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The legitimacy of the InfoSoc Directive

Specifically regarding the copyright exceptions

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Summary

The challenges of the digital networked environment to the EU copyright system are many. With the task of implementing the 1996 WIPO Internet Treaties while at the same time horizontally harmonizing the legal framework on copyright and related rights, the EU in 2001 adopted the much-criticized InfoSoc Directive. Its most controversial provisions were on copyright exceptions and the specific protection offered to technological protection measures.

This thesis argues that the Directive did not achieve its objective of market harmonization, and failed to adequately respect national legal cultures, or sufficiently consider issues of consumer protection, as laid out in the Treaty on the Functioning of the European Union. The InfoSoc Directive did not, in striking a balance between the interests of copyright holders and the public, provide for a dynamic framework from the perspective of the end-user. The exhaustive list of copyright exceptions contained in Article 5 did not take into account the fact that new business models arise at a tremendous speed in the digital sphere, and in not so doing, has restricted Member States from responding properly to future technical developments. By making all but one of the copyright exceptions optional, Member States have largely been allowed to keep their previous statutory copyright exceptions. Nine years after the adoption of the Directive there is still a lack of harmonization of copyright exceptions, despite that being the original objective. The exhaustive nature of the list of copyright exceptions failed to respect national legal cultures, especially in the digital sphere where the provision on minor exceptions is not applicable. The InfoSoc Directive, departing from earlier secondary legislation such as the Software Directive, created new terminology and provisions concerning the private-copying exception and technological protection measures, essentially allowing for copyright holders to contractually and technologically limit the use of copyright exceptions. The intended safety net contained in Article 6(4) was drafted in such a way that it derived Member States of effective tools against such technological limitations. Further, it is not applicable to interactive on-demand services at all.

Looking forward, a number of enhancements are possible. While a system of EU copyright law is far away, harmonization of copyright exceptions could be better achieved by providing for a shorter, open-ended list of broader exceptions, taking into consideration the need for Member States to adapt to future technological advancements. The private-copying exception could be applied wholly in the digital sphere by creating a levy system, compensating copyright holders with flat-rate charges on e.g. Internet connections, while allowing for unlimited digital private-copying for non-commercial purposes. By transforming copyright exceptions into user 'rights,' the circumvention of technological protection measures for certain uses would be legalized.

Sammanfattning

Det digitala samhällets utmaningar för EU:s upphovsrättsliga system är många. Med syftet att implementera WIPO:s internettraktater från 1996, samt att horisontellt harmonisera regelverket för upphovsrätt och närliggande rättigheter, antog EU år 2001 det mycket kritiserade InfoSoc-direktivet. Dess mest kontroversiella delar rör upphovsrättsundantagen samt det specifika skyddet som ges till tekniska skyddsåtgärder.

I det här arbetet framförs att direktivet inte åstadkom det uttalade målet om harmonisering av den inre marknaden, och att det misslyckades att respektera medlemsstaternas rättskulturer på ett adekvat sätt, samt att det inte tog tillräcklig hänsyn till frågor om konsumentskydd, som EU:s funktionsfördrag kräver. I sin balansering av upphovsrättsinnehavares och allmänhetens intressen, tog inte InfoSoc-direktivet tillräcklig hänsyn till slutanvändares behov av ett dynamiskt regelverk. Den uttömmande listan upphovsrättsundantag i artikel 5 beaktade inte att det i den digitala sfären uppkommer nya affärsmodeller på löpande band. Detta har begränsat medlemsstaternas handlingsutrymme i att bemöta framtida teknologiska utvecklingar. Genom att alla utom ett upphovsrättsundantag gjordes frivilliga, har medlemsstaterna i stort behållit sina tidigare upphovsrättsundantag. Nio år efter direktivets antagande och i motsats till direktivets ursprungliga syfte, är bristen på harmonisering fortfarande stor. Undantagslistans uttömmande natur misslyckades med att respektera medlemsstaternas rättskulturer, särskilt i den digitala sfären där klausulen om undantag av mindre betydelse inte är tillämplig. Genom att frångå tidigare sekundärrätt såsom mjukvarudirektivet, skapar InfoSoc-direktivet ny terminologi och nya regleringar gällande privatkopieringsundantaget och tekniska skyddsåtgärder, med den primära effekten att upphovsrättsinnehavare legitimt kan på kontraktuell och teknologisk väg inskränka användandet av undantag. Säkerhetsnätet mot detta, artikel 6(4), utformades på ett sådant sätt att medlemsstaterna fråntogs effektiva verktyg mot teknologiska inskränkningar. Artikeln är överhuvudtaget inte tillämplig på interaktiva on-demand-tjänster.

Framtida förbättringar och modifieringar är möjliga. Medan ett EU-rättsligt upphovsrättssystem inte på länge kommer att se dagens ljus, kan harmonisering av upphovsrättsundantag åstadkommas bättre, genom en kortare, icke-uttömmande lista med bredare undantag, i vilken hänsyn tas för medlemsstaternas behov att anpassa sig till framtida teknologisk utveckling. Privatkopieringsundantagen skulle kunna appliceras helt i den digitala sfären genom att skapa ett system med privatkopieringsersättning ovanpå t.ex. bredbandsavgifter, samtidigt som man tillåter obegränsad digital privatkopiering för ickekommersiellt bruk. Genom att omforma undantag till användarrättigheter, kan man säkerställa att kringgående av tekniska skyddsåtgärder för vissa ändamål blir lagligt.

Preface

This thesis marks the end of my studies at the Faculty of Law at Lund University. I chose to write about copyright law because of the rising importance it has had for consumers and other end-users in the digital world, and I chose the InfoSoc Directive in particular because of its consequences for the European market for digital copyrighted material. Rather than rethinking copyright, the European legislators decided to extend the notion of what a copy is in the analog world to the digital. Since a computer or similar machine operates by making copies, the extension meant that even mere use of copyrighted material by a consumer became subject to copyright-holder approval.

I would like to thank my supervisor, Anna Maria Nawrot, for helping me structure the thesis. I would also like to thank Giuseppe Mazziotti at the University of Copenhagen for assisting me in understanding the importance of a balanced copyright system and functioning copyright exceptions for end-users of digital copyrighted works, and for inspiring me to look further into the unsatisfactory instruments enacted by the European Union.

Finally, I would like to thank my family for their invaluable support, encouragement and patience during my years of studying in Lund.

Johannes Schönning
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Lund

Abbreviations

AG	Advocate General
CFR	Charter of Fundamental Rights
DRM	Digital Rights Management
ECHR	European Convention on Human Rights
ECJ	European Court of Justice (Officially: Court of Justice)
EIPR	European Intellectual Property Review
EULA	End User License Agreement
IIC	International Review of Intellectual Property and Competition Law
IPR	Intellectual Property Rights
RIDA	Revue Internationale du Droit d'Auteur
TEC	Treaty establishing the European Community
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
TPM	Technological Protection Measure
TRIPs	Trade-Related Aspects of Intellectual Property Rights
VuR	Verbraucher und Recht
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty

1 Introduction

1.1 Zeitgeist

The World Wide Web was released in 1990. The system, and the Internet, saw such exponential growth that no science-fiction writer could imagine their structure a mere two decades later. Copyright law, more than 300 years after the creation of the Statute of Anne, is once again forced to adapt to technological advancements. By no means a new thing – intellectual property law in general has since its infancy been closely linked to technology, and has always tried to adapt itself to the needs of the present. Because technology's nature of constantly presenting new challenges, the legal system's adaptation has been reactive and late, sometimes more, sometimes less.

The digital networked environment has brought the ordinary person into copyright in a way we have not witnessed before. Previously reserved to people 'in the know' or in the business, copyright now affects everyone, creating a need to redefine first and foremost what an *end-user* of copyrighted material is, and what the end-user's rights are. For the purposes of this thesis, I will use the term *end-user* to describe an individual (natural person) who partakes in the using of copyrighted material either as a consumer, or as a creator of a derivative work. The end-user not only uses works in a way that does not change the work (non-transformative), but also for various other purposes, such as mixing, ripping, burning, sampling, citing, extracting, manipulating, creating mash-ups and adding to other material, in effect uses that result in a derivative work (transformative). In essence, the digital networked environment has caused a significant reduction in the cost of making perfect reproductions. It has also caused dissemination of reproductions to be more swift, easy and cheap than previously, as well as provided technical tools to let users engage in transformative uses with much greater ease – it has lowered the entry barriers to becoming a creator.

Stemming from the *droit d'auteur* doctrine, the idea that there is a natural link between the creator and his or her work, European copyright law, and more specifically the scope of copyright, is designed with a maximalist viewpoint. Copyright exceptions become very important in such a system. In order to spur new creation, to promote scientific and cultural progress, it is not enough for potential creators to have access to the public domain. By creating opportunities for users to engage in dissemination of copyrighted works, the system incentivizes users to become creators themselves. In this regard, it can be repeated that intellectual production is a public good, dependent upon new ideas and forms of expression. An argument could be made that transformative uses of copyrighted works should be the most important exception, on the basis of public-policy interest freedom of

expression[1] as embodied in *inter alia* the U.S. Constitution's First Amendment and the European Convention on Human Rights' (ECHR) Article 10 (popularly called 'Europe's first amendment').[2]

The constitutional protection of copyright, on the other hand, could perhaps be found in the 'property clause' of Article 1 of the First Protocol to the ECHR,[3] or in the 'privacy clause' of Article 8 ECHR. The U.S. Constitution has a special 'copyright clause' in Article 1, § 8, cl. 8. The EU Charter of Fundamental Rights (CFR), a document which entered into force and gained the same status as the EU Treaties on December 1, 2009 with the Treaty of Lisbon, states in Article 17(2) that intellectual property shall be protected.

Exclusive rights of copyright holders have piece by piece been extended into the digital realm. It was long feared that copyright holders would lose control over their works once they were digitized. Digital Rights Management or *DRM* was born, allowing copyright holders to regain control in a technical way, with the unfortunate side-effect that now, users of copyrighted works were reliant on the explicit approval of the copyright holders, instead of legal exceptions. The as of yet unsolved conflict between DRM protection and legal copyright exceptions will be elaborated upon in chapters 3 and 5 of this thesis.

In *Free Culture*,[4] Lawrence Lessig writes:

> "[F]or while it may be obvious that in the world before Internet, copies were the obvious trigger for copyright law, upon reflection, it should be obvious that in the world with the Internet, copies should not be the trigger for copyright law … My claim is that the Internet should at least force us to rethink the conditions under which the law of copyright automatically applies, because it is clear that the current reach of copyright was never contemplated, much less chosen, by the legislators who enacted copyright law …"

A priori, this means that virtually every digital use of a work is subject to the approval of the copyright holder, and it highlights the importance of clear legal copyright exceptions. It is generally accepted that there should be a balance between the interests of the copyright holders and the interests of the public. This balance is reflected in *inter alia* the preambles of the WIPO Internet Treaties from 1996. Achieving and maintaining such a balance is even more important in a world where the public is increasingly diversified into a large number of individual end-users.

A copyright exception can be three things: an exclusion from the protected subject matter; a restriction on the scope of exclusive rights allowing particular kinds of use; or a statutory license, with or without the payment of

[1] See Hugenholtz, Copyright and Freedom of Expression in Europe, Expanding the Boundaries of Intellectual Property.
[2] See Senftleben, Copyright, Limitations and the Three-Step Test. An Analysis of the Three-Step Test in International and EC Copyright Law, pp. 34-41.
[3] ECtHR, Balan v. Moldova, [2009] E.C.D.R. 6
[4] Lessig, Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity, pp. 139-140.

remuneration.[5] This thesis will primarily use the term exception to denote a restriction on the scope of exclusive rights allowing particular kinds of use.

1.2 Purpose & hypothesis

In Europe, 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 (sometimes called 'the Copyright Directive', 'EUCD', or 'the InfoSoc Directive'; for the purposes of this thesis, I will use 'the InfoSoc Directive' or simply 'InfoSoc'[6]) sought to harmonize the legal framework on copyright and related rights, and bring it into the new digital networked environment. The information society in the Directive title should be read as 'the Internet.'[7]

The InfoSoc Directive has been called the most-lobbied Directive in European history,[8] and it has been said that it replaced maybe two-thirds of national copyright laws.[9] The list of copyright exceptions contained in Article 5, together with the exact contours of Articles 6 and 7 on technological measures and rights management information, proved to be the most controversial provisions. With the objective of harmonizing copyright law more horizontally than previous Directives,[10] InfoSoc achieved a mixed result, in part due to direct implementations of already problematic formulations (such as the WIPO Copyright Treaty's provisions on DRM), but also in part due to unintended consequences and vital omissions (such as the majority of the copyright exceptions in Article 5 being non-mandatory).

Focusing on the private-copying exceptions relevant to end-users, this thesis analyzes the InfoSoc Directive critically. Detailing the legal basis requirements for enacting a Directive in the EU, I ask whether the InfoSoc Directive in general, and the list of copyright exceptions as they affect end-users in particular, really fulfilled those requirements. Did the InfoSoc Directive accomplish harmonization of the internal market (as required by Article 114 of the Treaty on the Functioning of the European Union (TFEU))? Did it really consider and respect the different Member States' cultures (Article 167 TFEU) and consumers (Articles 12 and 169 TFEU)? Concluding that there is definitely both room and a need for improvements,

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[5] Guibault, Discussion paper on the question of Exceptions to and limitations on copyright and neighbouring rights in the digital era, Secretariat Memorandum prepared by the Directorate of Human Rights, Council of Europe, MM-S-PR (98) 7, chapter 1.

[6] It is my belief that 'InfoSoc' is a better term than 'the Copyright Directive', as the Directive did not harmonize fully European copyright law, but it sought to adapt the legal framework to the digital world. Further, we may see future Directives in the field of copyright, perhaps even a Directive more deserving of the title 'Copyright Directive.'

