

Lawfulness for Users in European Copyright Law

Acquis and Perspectives

by **Tatiana Eleni Synodinou***

Abstract: This article analyses the emerging dynamics of the concepts of lawful user, lawful use, and lawful access in European Copyright law. It aims to demonstrate that these concepts, which are part of the EU copyright law acquis, have the potential to provide a fair solution to the controversies regarding the “rights” and “duties” of users in European copyright law. The article proposes to establish a legislative dynamic definition of lawful use in

European Copyright Law. The concept must be clarified and given a broad meaning in order to cover both uses which are authorized by the right holders, but are also not restricted by law, by taking into account the legal ideals of fairness and reasonableness. This change must be accompanied by the recognition of all copyright exceptions as *ius cogens* and the establishment of effective procedural mechanisms to safeguard the enjoyment of lawful users’ rights.

Keywords: Copyright law; lawful user; lawful use; lawful access; lawful source; copyright exceptions; fairness; reasonableness; good faith; users’ rights

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Recommended citation: Tatiana Eleni Synodinou, Lawfulness for Users in European Copyright Law: Acquis and Perspectives, 10 (2019) JIPITEC 20 para 1.

A. Introduction

*“When law can do no right,
Let it be lawful that law bar no wrong;
Law cannot give my child his kingdom here,
For he that holds his kingdom holds the law”¹.*

1 Would a modern Shakespeare write about copyright law? In a modern version, one would say “because the author holds the means to control access to the work, he holds the copyright law”. Traditionally, copyright law is exclusively author-oriented, and users’ freedoms are seen as some narrow-interpreted restrictions, justified in specific circumstances.

There is no general concept of lawful or fair use of work of mind.

- 2 Lawfulness and fairness could, at first sight, be seen as antagonistic concepts in copyright law. Lawfulness is generally seen as a restriction in the sense that the use of a copyright-protected work could be made only on the grounds of a specific legal basis. On the other hand, fairness is perceived as an enabling concept, because it presupposes a balancing between the interests of the right holders and users, which would ideally result in a reasonable outcome with no unjustified adverse effects on both parties.
- 3 Exploring the concept of lawfulness of use and specifically researching the status of “lawful user” in European copyright law could be considered as heresy. Copyright law doctrine classically perceives

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1 (King John, 3.1.189), Constance to Cardinal Pandulph.

the use of copyright-protected works through the prism of exclusive control of the work by the copyright holder and it is characterized by the absence of the user.² Public interest is satisfied by the establishment of strictly defined exceptions or limitations to copyright. Moreover, exceptions or limitations are not traditionally considered as rights of the end-users.

- 4 The absence of the concept of the “user” in copyright law is also linked to another issue: the fundamental copyright premise that the mere use of works is free³ and the traditional disinterest of copyright law in personal uses which do not have a commercial nature. Fifty years ago, copyright law rarely concerned itself with uses that were not both commercial and public,⁴ while people believed that they were free to use copyright-protected works for non-commercial purposes.⁵ In line with this approach, since controlling access to and use of copyright-protected works by private users was not a realistic goal, copyright holders have mainly focused on controlling reproductions and communications to the public that have a commercial nature.
- 5 However, the digital era changed this paradigm and it is now possible to control access to and use of works by private users. The dematerialization and the disappearance of the tangible copy is a defining feature of the digital environment. In this context, the need to access a tangible copy of an intellectual creation in the analogue world has been replaced by access to the work itself. Consequently, the intrinsic value of information resides much more in its use than in its acquisition or possession.⁶ In this context, traditional users’ liberties come under siege, since the growing dependence on digital content, accompanied by stronger copyright protection, has led to a narrowing of freedom of use.⁷ Accordingly, it has become extremely difficult

to identify permissible use and exercising exceptions may require some serious brainwork.⁸

- 6 The thesis that it is necessary to safeguard copyright users’ interests or rights⁹ has effectively emerged as a reaction and a necessary counterbalance to the growing asymmetry between the widespread control of right holders over copyright-protected works and the ambiguous restricted scope of copyright users’ freedoms. In light of the above, the concepts of the “use” and of the “user” of copyright-protected works have obtained an autonomous status in European copyright legislation and case law through the corresponding concepts of lawful use, lawful user, and lawful access.¹⁰
- 7 This article analyses the emerging dynamics of the concepts of lawful user, lawful use, and lawful access in European Copyright law. It aims to demonstrate

Rights Approach’, in: Okediji R. (ed.) *Copyright Law in an Age of Limitations and Exceptions*, (Cambridge University Press, 2017), p. 133.

