlöny) No. 61</i>	Article 35(1) (broad private copying and public performance provision, Source copy must be legal according to Copyright Experts Council)	Article 33(2)	Article 95/A Mediation proceedings before Board of Experts at Patent Office, subsequent access to judiciary; exclude private digital copies

<p><b>IRELAND</b>  <i>Statutory instrument No. 16/2004 (European Communities (Copyright and Related Rights) Regulations 2004</i></p>	<p>--  Article 101 ('Recording for purposes of time-shifting'); Article 204(4).</p>	<p>--</p>	<p>Sec. 374  Immediate access to judiciary</p>
<p><b>ITALY</b>  <i>Legislative decree No. 68 of 9 April 2003 (Decreto Legislativo 9 aprile 2003, n. 68, "Attuazione della direttiva 2001/29/CE sull'armonizzazione di taluni aspetti del diritto d'autore e dei diritti connessi nella società dell'informazione", pubblicato nella Gazzetta Ufficiale n. 87 del 14 aprile 2003) amending the Basic Copyright Law Act (Act No. 633 of 22 April 1941 as amended)</i></p>	<p>Article 71sexties (1) (in relation to phonograms and videograms; number of copies restricted; third party copying not permitted )</p>	<p>Article 71nonies</p>	<p>Article 71(5) [transposed as annex to limitations] Mediation procedure before Copyright Committee</p>
<p><b>LATVIA</b>  <i>Amendments to the Copyright Law Act of 22 March 2003 and of 22 April 2004.</i></p>	<p>Article 34(1)</p>	<p>Article 18(2)</p>	<p>Article 18(4) provides that user may request removal; if right holder refuses, choice of mediation, arbitration or court proceedings</p>
<p><b>LITHUANIA</b>  <i>Law amending the law on copyright and related rights, No. IX-1355, 5 March 2003</i></p>	<p>Article 20(1)(1)</p>	<p>--</p>	<p>Article 75  Mediation, subsequent access to courts</p>
<p><b>LUXEMBOURG</b>  <i>Act amending the Law on Author's Rights, Related Rights and Databases (Loi du 18 Avril 2004 (Memorial A, no. 61 du 29 avril 2004, pp. 942-948, Loi du 18 avril 2004).</i></p>	<p>Article 10(4)</p>	<p>Article 10(2)</p>	<p>No explicit implementation; immediate court proceedings before district court and injunctions available</p>
<p><b>MALTA</b>  <i>Inserted into the Copyright Act under Part XVIII of Act IX of 2003, An Act entitled the Various Laws (Amendment) Act' Government Gazette of Malta, No. 17467.</i></p>	<p>Article 9(1)(c)</p>	<p>Article 9(3)</p>	<p>Article 42 (2)(a)  Right holder "should" make means available</p>

<p><b>NETHERLANDS</b>  <i>Act of 6 July 2004 amending the Copyright Act (Wet van 23 September 1912, houdende nieuwe regeling van het Auteursrecht), Stb. 2004, 336</i></p>	<p>Article 16b(1) (third party copying permitted except for sounds or images)</p>	<p>Applied in case-law</p>	<p>Article 29 a (4); 19 (3) NRA  In absence of voluntary measures, no specific procedure is foreseen; to be regulated under future government ordinances</p>
<p><b>NORWAY</b>  2005:97 “<i>Lov om endringer i åndsverkloven m.m.</i>” (“Act on amendments in the Copyright Act etc”), <i>Lovtidend (the official legal gazette) June 17, 2005, p. 481 ff</i></p>	<p>Article 12(1); 12(2) (Source copy should be lawful; private copying excluded if TPM in place)</p>	<p>Not perceived as substantive rule</p>	<p>Article 53 b  In absence of voluntary measures, beneficiaries may demand order by Tribunal established at Ministry of Culture</p>
<p><b>POLAND</b>  <i>Act of 1 April 2004 on the alteration of the Law on Copyright and Neighbouring Rights (2004 Act); Act of 28 October 2002 on the alteration of the Law on Copyright and Neighbouring Rights (2002 Act) = ustawa z dnia 1 kwietnia 2004 r. o zmianie ustawy o prawie autorskim i prawach pokrewnych (Dziennik Ustaw Nr 91, Poz. 869), ustawa z dnia 28 października 2002 r. o zmianie ustawy o prawie autorskim i prawach pokrewnych (Dziennik Ustaw Nr 197, Poz. 1662).</i></p>	<p>Article 23, 20, 20(1)</p>	<p>Article 35 (“two-step test”)</p>	<p>--</p>
<p><b>PORTUGAL</b>  <i>Law 50/2004 of 24 August 2004.</i></p>	<p>Article 81 (Source copy must be legal)</p>	<p>Article 75 (5)</p>	<p>Article 221  Right holder must provide “adequate measures”; mediation and arbitration procedure before the <i>Comissão de Mediação e Arbitragem</i></p>
<p><b>ROMANIA</b>  <i>Law no. 8/1996 on Copyright and Neighbouring Rights (amended by Law no. 285/2004, by EGO no 123/2005.</i></p>	<p>Article 34(1)</p>	<p>Article 34(1) and 33(1)</p>	<p>--</p>
<p><b>SLOVAKIA</b>  <i>Act No. 618/2003 of 4 December 2003</i></p>	<p>Article 24 (1) (A)</p>	<p>Article 38</p>	<p>--</p>

<p><b>SLOVENIA</b>  <i>Act amending the Copyright and Related Rights Act, Official Gazette RS No. 43/04.</i></p>	<p>Article 50(2)(2)</p>	<p>Article 46</p>	<p>Articles 166 b and 166 c  Obligation to make means available upon request; mediation before body agreed upon by right holders and users associations; Application of TPM's is termed as an exclusive right under copyright law</p>
<p><b>SPAIN</b>  <i>Ley 23/2006 de 7 julio, B.O.E. num. 162, 8 julio 2006, 25561</i></p>	<p>Article 31(2) and claim for compensation in Article 25</p>		<p>Private copying included; immediate access to courts under a positive right to litigate.</p>
<p><b>SWEDEN</b>  <i>Government Bill no 2004/2005:110, amending Act 1960:729 on Copyright in Literary and Artistic Works of 30 December 1960</i></p>	<p>Article 12 (source copy must be legal; third parties may make copies on behalf of beneficiaries)</p>	<p>--</p>	<p>Article 52f  Courts may order removal; penalties for rightholders foreseen.</p>
<p><b>UNITED KINGDOM</b>  <i>Statutory Instrument SI 2003/2498 ("The Copyright and Related Rights Regulations 2003). Minor amendments were made under the Performances (Regulations 2006 (SI 2006/18)</i></p>	<p>--  [sec. 70 permits reproductions of broadcasts for purposes of time shifting]</p>	<p>Not perceived as substantive rule by government</p>	<p>Sec. 296ZE  Complaints procedure before Secretary of State who may, under his discretion., order right holders to remove TPM's</p>

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### **BELGIUM**

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### **CYPRUS**

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### **CZECH REPUBLIC**

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### **DENMARK**

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### **ESTONIA**

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#### **GREECE**

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**SWEDEN**

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**UNITED KINGDOM**

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Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A of 10 December 1948.

Vienna Convention on the Law of Treaties (Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331).

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