[7] Hugenholtz, Why the Copyright Directive is Unimportant, and Possibly Invalid, EIPR (2000), Vol. 11, pp. 501-502.

[8] See Bechtold in Dreier & Hugenholtz (ed.), Concise European Copyright Law, p. 343.

[9] Cohen Jehoram, European Copyright Law – Even More Horizontal, (32) IIC 2001, p. 532, p. 545.

[10] See chapter 3.

towards the end I try to exemplify such needs and how they can be met on the EU level.

1.3 Delimitations

I will focus on private-copying exceptions, namely the ones incorporated into Article 5(2)(b) as well as the transformative uses allowed by Article 5(2) and (3). It is possible to analyze further the copyright exceptions by looking at them one by one.

In this thesis, I will not call into question the system of copyright law in general, or its constitutionality, objectives, premises or consequences, or the call for a balance of different interests. Recital 4 of the InfoSoc Directive reads:

> 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.

The following is stated in Recital 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.

I will analyze the private-copying exceptions and other provisions with Recitals 4 and 31 in mind.

Furthermore, this thesis will not deal with the issue of whether copyright should be considered a property right.[11] Finally, I will not go into the debate on whether copyright exceptions are, or should be, construed as rights in themselves instead of exceptions to exclusive rights.[12]

1.4 Method & material

I deemed it necessary to start off by elaborating on the InfoSoc Directive's background in international law, to put it in a historical context and a larger perspective.

Chapter 3 will deal with the provisions of the InfoSoc Directive, with an emphasis on the private-copying exceptions in Article 5, and Article 5 in

[11] See instead, for instance, Geiger, Intellectual "property" after the Treaty of Lisbon: towards a different approach in the new European legal order?, EIPR (2010), Vol. 32, pp. 255-258.

[12] And neither does the InfoSoc Directive. See Bechtold in Dreier & Hugenholtz (ed.), Concise European Copyright Law, p. 369.

general. An elaboration of Articles 6 and 7 on technological measures and rights management information is also included, as there is a vital link between them and the list of copyright exceptions. The three-step test and its inclusion in the InfoSoc Directive are discussed, with an interpretation of the test derived from case-law and doctrine.

In order to understand the Directive's legitimacy issue fully, I will in chapter 4 briefly explain the system of requiring a legal basis for the proper enactment of a Directive, together with the requirements that such a procedure and the resulting Directive must take into consideration the cultures of the Member States, and consumer interests.

Chapter 5 will, in a normative way, apply the principles from chapter 4 to the provisions of the InfoSoc Directive, scrutinizing the legitimacy of, first and foremost, the list of copyright exceptions, certain copyright exceptions in themselves, the link to technological measures and rights management information, with due regard to case-law and how the Directive has been implemented in the Member States.

In the final chapter, 6, I look towards the future. I try to argue for a revised European framework on copyright exceptions, replacing the one from InfoSoc.

Due to the nature of EU law, there is a relative lack of *travaux preparatoires*. Interpretation of the Directive will be done in accordance with its Recitals, the drafts presented during the legislative procedure, the words of the European Court of Justice (ECJ), and by applying opinions sampled from legal doctrine and related legal instruments such as the so-called WIPO Internet Treaties from 1996.

2 International copyright law

The title of this chapter is somewhat of a misnomer, as I will bring up the preceding instruments to the InfoSoc Directive on the international arena, with a focus on legal exceptions and provisions relevant to end-users and private copying in the digital networked environment. The three-step test, an important 'limitation to the limitations' of copyright, will be discussed separately due to its nature and the controversy it has caused. Before moving into the discussion on the InfoSoc Directive, I will briefly mention the other parts of the body of EU copyright law.

It can be cursory stated that the existing international copyright framework and all the international instruments are connected in various ways, a subject omitted from this thesis. The nature of and relation between different instruments can essentially be boiled down to the result of trade policy, new challenges of that time, administrative suitability, and the changing fiscal sizes of different nations, affecting net exporters and importers of intellectual property. For instance, it seems that structural changes in WIPO, the rise of Brazil, China and India as emerging economies, contributed to the choosing of the WTO as the forum for the provisions that would in 1994 become the TRIPs Agreement.[13] As TRIPs is more concerned with enforcement and a system of dispute settlement than limits on the scope of copyright, it will suffice to say that TRIPs merely restricts Member States to provide for limitations and exceptions as long as they comply with the three-step test,[14] and that, concerning protection of performers, producers of phonograms and broadcasting organizations, limitations and exceptions may be provided to the extent permitted by the Rome Convention,[15] subject to Article 18 of the Berne Convention.[16]

2.1 The Berne Convention

Together with the Rome Convention, the Berne Convention for the Protection of Literary and Artistic Works, adopted in 1886, set out the minimum standard of protection in copyright and neighboring rights. The Berne Convention contains provisions on the requirement of national treatment, however, with the caveat that most Union members regard Berne as a non-self-executing treaty and thus require national implementation.[17] The current text of the Berne Convention, a result of the Paris Revision in 1971, only contains a single mandatory copyright exception. Article 10(1)

[13] Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.
[14] TRIPs Agreement, Article 13.
[15] Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, adopted in 1961.
[16] TRIPs Agreement, Article 14(6).
[17] Chow & Lee, International Intellectual Property, Problems, Cases, and Materials, p. 25.

states that Berne Union countries must implement the right of quotation. Other exceptions in the Convention[18] are optional, as is typical of the major conventions in general.[19] Instead, they usually give general conditions on when an exception can be adopted.[20] Article 9 of the Berne Convention therefore sets out the three-step test, detailed below.

2.2 The WIPO Internet Treaties

The WIPO Internet Treaties is the name given to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), two treaties initiated by WIPO and signed at their headquarters on December 20 and 21 1996, by a Diplomatic Conference. The WCT was originally intended to be a protocol to the Berne Convention, but it ended up as a separate treaty instead, supported by the allowance of Article 20 of the Berne Convention that parties may enter into special agreements. The EU adopted the InfoSoc Directive as a measure implementing the WCT, and it will adhere to the WCT once all Member States have implemented the Directive.[21] The need for the WCT became apparent around the same time as the TRIPs Agreement was finalized, when the Internet started its rapid expansion around 1992-1994. The TRIPs Agreement contains no provisions specific to the digital networked environment, and WIPO was deemed to be better suited than the WTO to develop instruments to deal with the challenges of the digital networked environment, also called the digital agenda.[22]

Negotiations on the WPPT took place simultaneously as the WCT. Since the US did never adhere to the Rome Convention, and since the TRIPs Agreement was limited in level of protection of neighboring rights to the scope of the Rome Convention (as contrasted to the copyright provisions of TRIPs, which go beyond the Berne Convention), it was felt that a new instrument of neighboring rights on the international level was needed. The distinction of copyright on the one hand, and neighboring rights on the other, on the international level, was maintained by adopting the WPPT.[23]

2.2.1 Exceptions under the WCT

The Preamble to the WCT contains some interesting wordings in the recitals. The third recital indicates that it was thought that the digital networked environment had the potential to impact severely on the intellectual property framework. According to Senftleben, digital technology presents two extreme solutions, the first one being the free flow

[18] For instance, Articles 2bis, 9, 10, 11bis(2), and 13.
[19] However, see the Rome Convention, Article 15.
[20] Chow & Lee, International Intellectual Property, Problems, Cases, and Materials, p. 197.
[21] Senftleben in Dreier & Hugenholtz (ed.), Concise European Copyright Law, p. 87.
[22] For a detailed description of the negotiations leading up to the WCT, see Ficsor, Mihály, The Law of Copyright and the Internet, The 1996 WIPO Treaties, their Interpretation and Implementation, chapter 1.
[23] Brison in Dreier & Hugenholtz (ed.), Concise European Copyright Law, p. 165.

of information, and the second one, a new dimension of monitoring and controlling uses of copyrighted works, and that the final result from the WCT still remains to be seen. The fourth recital, stating that copyright protection is of great importance in incentivizing literary and artistic creation, uses a utilitarian rationale of copyright protection. Contrasted with the classical *droit d'auteur* and natural right doctrine of copyright, the WCT underlines that copyright is a means to an end and not an end in itself. The fifth recital states that there is a need to maintain a balance between right holders and the public interest – the same provision is found in the Preamble to the TRIPs Agreement. It provides a clear link to the Berne Convention, in that the Berne rules should govern the balancing process. The inclusion of such a statement on balance does not in any way mean the shape of such a balance is to be novel – the Berne link means the balance should be a traditional one, and that both exclusive rights and limitations are equally important parts of the copyright system.[24]

The Agreed Statement on the WCT set out that the right of reproduction in Article 9 of the Berne Convention is fully applicable to the digital environment, including the three-step test in subparagraph 2.[25] Article 10 of the WCT contains a version of the three-step test.

2.2.2 Exceptions under the WPPT

Virtually the same thing can be said about the WPPT as about the WCT. Dispensing with the additional enumerative list and the reference to compulsory licensing present in the Rome Convention, Article 16(1) of the WPPT allows Member States to adopt the same kinds of limitations and exceptions concerning the protection of performers and producers of phonograms, as they provide for concerning copyright protection. Article 16(2) contains a version of the three-step test. In the Preamble, there is, however, no reference as to the societal value of having a system of related rights, as we saw in the Preamble of the WCT about copyright. Incentivizing performers and phonogram producers was not something that the drafters sought to explicitly mention.

2.2.3 Technological measures

The WCT in Article 11 sets out the obligation of Member States concerning legal protection of technological measures:

> 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.

[24] Senftleben in Dreier & Hugenholtz (ed.), Concise European Copyright Law, p. 89.
[25] Guibault, Discussion paper on the question of Exceptions to and limitations on copyright and neighbouring rights in the digital era, Secretariat Memorandum prepared by the Directorate of Human Rights, Council of Europe, MM-S-PR (98) 7, chapter 2.

Closely connected to copyright exceptions and contractual provisions, Article 11, mirrored in Article 18 of the WPPT, however, does not address these connections, but merely states that legal protection should be given to technological measures. Neither ”adequate” nor ”technological measures” is defined.

2.3 The three-step test

> 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.[26]

The so-called three-step test was introduced in the Berne Convention, Article 9(2), at the 1967 Stockholm Conference, catering to a need to strengthen the reproduction right against the threat of phonographic piracy.[27] Only applicable to the right of reproduction in Article 9(1), it was subsequently included in *inter alia* TRIPs Article 13 (applied to all economic rights), WCT Article 10, WPPT Article 16(2) and InfoSoc Article 5(5), as well as in several other Directives and bilateral treaties. The three different parts of the test on whether an exception is compatible with it or not, are: (1) ”certain special cases”; (2) ”which do not conflict with a normal exploitation of the work”; and (3) ”and do not unreasonably prejudice the legitimate interests of the right holder.”[28]

The test has attracted quite some criticism, as it from a functional perspective seems to be distorting the balance between exclusive rights and the public interest that should exist in the copyright system. While the interpretation of the test has been more flexible than originally feared, there are still concerns as to how the test takes into account the justified interests of developing countries. A cumulative reading of the three requirements no doubt reinforces the position of the right holders at the expense of the public interest.[29] Such a reading, confirmed by the following case to be the correct approach, means that failure to fulfill one or more of the three steps makes the entire exception disallowed. The three-step test is essentially a variant of a compromised proportionality test, which means it would be appropriate to read it in a holistic manner, affording good compliance with one of the requirements to counterbalance a mere satisfactory compliance with the others.[30] Koelman argues that, for the 1967 Stockholm Conference, there was a need for a criterion that was sufficiently vague for the negotiating countries to do as they pleased and that allowed them to maintain the

[26] TRIPs Agreement, Article 13.
[27] Senftleben, Copyright, limitations and the three-step test. An analysis of the three-step test in International and EC Copyright Law, pp. 47-48.
[28] While the Berne Convention spoke of *the legitimate interests of the author*, the scope shifted when the test was incorporated into the TRIPs Agreement, to *the legitimate interests of the right holder*.
[29] Hugenholtz & Okediji, Conceiving an International Instrument on Limitations and Exceptions to Copyright, p. 17.
[30] Hugenholtz & Okediji, Conceiving an International Instrument on Limitations and Exceptions to Copyright, p. 21.

exemptions they had.[31] Proving to be adequately unspecific, the test found its way into subsequent international agreements. Minor exceptions have been discussed during negotiations for the Berne Convention revisions. Uses made for religious ceremonies, military bands and the needs for education should be permissible exceptions, as well as collective house antennas and radio and TV switching facilities, should be permissible, but as they have been included in only the materials from the Berne negotiations, obviously they could only be legitimately regarded in interpreting Berne.[32]

There is also debate as to who should apply the three-step test. Traditionally, the test was designed as a tool for national legislatures to apply when considering adopting provisions to bring national law in line with the provisions of the Berne Convention. It is not a test suited to application by courts, even though it will undoubtedly, in the future, be subject to interpretation by the ECJ, by mere virtue of being included explicitly in EU secondary law.

2.3.1 The IMRO case

No authoritative interpretation of the test under the Berne Convention has ever been given,[33] but in 2000 a WTO Dispute Resolution Panel was given the opportunity to interpret the test under Article 13 of the TRIPs Agreement. The *IMRO* case[34] concerned the interpretation of Section 110(5) of the U.S. Copyright Act, as amended by the Digital Millennium Copyright Act. The Section, which is also called the *home style exemption*, exempted a wide range of businesses and restaurants from liability for the public performance of musical works through TV or radio transmissions, which caused the EU to launch an infringement action against the US, at the behest of the Irish performing rights organization, under the TRIPs Agreement's dispute resolution system, alleging (oversimplified) that this exemption was not compatible with the three-step test. The Panel ultimately held subparagraph (B) to be incompatible with the test, after having constructively analyzed the three different parts of it.