- 8 Janssens M. C., ‘The issue of exceptions: reshaping the keys to the gates in the territory of literary, musical and artistic creation’, in: Derclaye, E.(ed.), *Research Handbook on the Future of EU Copyright*, (Edward Elgar,2009), p. 317-318.
- 9 See, for instance: Litman J. ‘Readers’ Copyright’, (2011) *J. Copyright Soc’y* 58, no. 2: 325-53; Niva Elkin-Koren, ‘Making Room for Consumers Under the DMCA’, (2007) 22 *Berkeley Tech. L. J.* 1119; L. Ray Patterson, Stanley W. Lindberg, *The Nature of Copyright: A Law of Users Rights*, (Athens, Georgia: University of Georgia Press, 1991); Carys C., ‘Globalizing User Rights-Talk: On Copyright Limits and Rhetorical Risks’ (2017), *Articles & Book Chapters*, <http://digitalcommons.osgoode.yorku.ca/scholarly_works/2666>; Liu J., ‘Copyright Law’s Theory of the Consumer’, (2003) 44 *B.C. L. REV.* 397; Geiger C., Schönherr F., ‘Defining the Scope of Protection of Copyright in the EU: The Need to Reconsider the Acquis regarding Limitations and Exceptions’ (2012) in: Synodinou T. E. (ed.) ‘Codification of EU Copyright Law: Challenges and Perspectives’ (Kluwer), pp. 133-167; Mazziotti G., *EU Digital Copyright Law and the End-User* (Springer, 2008); Chapdelaine P., ‘The Ambiguous Nature of Copyright Users’ Rights’, (2013) 26 *INTELL.PROP.J.* 1, 5; Dusollier S., ‘The Relations between Copyright Law and Consumer’s Rights from a European Perspective’ (2010), European Parliament Publication, Available at SSRN: <<https://ssrn.com/abstract=2127736>>. The importance of establishing a “fair balance” between copyright protection and users’ interest is also mentioned in the recital 31 to the Directive 2001/29, which states the following: “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”. For a recognition of the need to safeguard user interests by the CJEU, see, for instance: Case C-145/10, *Eva-Maria Painer v Standard VerlagsGmbH and Others*, ECLI:EU:C:2011:798, where it is stated in par. 134 that the quotation exception “...is intended to strike a fair balance between the right to freedom of expression of users of a work or other subject-matter and the reproduction right conferred on authors.”
- 10 Analogous developments have taken place worldwide. For the emblematic recognition of exceptions as users’ rights in Canada, see: *Canadian Ltd. v. Law Society of Upper Canada* [CCH] 2004 SCC 13.

2 Synodinou T., ‘The Lawful User and a Balancing of Interests in European Copyright Law’ (2010), *IIC*: 819-843. · Cohen J., ‘The place of the user in copyright law’ (2005) 74 *Fordham L. Rev* 347-374.

3 Westkamp G., ‘Temporary Copying and Private Communications—the Creeping Evolution of Use and Access Rights in European Copyright Law’(2004) *Geo. Wash. Int’l. LR*: 1057.

4 Litman J., ‘Lawful Personal Use (Symposium: Frontiers of Intellectual Property)’ (2007) *Tex. L. Rev.* 85, no. 7: 1871-920; Litman J., ‘The Exclusive Right to Read’, (1994) 13 *CARDOZO ARTS & ENT. L.J.* 29, 35; Pamela Samuelson, ‘Freedom of Expression in Historical Perspective’, (2003) 10 *J. INTELL. PROP. L.* 319, 326.