2.3.2 'Certain special cases'

The Panel stated that "certain" should be understood as "well-defined," and that "special" should be understood as "narrowly limited." Denying that there must be a strong public policy argument underlying the exception, no doubt in order to avoid having to evaluate such a policy,[35] the Panel rejected that interpretative tests be based on subjective aims of national legislation.

[31] Koelman, Fixing the Three-Step Test, EIPR (2006), Vol. 28, pp. 407-412, p. 407.
[32] Dreier in Dreier & Hugenholtz (ed.), Concise European Copyright Law, p. 43.
[33] The proper venue under the Berne Convention would be the International Court of Justice.
[34] World Trade Organisation, United States — Section 110(5) of the U.S. Copyright Act, Report of the Panel, WT/DS160/R, 15 June 2000.
[35] Ginsburg, Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-Step Test" for Copyright Exceptions, RIDA, Jan 2001, p. 5.

Instead, it held that Section 110(5)(B) could be considered ”well-defined,” but not ”narrowly limited,” as up to 73% of all eating establishments benefited from it. Thus, the Panel applied a mere quantitative test of this criterion, analyzing the exception by simply measuring the scope and reach of it.[36] Senftleben criticizes this approach,[37] arguing for a qualitative test instead, under which exceptions should be judged on the function of uses that it would intend to enable. Upholding a mere quantitative test could open up for the three-step test being enforced on a pure basis in economics.

2.3.3 ’Not conflict with a normal exploitation of the work’

The word ”normal” could be interpreted as being either empirical or normative. The Panel stated that both interpretations were appropriate. The object of the provision is to protect actual and predictable sources of revenues of the copyright holder from interference by exceptions, and to prevent free users of copyrighted works from competing with the major sources of exploitation available to the copyright holder.[38] According to the Panel, the fact that the impossibility of exercising an exclusive right in a specific market, due to lacking enforcement means, cannot be taken as indicative of what constitutes normal exploitation.[39] The question is whether protection of normal exploitation would reserve all types of exploitation, including plausible future alternatives resulting from technological advancements or changing consumer preferences, leading to progressive erosion of exceptions, is an undesirable conclusion that should not be generalized or given too much importance.[40] Applied to the home style exemption, the Panel stated that, ”if the market as a whole is music performed in business establishments, then the exemption of broadcasts significantly compromises the copyright owner’s opportunity for commercial gain,” and that therefore Section 110(5)(B) is not compatible with the requirement. Compensating the copyright holder for the economic loss incurred by the statutory exception cannot help this exception to pass the second step once a conflict with a normal exploitation has been found.[41]

2.3.4 ’Not unreasonably prejudice the legitimate interests of the rightholder’

This third step leaves the greatest flexibility. Looking at the terms, the Panel observed three terms of special importance: ”interests,” ”legitimate,” and ”unreasonable.” ”Interests” was held to be open for non-economic

[36] Mazziotti, EU Digital Copyright Law and the End-User, p. 82.
[37] Senftleben, Copyright, limitations and the three-step test. An analysis of the three-step test in International and EC Copyright Law, p. 140.
[38] Mazziotti, EU Digital Copyright Law and the End-User, p. 84.
[39] Ginsburg, Toward Supranational Copyright Law? The WTO Panel Decision and the ”Three-Step Test” for Copyright Exceptions, RIDA, Jan 2001, pp. 6-7.
[40] Ginsburg, Toward Supranational Copyright Law? The WTO Panel Decision and the ”Three-Step Test” for Copyright Exceptions, RIDA, Jan 2001, p. 14.
[41] Dreier in Dreier & Hugenholtz (ed.), Concise European Copyright Law, p. 43.

considerations. Concerning ”legitimate,” the Panel did not offer much reasoning. Ginsburg states, that an author would not have a ”legitimate” interest in preventing publication of an unfavorable book review; censorship would not be part of what constitutes ”legitimate interests.”[42] *E contrario*, the third term allows *reasonable* prejudice of the legitimate interests of the right holder. Cohen Jehoram argues that the condition implies that an exception that is unreasonable could be made reasonable by, for instance, financial compensation, in the form of compulsory licenses.[43] The normative nature of the terms ”legitimate” and ”unreasonably” means that a variety of public policy interests could be factored into the three-step test, such as, for instance, the right to privacy, or the freedom of expression.[44]

The Panel decision did not help much in increasing the predictability in future cases on the interpretation of the three-step test. Applying the test in the digital environment is yet more difficult. Normal exploitation and unreasonable prejudice in a digital environment differ substantially from what occurs in the analog world.[45]

2.4 EU copyright law

EU secondary law, affecting copyright, which has been enacted so far, includes the following:

- The Software Directive – Council Directive 91/250/EEC on the legal protection of computer programs
- The Rental Right Directive – 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 (replaced Directive 92/100/EEC)
- The Satellite Broadcasting Directive – Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission
- The Copyright Term Directive – 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 (replaced Directive 93/98/EEC)
- The Database Directive – Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases

[42] Ginsburg, Toward Supranational Copyright Law? The WTO Panel Decision and the ”Three-Step Test” for Copyright Exceptions, RIDA, Jan 2001, p. 9.
[43] Cohen Jehoram, Restrictions on Copyright and Their Abuse, EIPR (2005), Vol. 27 , p. 359-364, p. 361.
[44] Hugenholtz & Okediji, Conceiving an International Instrument on Limitations and Exceptions to Copyright, p. 25.
[45] Hugenholtz (ed.), The Future of Copyright in a Digital Environment, p. 94.

- The InfoSoc Directive – Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society
- The Resale Right Directive – Directive 2001/84/EC of the European Parliament and of the Council on the resale right for the benefit of the author of an original work of art

All these Directives are commonly called the 'first wave' of EU copyright law, except for the InfoSoc Directive, which is thought to have started the 'second wave,' containing more horizontal harmonization.[46] The following two measures also affect copyright, but they deal with intellectual property rights beyond just copyright:[47]

- The IPR Enforcement Directive – Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property right
- Council Regulation (EC) No. 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights

[46] Bechtold in Dreier & Hugenholtz (ed.), Concise European Copyright Law, p. 343.
[47] Dreier & Hugenholtz (ed.), Concise European Copyright Law, p. 5.

3 The InfoSoc Directive

3.1 Overview

I begin this structural analysis of the InfoSoc Directive by asserting that there were two original objectives behind its creation. The first one was to implement the WCT and the WPPT in the EU Member States, in order for the Member States and for the EU itself to ratify the WIPO treaties.[48] The second one was to harmonize European copyright law, in some sense, on a horizontal level. If one is to believe Hugenholtz, the Commission had 'gone rogue' and sought to accomplish way too much in a single instrument.[49] This two-pronged intent resulted in the creation of harmonization measures concerning not only the digital environment, but also the analog. For instance, the right of reproduction is of general application, and many of the copyright exceptions in Article 5 concern non-digital uses. The Commission had in 1995 published a Green Paper on Copyright in the Information Society,[50] in which it ambitiously had set out the objectives of *inter alia* re-defining at Community level the subject matter and the extension of economic and moral rights on creative works, and of harmonizing effectively provisions on collective rights management and technological protection of digital works. It should be said that most of the measures enumerated in the Green Paper did not end up in the InfoSoc Directive, particularly due to the reprioritization to allow for the implementation of the WCT and the WPPT also.[51]

The legal basis of the InfoSoc Directive is Article 114 TFEU. There is no dispute as to the policy objectives to be achieved. Recital 2 reads:

> "… 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. … 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."

Recital 4 reads:

> "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

[48] In part, the EU had already implemented the WCT and the WPPT. The Software Directive implemented Article 4 of the WCT; The Database Directive implemented Article 5 of the WCT; The Rental Right Directive dealt with several of the issues in the WCT and the WPPT, *inter alia* Article 7 of the WCT and Article 9 of the WPPT.
[49] Hugenholtz, Why the Copyright Directive is Unimportant, and Possibly Invalid, EIPR (2000), Vol. 11, pp. 501-502.
[50] Commission of the European Communities, Green Paper. Copyright and Related Rights in the Information Society, Brussels, 19 July 1995, COM (95) 382 final 49.
[51] Mazziotti, EU Digital Copyright Law and the End-User, p. 51.

network infrastructure, and lead in turn to growth and increased competitiveness of European industry…"

Recital 5 reads:

"…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."

And recital 6 reads:

"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 … leading to a refragmentation of the internal market…"

While motivated by the continued smooth operation of the internal market,[52] InfoSoc makes it clear that just as much of a concern is the strengthening of the industrial development of European industry.[53]

Chapter 1 of the Directive deals with the scope, and how the Directive interacts with the previous EU measures on copyright and related rights. The Directive is without prejudice to such previous EU measures, with the exception[54] of repealing Article 7 of the (now repealed and replaced) Rental Right Directive due to introducing a new general right of reproduction, and InfoSoc amends Article 3(2) of the Copyright Term Directive. An important realization, this should mean that the provisions on technological protection measures (TPMs) in Article 6 should not be applicable to software, and the Software Directive's provisions in Article 5(3) and Article 6 of allowing reverse-engineering of software for the purposes of creating compatible programs should still be applicable.[55] The scope of the Directive, in line with what is said in Article 1, does not include the basic requirements for copyright protection, or such transformative uses that are reserved to the copyright holder.[56]

Chapter 2 sets out the exclusive rights of reproduction, communication to the public, and of distribution, as well as containing arguably the most controversial feature of the Directive, Article 5 on copyright exceptions, which did not have a basis in the 1995 Green Paper. Chapter 3 deals with technological protection measures, split between Article 6 about technological measures and Article 7 about rights management information. Chapter 4 contains common provisions such as sanctions and remedies

[52] See also Recital 7.
[53] See also Ullrich, Legal Protection of Innovative Technologies: Property or Policy?, in Grandstrand (ed.), Economics, Law and Intellectual property – Seeking Strategies for Research and Teaching in a Developing Field, p. 439, p. 471.
[54] Article 1(2) referral to Article 11.
[55] Brown, Implementing the EU Copyright Directive, p. 14.
[56] I.e. acts of translation, adaptation or modification of the work; Mazziotti, EU Digital Copyright Law and the End-User, p. 52.

(which must be effective, proportionate and dissuasive[57]), application over time, and implementation. The relatively short implementation timescale of the Directive, 22 December 2002, was because the Commission wanted it to be implemented together with the E-Commerce Directive[58].[59] The Directive does not deal with the issue of moral rights, and only partially with the issue of levy schemes.[60]

Koelman has argued that the resulting Directive does not strive for economic efficiency as indicated by its recitals, with a legislative intent of promoting social welfare, but rather that the Directive is best explained by the 'public choice theory,' and that the provisions reflect the interests of lobbyists and rent-seekers.[61]

3.2 The exclusive rights

3.2.1 Article 2 – Right of reproduction

> "…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…"

As stated above, InfoSoc introduces a generally applicable right of reproduction, applicable to authors, performers, phonogram producers, film producers, and broadcasters for their respective works. Previous EU provisions on a reproduction right could be found in the Software Directive and the Database Directive. The notion in the Software Directive, Article 4(a), was problematic to the extent that it covered even temporary copying under its scope, subjecting mere use of software to the exclusive right of the copyright holder. It is still uncertain whether Article 4(a) encompasses acts of loading, displaying, running, transmitting or storing as specific types of reproduction, or whether they are implicitly allowed as long as a right to use the software has been acquired.[62] The Software Directive exempted certain uses, as mandatory provisions, under Articles 5 and 6, together with a provision on a shield against contractual overriding of the exceptions in Article 9.

The InfoSoc Directive adopted the Software Directive's broad notion of reproduction including temporary copies, and made it applicable to all types

[57] Dissuasive sanctions might cause a change in the legal damages systems of Member States in which copyright damages are awarded primarily on a compensatory basis. See Tritton, Intellectual Property in Europe, p. 372.
[58] 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.
[59] Recital 16; Tritton, Intellectual Property in Europe, p. 372.
[60] Bechtold in Dreier & Hugenholtz (ed.), Concise European Copyright Law, p. 355.
[61] Koelman, Copyright Law & Economics in the EU Copyright Directive: Is the Droit d'Auteur Passé?, IIC, No. 6/2004, pp. 603-638, especially at pp. 637-638.
[62] Czarnota & Hart, Legal Protection of Computer Programs in Europe. A Guide to the EC Directive, pp. 56-57.

of works mentioned in Article 2. The only mandatory copyright exception, Article 5(1), exempts from the scope of Article 2, reproductions 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…”

This means that for example caching and routing are exempted acts. Article 5(1)(a) should be read together with Articles 12-15 of the E-Commerce Directive on liability exemptions for Internet service providers. The term ”no independent economic significance” denotes that the reproduction should be ”made for the sole purpose of executing another act of exploitation of a work.”[63] Mazziotti argues that, concerning the act of browsing by end-users, there are uncertainties as to whether it is covered by Article 5(1), due to the wording of Recital 33, and to the interpretation of ”a lawful use” in Article 5(1)(b).[64] Recital 33 states that ”a lawful use” is ”authorised by the rightholder or not restricted by law.” [65] It should here be noted that it is easy to come up with a situation where a copyright holder authorizes a temporary reproduction, but it is harder to come up with a temporary reproduction not restricted by law. Hugenholtz has stated that ”temporarily stored digital packets are usually far too small to qualify as ’reproductions’ in a legal sense” and that ”[d]id we really need a European lawmaker to tell us that caching and browsing are allowed without authorisation? A common sense right would have done the job as well, if not much better.”[66] The absence of substantial provisions on the level of originality in the InfoSoc Directive means that the reproduction right, in Member States with a low-level requirement of originality for copyright protection, could be used to prevent reproductions of even a small or insignificant part of the work, it being deemed an infringement.[67]

3.2.2 Article 3 – Right of communication to the public

> ”…the exclusive right to 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 chosen by them.”

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[63] Commission of the European Communities, Explanatory Memorandum, Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, COM (97) 62, p. 30.
[64] Mazziotti, EU Digital Copyright Law and the End-User, p. 63.
[65] Concerning the interpretation of ”a lawful use”, see 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, pp. 33-34.
[66] Hugenholtz, Why the Copyright Directive is Unimportant, and Possibly Invalid, EIPR (2000), Vol. 11, pp. 501-502.
[67] Tritton, Intellectual Property in Europe, p. 367.

The right of communication to the public should be read together with Recital 23, and in a broad sense. Essentially a copy of Article 8 of the WCT, it covers digital transmissions of works over networks.[68] In this manner, Article 3 specifically targets interactive, on-demand services, such as when content is put on a website by the copyright holder, to be downloaded by visitors at their convenience. It therefore explicitly covers both streaming and downloading. It is not confined to Internet communications.[69]

3.2.3 Article 4 – Right of distribution

> "…the exclusive right to authorise or prohibit any form of distribution [of original works or copies thereof] to the public by sale or otherwise."

The exclusive right of distribution is supplemented by an exhaustion principle in Article 4(2). Read together with Recitals 28 and 29, the exhaustion principle is deemed only to apply to physical media, or, as Recital 28 states, "tangible articles." Digital copies, intangible articles, distributed over networks are not covered, and thus the right of distribution cannot be exhausted for such works – instead, downloading is treated as a form of communication to the public, see above. Article 4(2) was the subject of the case *Laserdisken*,[70] in which the ECJ clarified that the provision does not allow a Member State to derogate from the principle of Community-wide exhaustion. The Member State in question, Denmark, had previously applied a principle of international exhaustion, and Laserdisken, as an importer of copies of cinematographic works from countries outside the Community, alleged that the Danish implementation of Article 4(2), moving from international exhaustion to regional exhaustion, was illegitimate. The ECJ, in upholding the legitimacy of the Danish implementation, stated that Community-wide exhaustion was the only interpretation consistent with the main purpose of InfoSoc, that of ensuring the proper functioning of the internal market.

Implementing a principle of exhaustion for intangible articles would be inconceivable, according to Mazziotti.[71] Intangible articles are to be understood as services and subject to territoriality. In connection to this, it is interesting to discuss the Distance Contract Directive[72] and whether to view online content delivery as a distribution of goods or as a service. There are examples where the technical feasibility of returning digital copies to the retailer has been implemented in practice.[73] If construed as a service, digital downloads would not fall under the Distance Contract Directive, and the right of withdrawal would be in part removed.

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[68] See also Recital 25.
[69] Tritton, Intellectual Property in Europe, p. 367.
[70] C-479/04, Laserdisken ApS v. Kulturministeriet.
[71] Mazziotti, EU Digital Copyright law and the End-User, pp. 67-68.
[72] 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.
[73] See e.g. Tiscali's UK online music store at www.tiscali.co.uk/music.

3.3 Technological protection measures (TPMs)

Article 11 of the WCT and Article 18 of the WPPT set out that members should offer adequate legal protection of technological protection measures. Going further and containing more detailed provisions, the InfoSoc Directive establishes in Article 6 protection which is mostly independent of copyright exceptions. In chapter 3.4.4, I will analyze why Article 6(4) did not fulfill entirely its objective of allowing copyright exceptions in certain circumstances despite the existence of technological measures. On the model of Article 12 of the WCT and Article 19 of the WPPT, InfoSoc in Article 7 regulates rights-management information. Thereby, the Directive creates a complex system which has seen a variety of different implementations in the Member States, due to the system's failure of recognizing what later became the *de facto* standard of technological measures and rights-management information: Digital Rights Management or *DRM*. The InfoSoc Directive had, in this regard, become outdated within only a couple of years.

3.3.1 Article 6: Technological measures

Under Article 6(1), Member States are required to have legal protection against acts of circumvention of any effective technological measure, and, under Article 6(2), going further than what the WIPO Treaties did, they are required to outlaw the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of technologies which enable or facilitate circumvention of such effective technological measures. In part to take into consideration the rapid technological achievements in these measures, Article 6 adopts a broad definition of what a 'technological measure'[74] is. The same is true for Article 7 and 'rights-management information'.[75] It has been held in a German case, that making available circumvention software for download could be included under Article 6(2) and be seen as an importation of a circumvention device.[76] In the same case, it was stated that the linking to an

[74] Article 6(3): *"...any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works ..., which are not authorised by the rightholder of any copyright ... Technological measures shall be deemed to be 'effective' where the use of a protected work ... 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 a copy control mechanism, which achieves the protection objective."*

[75] Article 7(2): *"...any information provided by rightholders which identifies the work ..., the author or any other rightholder, or information about the terms and conditions of use of the work ..., and any numbers of codes that represent such information."*

[76] Munich Regional Court, I, 7 March 2005, 21 O 3220/05, upheld Munich Court of Appeal, 28 July 2005, ZUM 2005/12, p. 896. See Commission Staff Working Document, 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, SEC(2007) 1556, 30 November 2007, p. 8.

offshore website, where the software was made available, constitutes contributory infringement.

Article 6 was one of the most contested provisions of the Directive during its drafting.[77] The main problem seemed to be in the link to copyright exceptions, on how to allow the use of an exception on a work that is protected by technological measures. The original Commission proposal would have, ambiguously, protected technological measures as long as they restricted or prevented infringements of copyright.[78] Clearly, the final Directive provision chose a different wording, by virtue of the 2000 Common Position.[79] As stated by Vinje, ”it is unfortunate that EU legislators have chosen to adopt such a far-reaching prohibition on circumvention-related activities with no link to infringement.”[80]

3.3.2 Article 7: Rights-management information

Article 7(1)(a) lays out the obligation to provide legal protection against acts of removing or altering any rights management information knowingly, and Article 7(1)(b) the obligation to make illegal the making available of copyrighted works which have been stripped of their rights management information, or where such information has been altered.

3.3.3 The reality: DRM

DRM protection combines both access and copy control with rights management information. By doing that, this popular way of controlling digital copyrighted works hits both Article 6 and Article 7. As stated below, in 5.5, the result was that the Member States implemented Articles 6 and 7 differently, leading to a non-harmonious application on systems of DRM protection.

3.4 Copyright exceptions

The formalistically drafted Article 5 is the main source of InfoSoc copyright exceptions, providing an exhaustive list, which means that Member States may not provide for other exceptions than what the Directive provides for. In paragraph 1, the mandatory exception of temporary acts of reproduction is laid out. Paragraph 2 contains exceptions to the right of reproduction,

[77] Tritton, Intellectual Property in Europe, p. 371.
[78] Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, COM (97) 628 final, 7 April 1998.
[79] 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.
[80] Vinje, Should We Begin Digging Copyright’s Grave? EIPR (2000), Vol. 12, p. 551, p. 556.

inter alia the private-copying exception in 5(2)(b). Paragraph 3 contains exceptions to both the right of reproduction and the right of communication to the public. Paragraph 4 merely states that, where Member States have provided for exceptions to the right of reproduction, they may similarly provide for those exceptions to the right of distribution. Paragraph 5 contains the three-step test. I will not discuss each and every available copyright exception, but will focus on the ones relevant to end-users in the digital networked environment.

The need for a list of copyright exceptions in the EU was stated in Recital 31:

> "…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."

Here we see that the legal basis for enacting copyright exceptions is the smooth functioning of the internal market, as per Articles 26 and 114 TFEU.

3.4.1 The negotiation procedure

The Commission had stated in its Follow-up to the 1995 Green Paper,[81] that it intended to provide for exceptions designed on a 'fair use' model, based on wordings similar to those of the three-step test. France, Italy and Spain argued that a closed number of exceptions would have accomplished adequate harmonization of copyright exceptions, stressing the importance of legal certainty. The Scandinavian countries and the Netherlands, however, desired an open provision, similar to the 'fair use' doctrine under U.S. law.[82] This latter argument, based on the notion that an exhaustive list would be unsuitable for the digital networked environment, where new business models and new uses emerge at a rapid pace,[83] was struck down.[84] To solve the problem of combining exhaustiveness with the obligation to respect the different Member States' legal traditions and culture,[85] as Recital 32 mentions, the Commission opted for a quick solution and included all the requests of the Member States. Designating them, largely, as optional, made sure that the Member States more easily accepted the composition of the

[81] Communication from the Commission, Follow-up to the Green Paper on Copyright and Related Rights in the Information Society, COM (96) 586 final.
[82] Cohen Jehoram, European Copyright Law – Even More Horizontal, (32) IIC 2001, p. 532, p. 542.
[83] Hugenholtz, Why the Copyright Directive is Unimportant, and Possibly Invalid, EIPR (2000), Vol. 11, pp. 501-502.
[84] Luxembourg abstained from voting on the whole proposal in protest.
[85] See below, chapter 4.2.1.

list.[86] What had originally been a list of seven exceptions had grown into a full list of 21.

3.4.2 The exhaustive list itself

Recital 32 reads:

> ” 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.”

Reasonably, this contradicts the objective stated in Recital 31. Mazziotti argues that ”an exhaustive enumeration of exceptions and limitations” can hardly be compatible with the objective of abolishing obstacles to the smooth functioning of the internal market, meaning that the EU would only have been allowed to enact harmonization measures where there was evidence that differences between Member States affected intra-Community trade.[87] It is questionable as to whether an exhaustive list, where 20 of the 21 exceptions are optional, actually leads to harmonization of the internal market.[88] The mandatory exception of temporary acts of reproduction is discussed above, in chapter 3.2.1. Below is a discussion on the exceptions relevant to end-users in the digital networked environment.

3.4.2.1 Private copying

Laid out in Article 5(2)(b), Member States may provide for exceptions to the right of reproduction concerning copying:

> ”…by a natural person 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…”

An extension of the right to privacy, the private-copying exception highlights a belief that copyright does not extend to the private sphere. Indeed, private use never significantly affected a normal exploitation of works, or the legitimate interests of the copyright holders. Following the development in the Software Directive and the Database Directive, private-copying exceptions have been more restrictive in the digital networked environment, due to the ease with which one can reproduce a work.[89] There are, however, multiple bases on which to build a private-copying exception on, such as the freedom of expression, the public’s right to information, or

[86] Mazziotti, EU Digital Copyright Law and the End-User, pp. 78-79.
[87] Mazziotti, EU Digital Copyright Law and the End-User, pp. 77-78.
[88] Bechtold in Dreier & Hugenholtz (ed.), Concise European Copyright Law, p. 369.
[89] Guibault, Discussion paper on the question of Exceptions to and limitations on copyright and neighbouring rights in the digital era, Secretariat Memorandum prepared by the Directorate of Human Rights, Council of Europe, MM-S-PR (98) 7, chapter 4.

other similar fundamental rights.[90] The InfoSoc Directive subjects the private-copying exception to the control of the copyright holders, albeit an exception can be legitimized by the national provisioning of a statutory license scheme with fair compensation to the copyright holders in mind. The popular solution of levies[91] can therefore be maintained in Member States having such a scheme, provided that they give fair compensation. If Member States do not provide for fair compensation through such schemes, they are obliged to phase-out the schemes to the extent that TPMs operate effectively on the copyrighted works.[92] Essentially, it tried to follow the reasonable path of not forcing the users of the private-copying exception to pay levies for copying which cannot take place due to TPMs. Following Recital 57, the issue of protecting personal data when end-users seek to benefit from the private-copying exception, and TPM-affected works, is crucial. No further guidance is given in the Directive, but it should be an apparent imperative to ensure, in a system promoting TPMs as a technological solution to legal enforcement problems, that designers and users of TPMs incorporate safeguards for the protection of end-user privacy.[93]

The Directive does not define ”commercial,” which is left to the Member States. The term ”fair compensation” is a novelty to EU copyright law. In previous Directives, the term used was ”equitable remuneration.” Recital 35 states that a valuable criterion in determining what constitutes fair compensation would be the possible harm to the rights holders resulting from the act in question. This link to a notion of harm is equally novel., and it has a lower standard than ”equitable remuneration.”[94]

The ECJ will possibly shed some light on the interpretation of the term “fair compensation” in the still-pending case of *SGAE v. Panawan*.[95] According to the facts of the case, the Spanish IPR management society launched proceedings against a private company, claiming that the latter must pay a flat-rate compensation (levy) to the society, for private copying in respect of storage media, marketed by the company during a specific period in time. The national court has referred questions to the ECJ concerning the question on whether Spanish law is consistent with Article 5(2)(b) of the InfoSoc Directive, in requiring that compensation shall be paid by wholesalers and retailers for *inter alia* digital reproduction equipment for reproducing copyrighted material, even where the use of such equipment does not

[90] Geiger, The answer to the machine should not be the machine: safeguarding the private copy exception in the digital environment, EIPR (2008), Vol. 30, pp. 121-129, p. 123.
[91] For a discussion on the pros & cons of levies and DRM, see Koelman, The Levitation of Copyright: An Economic View of Digital Home Copying, Levies and DRM, Entertainment Law Review 4/2005, pp. 75-81.
[92] Hugenholtz, Guibault & van Geffen, The Future of Levies in a Digital Environment,.
[93] Mazziotti, EU Digital Copyright Law and the End-User, p. 92.
[94] Bechtold in Dreier & Hugenholtz (ed.), Concise European Copyright Law, p. 373.
[95] C-467/08, Sociedad General de Autores y Editores (SGAE) v. Padawan S. L., *still pending*.

involve such reproduction. The AG Opinion[96] released on 11 May 2010 recommends that the ECJ hold: that the concept of "fair compensation" is to be interpreted as an autonomous Community law concept;[97] that Member States are obliged to strike a fair balance between the different interests in implementing that concept;[98] that the imposition of a levy on equipment is only justified where there is a link to the presumed use of that equipment;[99] and that the imposition of a levy on equipment clearly intended for other uses than private copying is contrary to Article 5(2)(b).[100]

3.4.2.2 Relevant transformative use exceptions

The InfoSoc Directive contains some general (i.e. not specific to digital uses) exceptions relevant to end-users seeking to use a work for transformative purposes (e.g. creating a derivative work). Article 5(3) lists exceptions concerning *inter alia* teaching and scientific research, quotations, uses of political speeches and extracts from public lectures, reporting of current events, incidental inclusions in other material, and caricatures, parodies or pastiches, and also uses for the benefit of people with disabilities.[101] The exceptions consider various public policy objectives, such as the freedom of expression, freedom of the press, equal access.

3.4.2.3 Minor exceptions

Article 5(3)(o) provides Member States with the option of maintaining certain copyright exceptions, if they are of minor importance and if they only concern analog uses and do not affect the free movement of goods and services. *E contrario*, this provision means that Member States may not consider new exceptions for digital uses.

3.4.3 Inclusion of the three-step test

A norm of EU law since the Software,[102] Rental Right,[103] and Database[104] Directives, the three-step test was incorporated into InfoSoc in Article 5(5). Qualifying as a measure subject to interpretation by the ECJ, it is regarded as being directed towards national legislatures in implementing the Directive. However, some Member States did not fully agree with this interpretation and have implemented the test as a national provision, thus opening up for national courts to scrutinize exceptions in individual cases

[96] Opinion of Advocate General Trstenjak, delivered on 11 May 2010 in case C-467/08, Sociedad General de Autores y Editores (SGAE) v. Padawan S. L.
[97] AG Opinion, paragraph 59-72.
[98] AG Opinion, paragraph 73-84.
[99] AG Opinion, paragraph 87-95.
[100] AG Opinion, paragraph 96-101, 108-111.
[101] Adding to this, the quite superfluous – in this day and age – exception related to use by communication or making copyrighted works available, for the purpose of research or private study, to individual members of the public *by dedicated terminals on the premises* of establishments such as libraries, schools, museums, archives and so forth, Article 5(3)(n).
[102] Article 6(3).
[103] Article 10(3) of the now-repealed and replaced Directive.
[104] Article 6(3).

under the test.[105] Mazziotti argues that Recital 44[106] is an indicator that the three-step test is not merely directed towards the Member States' legislatures – they are already obliged to follow the three-step test under other international instruments – but also towards the judiciaries, creating a sort of common benchmark and dynamism to the exceptions enumerated in Article 5.[107] This follows from the possible interpretations that can be made of the phrase "When *applying* the exceptions…" Concerning exceptions in the digital networked environment, Recital 44 states, the scope of such exceptions may have to be even more limited. Tritton argues that this creates a kind of 'four-step test' in relation to the Internet. When scrutinizing exceptions in relation to the Internet, consideration should be taken with regard to the fact that technology in these fields makes available faithful reproduction and rapid dissemination, and that the scope for economic harm thus can be greater than in an analog context.[108]

3.4.4 Interface with DRM protection

As mentioned in 3.3.1 above, the original Commission proposal[109] had stated that legal protection for TPMs would only be mandated where these measures did not limit or prohibit the legal copyright exceptions. The Commission, as WIPO negotiator for the Community in the drafting of the WCT and the WPPT, was aware of the link between TPMs and copyright exceptions,[110] but at the time of the 2000 Common Position,[111] the link had been removed, replaced by a subjective criterion of submission to the will of the copyright holder. The Council had been forced to compromise between the original Commission proposal and the various restrictive amendments from the European Parliament, some of which had sought to make copyright exceptions entirely dependent upon the functionality of TPMs.[112] The

[105] Hugenholtz & Okediji, Conceiving an International Instrument on Limitations and Exceptions to Copyright, p. 18.
[106] Recital 44 reads: *" 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."*
[107] Mazziotti, EU Digital Copyright Law and the End-User, pp. 85-86.
[108] Tritton, Intellectual Property in Europe, p. 369.
[109] Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, COM (97) 628 final, 7 July 1998.
[110] Hugenholtz, Why the Copyright Directive is Unimportant, and Possibly Invalid, EIPR (2000), Vol. 11, pp. 501-502.
[111] 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.
[112] Mazziotti, EU Digital Copyright Law and the End-User, p. 73.

original Commission proposal had contained a statement in Recital 27 to the effect that private-copying and remuneration-scheme exceptions should not restrict the use of TPMs, and several amendments from the European Parliament wanted to extend this to other exceptions as well. The effect of Article 6(3) of the InfoSoc Directive is, that all material locked in with TPMs (DRM) is protected by virtue of law, and it is not important whether the entirety of that material is copyright protected or not.

That is why Article 6(4) was added.[113] It would seem that rights holders according to this provision would have to make available for the actual usage of certain copyright exceptions, namely the ones under Articles 5(2)(a), 5(2)(c)-(e), 5(3)(a)-(b) and 5(3)(e),[114] as long as the user has legal access to the protected work. The majority of copyright exceptions enumerated in Article 5 is therefore subject to the limitations imposed by TPMs.[115] This means that Article 6(4) does not create effective safety nets for the most important public-policy objectives upholding certain exceptions, deriving Member States from effective tools in intervening where TPMs restrict the public interest.[116]

Hugenholtz is highly critical of this Article. He asks what "voluntary measures," "agreements between rightholders and other parties" and "appropriate measures" mean. The interpretation is left to the Member States. Would Member States be obliged to make available a few copies to the public for inspection and reproduction by the public, or would they be

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[113] Article 6(4) reads: *"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*."*

[114] Mandated: Photocopying, quotations for teaching or research purposes, and uses for the benefit of people with disabilities. Optional: Private-copying.

[115] Tritton, Intellectual Property in Europe, p. 371.

[116] Mazziotti, EU Digital Copyright Law and the End-User, p. 94.

obliged to prohibit TPMs if they seriously infringed public access?[117] Departing from the notion in *inter alia* Recital 33 of 'a lawful use,' 'legal access,' as a condition, effectively means that all lawful uses that are restricted by contract and TPMs, are legitimate under Article 6(4). In other words, copyright holders may, through a combination of licenses and TPMs, restrict acts that are not prohibited by law. Licenses, typically EULAs, mass-market licenses, click-wrap and browse-wrap, could be designed so that the end-user might only obtain legal access after having accepted the license agreement.

In connection with TPMs and Article 6(4), the relationship between copyright exceptions and contract law is laid out in Article 9. Here, it is stated that the Directive is without prejudice to the law of contract. Recital 45 makes it clear that contractual overrides to the exceptions in Article 5(2)-(4) are allowed. Consumer protection laws may, however, restrict such contractual overrides.[118] Absent consumer protection provisions, however, by virtue of accepting a license agreement, and thereby gaining legal access, an end-user has in reality cancelled his or her rights under copyright exceptions. This creates a burden on national legislatures to clarify the situation.

Recital 53 states that Article 6(4)(1)-(2) shall not apply concerning interactive on-demand services. Most material on the Internet is interactive, and Recital 53 leads to the conclusion that TPMs will be without restriction.

3.5 Implementation

Only Denmark and Greece met the implementation deadline of 22 December 2002.[119] The Commission brought infringement proceedings for failure to implement the Directive against some Member States.[120]

Gasser and Girsberger demonstrate that the vague terms used in Article 6 to identify technological protection measures have resulted in different, non-harmonious, implementations in the member states.[121] This is exacerbated by the fact that the most common form of technological protection, DRM, also includes rights management information. Denmark denies legal protection to access-control technologies, but protects copy-control technologies.[122] Hungary only protects TPMs as long as they serve to

[117] Hugenholtz, Why the Copyright Directive is Unimportant, and Possibly Invalid, EIPR (2000), Vol. 11, pp. 501-502.
[118] Bechtold in Dreier & Hugenholtz (ed.), Concise European Copyright Law, p. 371.
[119] Bechtold in Dreier & Hugenholtz (ed.), Concise European Copyright Law, p. 402.
[120] E.g. C-31/04 Commission v. Spain, C-56/04 Commission v. Finland, C-59/04 Commission v. France, C-88/04 Commission v. UK, C-91/04 Commission v. Sweden, C-143/04 Commission v. Belgium.
[121] Gasser & Girsberger, Transposing the Copyright Directive: Legal Protection of Technological Measures in EU-Member States. A Genie Stuck in the Bottle?, especially Part II.
[122] Gasser & Girsberger, Transposing the Copyright Directive: Legal Protection of Technological Measures in EU-Member States. A Genie Stuck in the Bottle?, p. 13.

prevent copyright infringement, allowing end-users to engage in circumvention of TPMs in order to use statutory copyright exceptions, which is contrary to the wording of Article 6(3).[123] Article 6(4) also caused significant delays in implementing the Directive, due to its many uncertainties. Since it affects enforcement possibilities of exceptions, it also affected the implementation of copyright exceptions.

The private-copying exception in Article 5(2)(b) also saw various different implementations,[124] especially in the interface with Article 6(4),[125] where many Member States omitted the possibility of creating enforcement mechanisms for private copying.[126]

Concerning implementation of the three-step test into national laws, many Member States have not explicitly implemented it.[127] This follows from the notion that the three-step test as envisaged in Article 5(5) was directed at the national legislatures, and that its purpose was to make sure that national exceptions complied with it as an implementation measure. France, Italy, Greece, Luxembourg, Portugal and Spain have, however, provisions in their national laws reflecting the two latter, if not all, steps of the test.[128]

[123] Gasser & Girsberger, Transposing the Copyright Directive: Legal Protection of Technological Measures in EU-Member States. A Genie Stuck in the Bottle?, p. 14.
[124] See e.g. the Dutch implementation. Hugenholtz, The Implementation of Directive 2001/29/EC in The Netherlands, RIDA, 2005-206, pp. 117-147.
[125] 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, pp. 111-113.
[126] See Mazziotti, EU Digital Copyright Law and the End-User, Appendix II.
[127] *Inter alia* Austria, Denmark, Finland, Germany, the Netherlands and the UK. See Brown, Implementing the EU Copyright Directive, p. 22.
[128] Geiger, From Berne to national law, via the Copyright Directive: the dangerous mutations of the three-step test, EIPR (2007), Vol. 29, pp. 486-491, p. 486.

4 EU copyright harmonization requirements

4.1 Approximation of laws

The old EC Treaty (TEC) did not contain a provision similar to Article 118 TFEU, but instead implied in Article 295 TEC[129] that the European Community lacked direct competence to legislate in the field of copyright law.[130] Therefore, the harmonization of copyright law present in the InfoSoc Directive was undertaken with a basis in Article 95 TEC, which is now Article 114 TFEU. This chapter will deal with, first, the requirements for use as a legal basis for enacted measures of Article 114 and connected interpretations as made by the ECJ, and second, the application of Article 114 as a legal basis for enacted measures in copyright law.

4.1.1 Article 114 TFEU

Article 114 TFEU[131] lays out the procedure for enacting Directives on the basis of Article 26 TFEU (ex Article 14 TEC), that is, for the purposes of

[129] Article 295 read: *"This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership."* Virtually the same formulation has been kept in Article 345 TFEU.

[130] Mazziotti, EU Digital Copyright Law and the End-User, p. 37.

[131] Article 114 reads: *"1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.*
2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.
3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.
4. If, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 36, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.
5. Moreover, without prejudice to paragraph 4, if, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.

establishing or ensuring the functioning of the internal market. EU copyright law is therefore in reality internal market legislation, and it implies that the measures enacted should strive to remove national barriers to the free movement of goods (or services[132]), or to remove conditions distorting competition. Article 114 is a residual provision, which means that it should only be used where there is no other suitable provision in the Treaties to function as a legal basis. Where there is a dispute on which provision to use, the ECJ has stated that regard should be had to the nature, aim, and content of the measure.[133] Despite its residual character, according to Craig & de Búrca, the ECJ has on numerous occasions allowed Article 114 to be the legal basis for enacted measures.[134]

Broadly framed, the Article has been held to have some limits in scope. In the *Tobacco Advertising* case,[135] the ECJ read Article 114 in the light of ex Articles 3(1)(c) (repealed) and 14 (Article 26 TFEU) TEC, and struck down a Directive designed to harmonize the law relating to the advertising and sponsorship of tobacco products. The ECJ asserted that Article 114 TFEU requires that the measure enacted has a genuine intention to improve the conditions for the establishment and functioning of the internal market, as contrasted to giving a general power to regulate markets, something that was not covered by Article 114. De Witte has argued that this denial of a general power to regulate markets in reality presents a false view, and that

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6. The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.
In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.
When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.
7. When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.
8. When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.
9. By way of derogation from the procedure laid down in Articles 258 and 259, the Commission and any Member State may bring the matter directly before the Court of Justice of the European Union if it considers that another Member State is making improper use of the powers provided for in this Article.
10. The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Union control procedure."

[132] The reason for my inclusion of services in brackets is that the exclusive rights not solely pertain to goods, but also to services to some extent. See above, chapter 3.2.

[133] C-300/89 Commission v. Council, C-426/93 Germany v. Council, C-271/94 European Parliament v Council.

[134] Craig & de Búrca, EU Law, Text, Cases, and Materials, pp. 92-93, 615-617.

[135] C-376/98, Germany v. European Parliament and Council.

the EU institutions on several occasions have included non-market concerns in internal market legislation.[136]

The ECJ also created a sort of *de minimis* rule in Article 114, stating that any distortion of competition must be appreciable[137] – a necessary restriction on the powers of the EU legislature, which would otherwise be unlimited,[138] and contradictory to the principle in Article 13(2) TEU, that the EU only has the powers specifically conferred on it.

Since that judgment the ECJ has issued a general criterion for when Article 114 can be used as the legal basis for an enacted measure. In the *2006 Tobacco Advertising* case,[139] the ECJ upheld the validity of a Directive on tobacco advertising, concluding that there were disparities between the relevant national laws on advertising and sponsorship of tobacco products, and that these disparities could affect competition and inter-state trade:

> ”It follows … that when there are obstacles to trade, or it is likely that such obstacles will emerge in the future, because the Member States have taken, or are about to take, divergent measures with respect to a product or a class of products, which bring about different levels of protection and thereby prevent the product or products concerned moving freely within the Community, Article 95 EC authorises the Community legislature to intervene by adopting appropriate measures, in compliance with Article 95(3) EC and with the legal principles mentioned in the EC Treaty or identified in the case law, in particular the principle of proportionality.”[140]

This builds upon previous cases where the ECJ had stated that, in order for Article 114 to be the proper legal basis for an enacted measure, harmonization of the internal market must be the main objective of the measure,[141] not be an incidental effect of the measure,[142] and the choice of legal basis must rest on objective factors which are amenable to judicial review. Those factors include in particular the aim and the content of the measure.[143] Where the measure has several components, each with its own different aim (perhaps one components seeks to harmonize the internal market while another seeks to develop the common commercial policy in accordance with Article 207 TFEU), and no component is secondary and indirect in relation to the other, the measure may be founded on the various

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[136] de Witte, Non-market Values in Internal Market Legislation, in N. Nic Shuibhne (ed.), Regulating the Internal Market.
[137] C-376/98 Germany v. European Parliament and Council, paragraph 107.
[138] Amtenbrink, Harmonisierungsmassnahmen im Binnenmarkt im Lichte der Entscheidung des Europaeischen Gerichtshofs zur Tabakwerberichtlinie, VuR, May 2001, pp. 163-174, p. 174.
[139] C-380/03 Germany v. European Parliament and Council.
[140] C-380/03 Germany v. European Parliament and Council, paragraph 41.
[141] C-155/91 Commission v. Council, paragraph 20 and C-377/98 The Netherlands v. European Parliament and Council, paragraph 27.
[142] C-70/88 European Parliament v. Council, paragraph 17 and C-155/91 Commission v. Council, paragraph 19.
[143] C-491/01 The Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd., paragraph 93.

legal bases required.[144] In all the cases mentioned in this subchapter, except for the first *Tobacco Advertising* case,[145] the ECJ allowed the use of Article 114 as the legal basis for the enacted measures.

It must be mentioned that, just as the ECJ has had an open approach to Article 114 and the objective of harmonizing the internal market, so has the EU institutions in general shifted towards a more holistic view of the internal market.[146] Internal market legislation must, of course, satisfy a pure criterion of removing obstacles to the free movement of goods (or services), or of removing obstacles distorting competition, but it would also contain other objectives. Something else than the pure criterion above might be the reason the measure is initiated in the first place, pertaining to the social dimensions of the internal market, or to some public policy objective.[147]

4.1.2 The application of Article 114 TFEU to copyright law

There is a dichotomy between the protection of national property rights and the rules on the free movement of goods (and services). European copyright law was, until the enactment of the Directives mentioned in chapter 4, mostly of national concern. The conflict with the free movement rules was addressed by the ECJ for the first time in *Deutsche Grammophone v. Metro-SB-Grossmärkte*.[148] In that case, it was laid out that the *existence* of intellectual property rights was a matter for Member States (as derived from the provisions of Articles 36 and 345 TFEU), while the *exercise* of such rights could fall within the field of application of the EC Treaty, and thus subject to Community competence. In the case, a German manufacturer of sound recordings sought to rely on its exclusive distribution right to prohibit the importation and marketing in Germany of sound recordings, which it had itself supplied to a French subsidiary. The ECJ created a compromise in which both the exclusive rights were respected, and the objective of free movement of goods was upheld, by stating that a rights holder had the exclusive right to distribution by putting the goods on the Community market, while, having done that, the rights holder would not be able to use his or her exclusive rights to prevent parallel trade. This principle of Community-wide exhaustion was later included, explicitly or as an influence, in Article 4(c) of the Software Directive[149], Article 5(c) of the Database Directive[150], and Article 4(2) of the InfoSoc Directive.

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[144] C-491/01 The Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd, paragraph 94.
[145] C-376/98 Germany v. European Parliament and Council.
[146] Craig & de Búrca, EU Law, Text, Cases, and Materials, pp. 633-634.
[147] See de Witte, Non-market Values in Internal Market Legislation, in N. Nic Shuibhne (ed.), Regulating the Internal Market, p. 75.
[148] C-78/70 Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Großmärkte GmbH & Co. KG.
[149] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs.
[150] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

ECJ dealt with secondary level exploitation of exclusive rights in three subsequent cases. In the first, *Coditel*,[151] concerning cable re-transmission in Belgium of broadcastings from Germany, the ECJ held that the principle of exhaustion did not apply to intangible forms of commercial exploitation, but only to physical uses of copyrighted goods. In *Warner Brothers*,[152] concerning unauthorized rental of a video tape in Denmark, marketed in the UK, the ECJ declined once again to apply the rules on the free movement of goods to a copyright matter. The rental right given to copyright holders under Danish law, but not under UK law, was held to be justified protection under Article 36 TFEU, even though it had the effect of restricting intra-Community trade (of video tapes). In *EMI Electrola*,[153] Article 36 TFEU was once again allowed to restrict the free movement of goods, permitting a copyright holder of sound recordings to get an injunction in Germany against unauthorized importation of records from Denmark, where the copyright had expired.

This line of case law from the ECJ provoked responses from the Commission. Jehoram argued[154] that the Satellite Broadcasting Directive[155] should be viewed as a remedy to *Coditel*, that the Rental Rights Directive[156] should be linked to *Warner Brothers*, and that the Copyright Term Directive[157] should be connected to *EMI Electrola*. However, the Directives were not solely targeted at solving the situations dealt with by the ECJ, but also sought to remove distortions of the internal market at the primary level. In the 1988 Green Paper on copyright and the challenge of technology,[158] the Commission stated that it did not want to enact horizontal provisions in the field of copyright law, but merely to remedy the outcomes of the ECJ judgments, and only to harmonize for very particular subjects, such as computer software, databases, term of protection and resale rights.[159]

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[151] C-62/79 Coditel, and others v. Ciné Vog Films and others.
[152] C-158/86 Warner Brothers Inc. and Metronome Video ApS v. Erik Viuff Christiansen.
[153] C-341/87 EMI Electrola GmbH v. Patricia Im- und Export and others.
[154] Cohen Jehoram, European Copyright Law – Even More Horizontal, (32) IIC 2001, p. 532, pp. 533-34.
[155] Council Directive 93/83/EEC of 27 September 1993 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.
[156] Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, replaced by 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.
[157] Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights, replaced by 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.
[158] Commission of the European Communities, Green Paper on Copyright and the Challenge of Technology, COM (88), 172 Final of 7 June 1988.
[159] Commission of the European Communities, Green Paper on Copyright and the Challenge of Technology, COM (88), 172 Final of 7 June 1988, p. 536.

According to Mazziotti, the first wave of EU copyright legislation also sought to avoid ”competitive distortions in internal trade and of strengthening the industrial development and the international competitiveness of European industry, especially in the strategic sectors of computer programmes and databases,”[160] and to introduce measures to combat ’audiovisual piracy’. Knowledge of the pursuit of these policies complements the explanation given in the 1988 Green Paper above. Already in the first copyright measure, the Software Directive, a horizontal provision had been laid out in Article 1(3)[161]. Following this lead, the Database Directive had as one of its objects to remove discrepancies concerning the standard of originality required for a database to enjoy protection.[162]

Why such horizontal measures were enacted, despite what had been stated in the 1988 Green Paper, Mazziotti[163] and Weatherill[164] argue, is due to institutional changes following the entry into force of the Single European Act, subjecting internal market legislation and therefore *inter alia* copyright, to qualified-majority decisions in the Council, instead of unanimity. Removal of a national veto in Article 114 TFEU (ex Article 95 TEC, ex ex Article 100a TEC) opened up for the Community to use that Article as a legal basis for adopting, effectively, measures in copyright law.

Article 352 TFEU can serve as a legal basis for an enacted measure. This provision is also a residual one. It has been the legal basis for regulations on Community trade marks[165], Community plant variety rights[166], and Community designs[167], which were not based on Article 114 as they were not harmonization measures, but regulations existing side-by-side with national systems.[168]

Commonly, the objective and legal basis of a Directive is stated in its recitals. The formal legal basis of the InfoSoc Directive was depicted in chapter 3, and in chapter 5 I ask whether the Directive fulfills that legal basis. However, before that, a couple of Treaty articles pertaining to national cultural policies and consumer protection must be highlighted.

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[160] Mazziotti, EU Digital Copyright Law and the End-User, p. 47.
[161] Article 1(3) of the Software Directive reads: *”A computer program shall be protected if it is original in the sense that it is the author’s own intellectual creation. No other criteria shall be applied to determine its eligibility for protection.”*
[162] Concerning the Database Directive, *sui generis* rights for non-original databases were created alongside copyright protection for original databases, to harmonize the discrepancies present in the Member States. A lower copyright standard had been prevalent in the Common Law Member States, whereas *droit d’auteur* Member States had a higher standard.
[163] Mazziotti, EU Digital Copyright Law and the End-User, pp. 48-49.
[164] Weatherill, EC Consumer Law and Policy, p. 7.
[165] Council Regulation (EC) No. 40/94 of 20 Dec. 1993 on the Community Trade Mark.
[166] Council Regulation (EC) No. 2100/94 of 27 Jul. 1994 on Community Plant Variety Rights.
[167] Council Regulation (EC) No. 6/2002 of 12 Dec. 2001 on Community Designs.
[168] See Hugenholtz (ed.), Harmonizing European Copyright Law, The Challenges of Better Lawmaking, p. 15.

4.2 Respecting cultures and consumer protection

The importance of this sub-chapter is best illustrated by giving away the answer right away. Perhaps the closed list of copyright exceptions in Article 5 of the InfoSoc Directive does not adequately take into consideration the obligation under Article 167 TFEU, of respecting natural cultural policies. Perhaps the interplay between Article 5, the copyright exceptions, and Articles 6 and 7, concerning DRM protection, did not take into account the consumer protection perspective required under Articles 12 and 169 TFEU.

4.2.1 National cultural policies

Previously Article 151 TEC, Article 167 TFEU,[169] cross-sectional in nature, contains both negatively and positively phrased obligations. The EU shall respect national and regional diversity,[170] and it shall take cultural aspects into account when adopting secondary legislation, in particular in order to respect and to promote the diversity of cultures.[171] However, no harmonizing measures may be adopted in the area of cultural policies.[172]

The Union must therefore balance these provisions. According to de Witte, harmonization of certain national cultural policies has not been absolutely prohibited by Article 167(5), and has already taken place by claiming that such harmonization was necessary for the functioning of the internal market:

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[169] Article 167 reads: *"1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.*
2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:
— improvement of the knowledge and dissemination of the culture and history of the European peoples,
— conservation and safeguarding of cultural heritage of European significance,
— non-commercial cultural exchanges,
— artistic and literary creation, including in the audiovisual sector.
3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.
4. The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.
5. In order to contribute to the achievement of the objectives referred to in this Article:
— the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States,
— the Council, on a proposal from the Commission, shall adopt recommendations."
[170] Article 167(1).
[171] Article 167(4).
[172] Article 167(5).

> "[T]he prohibition of cultural harmonisation contained in Article [167] has not prevented the occasional use of European law-making powers to harmonise national cultural policy rules 'through the backdoor'. On each of these occasions, a question arises whether the European legislator has given adequate (or exaggerated) consideration to cultural diversity concerns when adopting a measure which, legally speaking, is primarily aimed at achieving economic (internal market) goals. A major object of controversy, in this respect, was, and still is, the Directive on [Television without Frontiers]. Whereas some observers have criticised it for privileging market efficiency over cultural policy concerns, others have argued that its provisions reserving a quota of television programming for works of European origin are an undue element of protectionism that artificially obstructs the functioning of the internal market for television programmes."[173]

Similarly, the Resale Right Directive,[174] with a legal basis in Article 114 TFEU, harmonized national rules concerning the resale right of artists. This right, the so-called *droit de suite*, did not exist in some countries, such as the UK, and by imposing such a right on all the Member States, the EU sought to strengthen the legal position of artists as against the art trade sector (art sellers had gravitated towards countries where they could avoid the *droit de suite*) – a cultural policy concern.

One month after the first *Tobacco Advertising* case,[175] the ECJ, in *Luxembourg v. Parliament and Council*,[176] adopted a reasoning to the effect that there is no *a priori* substantive limit to the kinds of public policy concerns available to the EU legislator. Choosing to ignore such concerns is not dictated by constitutional principle, it is a policy choice. In that case, the Court said that, when seeking to abolish barriers to the free movements, the EU institutions are to have due regard to the public interests pursued by the Member States in upholding those barriers, and adopting a level of protection for those interests that seems acceptable. It however added, that the institutions enjoy a measure of discretion for the purpose of its assessment of the acceptable level of protection.[177] Inclusion of public policy considerations in harmonization instruments has not been heavily scrutinized by the ECJ, especially not in cases where the legal basis has not been the primary subject of the dispute.[178]

As can be seen from the following quote by Hugenholtz et al, there is support for the notion that Article 167(5) is not a hindrance for using Article 167(4) as a legal basis for harmonization measures in the field of culture:

> "When asked to rule on the constitutionality of the rental right for phonograms, the ECJ acknowledged that the interest of stimulating artistic creation (then art. 128 EC

[173] de Witte, Non-market Values in Internal Market Legislation, in N. Nic Shuibhne (ed.), Regulating the Internal Market, pp. 71-72.
[174] Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art.
[175] C-376/98, Germany v. European Parliament and Council.
[176] C-168/98, Luxembourg v. European Parliament and Council.
[177] C-168/98, Luxembourg v. European Parliament and Council, paragraph 32.
[178] de Witte, Non-market Values in Internal Market Legislation, in N. Nic Shuibhne (ed.), Regulating the Internal Market, p. 73.

> Treaty) is one that is served by the introduction of an exclusive rental right.[179] This is a somewhat mystifying argument, also considering that article 151(4), instructs the EC to take cultural aspects into account in its actions under article [114] or other provisions, in particular in order to respect and promote the diversity of its cultures. Article [167] would therefore seem to curtail rather than strengthen the Community's possibilities of harmonising copyright for the purpose of internal market integration."[180]

Article 167 TFEU could serve as a legitimate basis for the EU legislature to consider further whether measures already enacted or future measures benefit creators vis-à-vis intermediaries such as publishers, record companies and broadcasters. It has been suggested that increased IP protection on the EU level has so far benefited the latter more than the former.[181]

Together with the principles of subsidiarity and proportionality, contained in Article 5 TEU, Article 167 TFEU means that any measure enacted by the EU legislature in the field of copyright, must take due regard to the former strict principle of territoriality, and, absent a political will to achieve effective harmonization, any such measure must respect the legal constraints imposed upon it by Article 167, and not restrict or interfere with national sovereignty concerning the Member States' copyright systems. According to Article 2(5) TFEU, legally binding acts of the Union adopted on the basis of the provisions of the treaties relating to areas where the Union only has 'supportive' competences shall not entail harmonization of Member States' laws or regulations. In Article 6(c), culture is stated to be such an area. As concerns proportionality, it governs primarily the mode and the intensity of Union measures. The measures must, according to the principle, be fit to achieve its aims, it may not go further than necessary to achieve that aim, and the disadvantages caused may not be disproportionate to the aim pursued.[182]

4.2.2 Consumer protection

Before the Treaty of Lisbon, Article 153 TEC regulated the obligation to take consumer protection law and policy into account in legislative activities. That Article has been split into two parts, Article 12[183] and Article 169[184] TFEU. A consumer perspective on European copyright is not

[179] C-200/96, Metronome Musik v. Music Point Holkamp.
[180] Hugenholtz (ed.), Harmonizing European Copyright Law, The Challenges of Better Lawmaking, p. 14.
[181] Hilty, Copyright in the Internal Market, IIC 2004, Vol. 35, no. 7, pp. 760-775, pp. 761-762.
[182] See Hugenholtz (ed.), The Recasting of Copyright & Related Rights for the Knowledge Economy, p. 15.
[183] Article 12 reads: *"Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities."*
[184] Article 169 reads: *"1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.*

common. In fact, the consumer as such is largely invisible within that context. The word ”consumer” is not mentioned expressly in any of the seven copyright-related directives adopted since 1991.[185] Nevertheless, Article 169 TFEU requires that all measures using Article 114 as a legal basis contribute to the objective of promoting the (economic) interests of consumers and to ensure a high level of consumer protection, as well as of promoting consumers' right to information and education. Article 169 gives the Union some legislative powers, but more importantly, consumer protection is to be attained by integrating the interests of consumers into the defining and implementation of other Union policies and activities, as per Article 12.

Historically, the consumer had only a negligible part to play in copyright law. As the Lessig quote in chapter 1 shows, the expansion of copyright law into the digital environment meant that not only physical copies, but also digital copies, were covered. The nature of a digital copy is something rather different, as even non-transformative uses require a copy to be made. With the Software Directive and the Database Directive, the exclusive reproduction right was given a very broad formulation, covering all digital operations involving some form of copying, even the temporary or transient ones. Including private copying, this subjected mere consumption of copyrighted works digitally to the exclusive rights. As demonstrated in 3.2.1, this broad formulation was kept for the InfoSoc Directive as well, to the effect that the right of reproduction – of making new copies of works – covered such acts of consumption as copying a copyrighted song from a computer to a portable media player, or converting it into a file with a lesser bit-rate in order to save disk space.

Consumer protection is also actualized when considering the issue of copyright and contracts in the digital environment. So-called click-wrap and browse-wrap licenses and technological measures serve to put both contractual and technological restrictions on consumers, disallowing them enjoyment of copyright exceptions in pursuit of public policy goals. In this regard, Article 9(1) of the Software Directive and Article 15 of the Database Directive require that national law declare contractual clauses restricting such exceptions null and void. The InfoSoc Directive did not succeed in also

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2. The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through:
(a) measures adopted pursuant to Article 114 in the context of the completion of the internal market;
(b) measures which support, supplement and monitor the policy pursued by the Member States.
3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 2(b).
4. Measures adopted pursuant to paragraph 3 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notified of them.”

[185] Helberger & Hugenholtz, No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law, Berkeley Technology Law Journal, Vol. 22:1061, p. 1066.

requiring this on a horizontal level. Allowing contractual restrictions to copyright exceptions on an EU level would ideally entail regulating that such contracts be considered consumer contracts under EU private international law, more specifically Article 6 of the Rome I Regulation.[186] According to Article 6, consumer contracts are subject to the law of the consumer's country of domicile, which means that consumers more reliably can engage in uses of copyrighted works that, from the consumer's point of view, are easier to gain knowledge of (due to being the law of the country of the consumer's domicile). A contract would not have, despite containing a choice-of-law clause, the effect of depriving the consumer of mandatory copyright exceptions as provided by the country in which the consumer is domiciled.[187] The EU Distance Contract Directive[188] was discussed in connection with Article 4 of the InfoSoc Directive, see chapter 3.2.3 above.

[186] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).
[187] Mazziotti, EU Digital Copyright Law and the End-User, pp. 122-123.
[188] 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.

5 Legal basis of the InfoSoc Directive

5.1 Article 114 TFEU

As evidenced by the preceding chapters, the InfoSoc Directive is controversial in both its procedure and its substance. Rushed through the EU legislature,[189] the resulting instrument seems to have taken no noteworthy considerations of the challenges or possibilities of the digital networked environment. What it mandated instead, was *sui generis* protection of TPMs, a closed list of copyright exceptions, some of which were circumscribed or restricted by other provisions of the Directive (such as Articles 6(4) and 9), and overly broad classifications of exclusive rights, accompanied by a strange provision on exhaustion which does not apply to digital works. A discussion on whether or not the Directive has fulfilled its legal basis is thereby legitimized.

In the EU *acquis*, there are no harmonization measures that seek to avoid territorial partitions concerning uses of works through the Internet. Community-wide licensing of online services providing digital works was only noted in 2005, in the Commission's Recommendation on collective cross-border management of copyright and related rights for legitimate online music services.[190] Remarkably, the InfoSoc Directive omitted such measures, despite the fact that it was designed to combat certain challenges in the Information Society, and merely confined the objective of market integration to the old framework of physical media. Naturally, this apparent lack of interest in issuing provisions for the pursued objective stated in the Article 114 TFEU legal basis – the harmonization of online markets – is a reason in itself to question the legitimacy of the Directive.

An exhaustive list of copyright exceptions should, in the abstract, not mean that copyright exceptions would be made uniform in the Member States. Obviously, it would have helped if the exceptions had been mandatory. As stated earlier, 20 of the 21 exceptions enumerated, are optional. The reality is that Member States have mostly kept their national copyright exceptions since before the Directive, and that the Directive only caused slight changes, with some Member States adopting some additional exceptions. This does not, by far, mean that national copyright exceptions are harmonized.

In chapter 4.1, the requirements to use Article 114 TFEU were laid out. Harmonization measures should strive for the removal of discrepancies

[189] Three years as compared to six for the Database Directive, see Hugenholtz, Why the Copyright Directive is Unimportant, and Possibly Invalid, EIPR (2000), Vol. 11, pp. 501-502.
[190] Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services.

between Member States, which result in obstacles to the free movement of goods (and services). The InfoSoc Directive omitted certain matters which perhaps would have been crucial to achieve proper market harmonization, such as the definition of a derivative work.

If we define the market as the (cross-border) dissemination of digital copyrighted works on the Internet, we see in front of us a market filled with national barriers. Since Member States are not mandated to provide for the same copyright exceptions out of an exhaustive list of 20, and since the difference between Articles 6 and 7 on the one hand, and DRM on the other, there is an apparent lack of incentives to provide for cross-border delivery of such goods and services. Looking at the big players on the arena for online music delivery, both for downloading and streaming, we see that there is a strict national dimension to the market, supporting the notion that the InfoSoc Directive did not, in fact, help to eradicate national barriers. The main reasons for the national dimension to the online music delivery market, are: that copyright collective management systems vary greatly between Member States; that there is a lack of clarity in the connection of copyright and contracts as a result of Articles 6(4) – which is not applicable to online music delivery – and 9; that there is only limited harmonization of copyright exceptions; and that there is a dispersed and unclear implementation of enforcement of permissible acts (i.e. Article 6(4)).

Article 114 TFEU requires market integration.[191] It is a simple *ex post* fact that InfoSoc did not achieve market integration. However, it must still be considered whether the lower threshold of Article 114 TFEU was met. Despite pursuing other public policies, such as the strengthening of European industry as per Recital 6, InfoSoc must still make a plausible effort in seeking to remove barriers to the free movement of goods (and services), or distortions of competition. I hold that it does not.

The ECJ first held in the 1998 *Tobacco Advertising* case[192] that the Directive before the court was to be annulled on the basis of it having gone far beyond the permitted limits by enacting a public health policy, for which the EU was not competent at the time. In the case concerning the *Biotech Protection Directive,*[193] the ECJ stated, that in order for Article 114 TFEU to be the proper legal basis for an enacted measure, harmonization of the internal market, by abolishing obstacles to the free movement of goods (and services) or distortions of competition, must be the main objective of the measure.

Bonofacio argued that the InfoSoc Directive, in light of the above-mentioned case law from the ECJ, should be treated as a mature Community

[191] de Witte, Non-market Values in Internal Market Legislation, in N. Nic Shuibhne (ed.), Regulating the Internal Market.
[192] C-376/98, Germany v. European Parliament and Council.
[193] C-377/98, The Netherlands v. European Parliament and Council.

policy instead of internal market legislation.[194] In light of the provisions of Article 6 on TPMs, that imposes an obligation upon Member States to provide for legal protection for TPMs on a *sui generis* model, Article 114 TFEU as a legal basis seems implausible.

In the case *Laserdisken*,[195] the ECJ ruled on the validity of the Article 114 legal basis. Laserdisken was a company engaged in importing and selling copies of cinematographic works in Denmark, mostly from other EU Member States but also from countries outside the EU. After having registered a significant drop in its operations, it launched proceedings against Kulturministeriet for having amended the Danish Law on copyright in a way that altered the Danish exhaustion principle to be regional instead of international, due to implementation measures of Article 4(2) of the InfoSoc Directive. Laserdisken argued invalidity of the entire Directive, with a special focus on Article 4(2) as being clearly in breach of the proportionality principle. The Danish court in which the proceedings were launched decided to stay the proceedings and refer questions on the validity of Article 4(2) (only) to the ECJ. Holding that a principle of international exhaustion was incompatible with the obligation in Article 4(2), the ECJ stated the following about, first, the legal basis for the Directive: It is settled case-law that the choice of legal basis must rest on objective factors which are amenable to judicial review. Those factors include in particular the aim and the content of the measure.[196] Recitals 1, 3 and 6 clearly show that the Directive pursues the objective required by Article 114 TFEU.[197] It continued by stating that Article 4(2) was not invalid. Mazziotti argues that it is clear that the ECJ only considered the case on the basis of the harmonization purpose of Article 4(2) and not of the Directive as a whole.[198] Indeed, the Court does not speak of any other Recitals or Articles. Had the Court not been restricted to Article 4(2), there is cause for the speculation that the Directive would have been annulled.

A more suitable legal basis for the Directive would have been Article 352 TFEU, which, however, requires Council unanimity.[199] Article 352 is a residual provision, intended for the circumstances in which the necessary powers to obtain one of the objectives of the Treaties are not present in other places of the Treaties. Owing to the fact that unanimity is required, it is politically desirable to be able to use other legal bases instead. Considering the 'public choice theory' argument and the claim that the InfoSoc Directive was heavily lobbied, it is natural that the negotiators steered away from Article 352 TFEU.

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[194] Bonofacio, The Information Society and the Harmonisation of Copyright and Related Rights: (Over)stretching the Legal Basis of Article 95(100A)?, Legal Issues of European Integration (1999), p. 1, pp. 64-75.
[195] C-479/04 Laserdisken ApS v. Kulturministeriet.
[196] C-479/04, paragraph 30. See C-491/01 The Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd., paragraph 93.
[197] C-479/04, paragraph 32-34.
[198] Mazziotti, EU Digital Copyright Law and the End-User, pp. 117-118.
[199] Cf. C-377/98 The Netherlands v. European Parliament and Council, paragraph 25.

5.2 Cultural policies

As stated above in chapter 4.2.1, Articles 12 and 167 TFEU require that the EU shall respect national and regional diversity, and that it shall take cultural aspects into account when adopting secondary legislation, in particular in order to respect and to promote the diversity of cultures. However, no harmonizing measures may be adopted in the area of cultural policies. As seen, internal market legislation has, on a number of occasions, trespassed on this prohibition, to the degree that Article 167 TFEU could be regarded as an unofficial legal basis for harmonization measures.

Contrasting the weak position given to copyright exceptions in Article 5 and their harmonization, with the strong wordings on the exclusive rights in especially Articles 2 and 4, as well as with the unprecedented protection afforded to TPMs under Article 6, the Directive intruded upon the cultural aspects of Member States. Not least, the exhaustive nature of the list in Article 5, stops Member States from providing for copyright exceptions in other areas or for other uses, a clear disregard of the obligation to respect the Member States' different legal cultures. This is even more apparent in the digital environment, as Article 5(3)(o) on minor exceptions only applies to non-digital uses. As assessed, Member States are not entitled to provide for copyright exceptions in the digital environment other than those enumerated, despite the high probability of new uses being created by the rapid, almost exponential, advancement of technology. As Hugenholtz argues, "[n]ow, thanks to the Directive, if some unforeseen use that we all agree should be exempted emerges, we'll have to wait at least three years, if not much longer, for the Directive to be amended."[200] To take cultural policies and Article 167 TFEU into full consideration, the InfoSoc Directive should have stayed out of analog exceptions, and stuck to merely covering exceptions for digital uses where there is a motivated need from an internal market perspective for a harmonized framework. The present list is simply not understandable when considering Recital 32 and that the Directive allegedly takes due account of the Member States' different legal traditions. The words in Recital 31 about the direct negative effects on the functioning of the Internal Market caused by existing differences in the exceptions to certain restricted acts, seem to be equally valid at present, nine years after the adoption of the InfoSoc Directive.

5.3 Consumer protection

Article 169 TFEU requires that all measures using Article 114 as a legal basis contribute to the objective of promoting the (economic) interests of consumers and to ensure a high level of consumer protection, as well as of promoting consumers' right to information and education (see above, chapter 4.2.2).

[200] Hugenholtz, Why the Copyright Directive is Unimportant, and Possibly Invalid, EIPR (2000), Vol. 11, pp. 501-502.

As discussed under 3.4.4, the specific provisions of the InfoSoc Directive in Articles 6(4) and 9 create a system where contractual overrides to copyright exceptions are allowed. There are, however, binding consumer protection instruments, such as the Distance Contract Directive, to consider. Coordination between EU consumer law and copyright law is lacking, however. As stated in connection with Article 9, it is imperative to safeguard end-user privacy in a society promoting the usage of DRM protection. This becomes even more vital should private-copying exception enforcement be realized. While consumers could still, in theory, rely on mandatory statutory copyright exceptions under their own country's laws when facing contractual restrictions, in accordance with the Rome I Regulation, there is still the problem that TPMs may not be circumvented, no matter the purpose. Arguably, the InfoSoc Directive cannot be read on its own due to EU consumer law being detached from copyright law. The considerations of consumer protection, that should have been made, focus primarily on requiring stronger legal certainty in the interface between exceptions, TPMs and contracts.

6 Conclusion – The future

Summarizing last chapter, I draw the conclusion that, if the ECJ were ever to scrutinize InfoSoc in its entirety, it would have stated that *inter alia* Article 5 does not live up to the requirements of Article 114 TFEU. Article 5 also serves as a basis for the argument that the Directive failed to take into consideration national cultural policy and the historically strong territoriality of copyright. By essentially allowing contractual and technological overrides to the use of copyright exceptions, the Directive also failed to adequately protect consumers.

The Commission is currently of the opinion that there are no problems bearing on the internal market, in practice, concerning copyright. Instead of presenting further harmonization measures, it plans to make some minor adjustments to the existing Directive.[201] The Commission would prefer to operate via Recommendations instead, as they are quicker to adopt than Directives, and can be made whenever the Commission considers it necessary, however, with the downside of bypassing the Member States and that they are not binding (although might incite self-regulation).[202] It has undertaken a couple of measures with regard to the treatment of levies.[203]

The InfoSoc Directive raises serious implications. It is not alone in creating rights in information that closely resembles rights to property, however.[204] When looking at the big picture, we can see this to be a trend in EU copyright law in general. In chapter 1, I included a quote by Lawrence Lessig to the effect that digital copying should not be equated with analog copying.

Below, I discuss a number of enhancements that could, indeed should, be made to the provisions of the InfoSoc Directive. The conclusions that the Directive inadequately achieves market integration, respects legal cultures, and protects consumer interests, are based on the structure and functioning of the Directive provisions. Therefore, with the aims of Articles 12, 26, 114, 167 and 169 TFEU, in mind, it is necessary to suggest alternative approaches to the underlying substantive issues at hand.

Arguably the best way to establish a truly internal market for works covered by copyright would be to create an entire EU copyright system. The EU still

[201] Working Paper on the review of the EC legal framework in the field of copyright and related rights, 2004.
[202] Dreier & Hugenholtz (ed.), Concise European Copyright Law, p. 2.
[203] Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services, and the Copyright levy reform – Work Programme for 2006. The Commission in 2006 abandoned its project on reforming copyright levies further.
[204] Westkamp, Transient Copying and Public Communications: The Creeping Evolution of Use and Access Rights in European Copyright Law, The George Washington International Law Review, Vol. 36, 2004, p. 1057.

has a long way to go, in that regard, however – if it is at all desirable. Except for the Software Directive and the Database Directive, there have been no attempts at harmonizing standards of originality. The differences between the Common Law Member States and the *droit d'auteur* Member States are, possibly, irreconcilable.[205] Creating a system where, as is standard practice in most international and national systems today, copyright is awarded without registration, would perhaps simply not be feasible. Leaving that issue aside, I turn to enhancements of the specific subject matter of the main InfoSoc provisions discussed in this thesis.

Concerning the private-copying exception in the digital networked environment, there are a number of enhancements that could be made. Extending private copying into the digital sphere while at the same time imposing a levy on manufacturers, importers and distributors of hardware could be one. Another solution would be to separate the private-copying exception as it applies to home users, on the one hand, and private users within enterprises, organizations and similar, on the other.[206] However, the question on whether to allow, to a certain large extent, private copying on the Internet is a sensitive and difficult issue. The economic effects of either policy option are not known, or are subject to dispute. As technology progresses, TPMs will possibly open up for certain private uses, however, with the attached risk of prejudicing the end-user's right to privacy on a higher level than at present. While free-riders will always exist, and while enforcement against individuals is increasingly becoming too costly, the alleged problem of *fair compensation* to copyright holders that would be created by allowing private copying for non-commercial purposes (using the criterion of commercial intent as opposed to commercial scale, which need not necessarily include intent), could be solved by the imposition of a grand-scale levy system on certain of society's service providers.[207] With the immediate effect of decriminalizing the stigmatized 'file-sharing problem,'[208] such a solution would probably not be compatible with the three-step test. A levy system would perhaps be able to provide fair remuneration to the level of counterweighing the unreasonable prejudice to the copyright holders' legitimate interests, but it would severely cripple the (normal) exploitation opportunities on the Internet, and possibly be in breach of other international obligations.[209] This does not mean, however, that international negotiations, leading up to the effect of creating such a

[205] See above, chapter 4.1.2.
[206] Guibault, Discussion paper on the question of Exceptions to and limitations on copyright and neighbouring rights in the digital era, Secretariat Memorandum prepared by the Directorate of Human Rights, Council of Europe, MM-S-PR (98) 7, chapter 4.
[207] Such as on equipment used for digital copying, digital storage media, Internet service providers, and file-sharing distribution services. Granted, the last category would more easier than the others be able to circumvent such requirements and obligations.
[208] But only partially. Private-copying exceptions are not applicable to the right of communication to the public under the InfoSoc Directive. This means that with the terminology used, unauthorized uploading would still be prohibited, and not subject to even the possibility of an exception. It is apparent that the InfoSoc Directive does not facilitate or consider present-day technological file-sharing distribution methods.
[209] E.g. Berne Convention Articles 11bis(2) and 13(1).

system, could not or should not occur. That such a system is contrary to the present international framework seems to be an overly rigid and legalistic argument. Further, there is still the question of the suitability of the three-step test in the digital networked environment. Within the discussion for the second part, a 'normal exploitation of the work,' I would like to add that the test should take due regard to the fact that, as Hugenholtz pointed out,[210] new business models and methods arise on a regular basis in the digital sphere. Allowing for a private-copying exception might not prejudice a normal exploitation in the market economy of tomorrow. It remains to be seen to what extent the pending ECJ judgment in the case *SGAE v. Padawan* will affect directly the various levy systems by imposing a discrimination criterion, as suggested by the AG Opinion.

The need for reform on TPMs is best symbolized by the fact that the InfoSoc Directive does not allow for circumventions of them for the purposes of using a copyright exception, save for the very limited circumstances proffered by Article 6(4). A provision, as we have seen, with many inherent flaws. Article 11 of the WCT intended for TPMs to safeguard not only exclusive rights, but also copyright exceptions. Restoring this intention to the EU *acquis* by amending or replacing the provisions in InfoSoc is requested. Properly a subject for an entire thesis in itself, there needs to be a discussion on the public policy and ethical ramifications of using TPMs. At present, TPMs are not yet able to distinguish between lawful and unlawful uses. Together with the *sui generis* protection, this means that, as Lawrence Lessig put it, "Code becomes law."[211]

Interoperability with future digital and software standards is threatened by the fact that TPMs require a compatible technological system to function. One of the main objectives of copyright, that of stimulating creative and literary works, to increase the body of culture and knowledge, is endangered, in the digital environment, if TPMs are allowed to restrict access and copying to the degree that technological restrictions prevent works from properly entering the public domain. There is also a certain 'chilling effect' with regard to the creation of derivative works and the freedom of expression if TPMs are allowed to legally restrict copyright exceptions. It should at least be considered, that a suitable safeguard would be the creation of agencies, or indeed using existing libraries, to keep copies, free of TPMs, for storage and for certain uses – copyright holders would ideally under such a system submit works to the agency themselves, failing that, be incentivized by legal mandate.

The notion that the three-step test, or indeed the 'four-step test,' as envisaged in the Directive's Article 5(5), should be applied by national judiciaries, due to its omission of addressees, is cause for concern if the test applies a mere quantitative reading, as the case from the 2000 WTO Panel

[210] Hugenholtz, Why the Copyright Directive is Unimportant, and Possibly Invalid, EIPR (2000), Vol. 11, pp. 501-502.
[211] Lessig, Code: and Other Laws of Cyberspace, p. 126.

suggests.[212] The three-step test as structured is intended for legislatures to apply when implementing copyright exceptions. As Koelman has stated, the test, if applied by judges, does not afford the same 'wiggle room' in considering non-copyright holder interests in the balancing of interests, as does the US 'fair use' doctrine.[213] The notion of "normal exploitation" is construed as an economic term and is to be interpreted from the perspective of the 'exploiter,' that is, the rights holder.[214] Applied by judges, the test would threaten uses under copyright exceptions in so far as these are based on public policy arguments, which the judges would not be able to consider.[215]

That raises the question on what to do with the exhaustive nature of the list of copyright exceptions in Article 5. It is obvious that it failed to achieve its aims of market harmonization, and that further actions are necessary if that aim is to be reached. It is therefore interesting to look at the negotiations leading up to the adoption of the Directive. The Netherlands had proposed an open-ended formulation in Article 5, similar to the US 'fair use' doctrine. The proposal found no support, as it was argued to be too legally uncertain.[216] Revising the system and creating a 'fair use' type of exception is, however, a persuasive thought. The argument is, that, in order for EU law not to become obsolete and in need of amendment facing every new technological advancement creating a new type of use, Member States must be able to adapt by providing for exceptions, if necessary. This is difficult to achieve using exhaustive lists. However, due to the risks of legal uncertainty inherent in a 'fair use' system, a better option would be, in the absence of larger measures harmonizing entirely the copyright system, a shorter list of broader copyright exceptions, with the key feature that they would be mandatory, and that the list would be open-ended. The purpose would be to increase market integration, legal certainty, and enforce certain vital public policy interests. While the achievements of such a solution remain unknown, the probability of it enhancing the status quo, seems high.

Credibly, this would have to be supplemented by the characterization of some of these exceptions as end-user rights in specific circumstances. The Software Directive provided for the non-waivability of exceptions with regards to contractual restrictions and TPMs. That is desperately needed not only for software but also for the entirety of the copyrightable subject-matter body. Such a characterization satisfies market integration in so far as it, in individual cases, efficiently upholds copyright exceptions in the face of

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[212] World Trade Organisation, United States — Section 110(5) of the U.S. Copyright Act, Report of the Panel, WT/DS160/R, 15 June 2000.
[213] Koelman, Fixing the Three-Step Test, EIPR (2006), Vol. 28, pp. 407-412, p. 407.
[214] Geiger, Towards a balanced interpretation of the "three-step test" in copyright law, EIPR (2008), Vol. 30, pp. 489-496, p. 490.
[215] The French Cour de Cassation applied a version of the three-step test to scrutinize a private-copying exception in the *Mulholland Drive* case; Cour de Cassation, civ.1, 19 juin 2008, M. Perquin, UFC Que choisir c/ Soc. Universal Pictures Vidéo France et al.
[216] As stated by Cohen Jehoram, it would have "opened up a real lawyers' paradise of fair use." See Cohen Jehoram, European Copyright Law – Even More Horizontal, (32) IIC 2001, p. 532, p. 542.

contractual and technological overrides. It would also better protect the needs and interests of consumers as required by the TFEU, in offering stronger legal certainty. An overhaul of Article 6(4), as this proposition would suggest, would finally have to reconsider the appropriateness of 'legal access' (see above, 3.4.4) as the criterion at present only obligates the copyright holder to aid the end-user, in bypassing TPMs, if that end user has agreed to the contractual terms of use.

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