5 Litman, J., ‘Lawful Personal Use (Symposium: Frontiers of Intellectual Property)’, op.cit., p. 1873.

6 Dusollier S., ‘Incidences et réalités d’un droit de contrôler l’accès en droit européen’ in: *Le Droit d’auteur: un contrôle de l’accès aux œuvres?*, (2000) *Cahiers du CRID n° 18*, p. 25-52.

7 Elkin Cohen N., ‘Copyright in the Digital Ecosystem, A User

that these concepts, which are part of the EU copyright law *acquis*, have the potential to provide a fair solution to the controversies regarding the “rights” and “duties” of users in European copyright law. In the state of the art, exceptions to Copyright law are analyzed and interpreted either through the scope of the three steps test,¹¹ or with reference to externalities such as freedom of expression. It is proposed in this article that the emerging concept of lawfulness should play a substantial role in the conceptual delimitation of the copyright exceptions. The article argues that lawfulness and fairness of use in copyright law should not be considered as antagonistic but as mutually complementary elements of an EU dynamic concept of “lawful use”. It further proposes the establishment of a taxonomy of lawful use in European copyright law, which would be based on the consolidation and further development of the existing *acquis* and principles of lawful use, as the latter have emerged via the case law of the Court of Justice of the European Union (CJEU).

- 8 The article is divided into three parts. The first part (B.) will examine the piecemeal legislative birth of the concepts of lawful user and of lawful use and the variant interpretations of these notions by the CJEU. The second part (C.) will explore the adjacent, but not identical, emerging concept of lawful access, which was introduced in the rhetoric of the EU copyright digital single market package. Finally, the third part (D.) will bring to light aspects of the silent consolidation and expansion of these concepts by the CJEU through the establishment of a prototype of a lawful and responsible user of copyright-protected works on the Internet.

B. The origins and dynamics of the concept of lawful use in European copyright law

- 9 The concept of “lawful user” made its first appearance in the Computer Programs Directive.¹² The Directive has introduced the notion, but paradoxically does not establish a clear terminology and does not use an identical term for defining the person who is entitled to enjoy the exceptions. In this context, the term “lawful acquirer of the program” or descriptive definitions such as the “person having a right to use the computer program” or the “person having a right to use a copy of a computer program” are used indiscriminately to determine the person who can lawfully invoke the application of copyright exceptions.¹³
- 10 The same expression reappears five years later in the Database Directive.¹⁴ In this case, the person who can claim the application of the exceptions established by that Directive is defined consistently as the “lawful user of a database”. Even though the two Directives do not use exactly the same term, the meaning of the concept in both Directives has to be perceived as identical. This interpretation seems to be implicitly confirmed by the Report published by the Commission on the implementation and effects of Directive 91/250/EEC on the legal protection of computer programs.¹⁵ As stated in the Report, Articles 6 and 8 of the Database Directive (Directive 96/9/EC), which use the term “lawful user”, were modelled along the lines of Article 5 (1) of the Computer Programs Directive. In any case, since the CJEU has not expressly dealt with this question, the issue will have to be addressed in a future consolidation or codification of the EU copyright *acquis*.
- 11 From a copyright policy point of view, the introduction of the concept of “lawful user” in those two Directives constitutes the expression of a new perception of the delimitation of copyright monopoly, characteristically of a paradigm shift. It is the first time ever that the individualized entity of the user of copyright-protected works is recognized

11 From the vast bibliography see: Geiger C., Gervais D. J., Senftleben M., ‘The Three-Step-Test Revisited: How to Use the Test’s Flexibility in National Copyright Law’ (2014), *American University International Law Review*, Vol. 29, No. 3, pp. 581-626. Available at SSRN: <<https://ssrn.com/abstract=2356619>> or <<http://dx.doi.org/10.2139/ssrn.2356619>>; Senftleben, M., ‘The International Three-Step Test A Model Provision for EC Fair Use Legislation’, (2010) 1 *JIPITEC* 67, para. 1; Griffiths J., ‘The ‘Three-Step Test’ in European Copyright Law - Problems and Solutions’ (2009), Queen Mary School of Law Legal Studies Research Paper No. 31/2009. Available at SSRN: <<https://ssrn.com/abstract=1476968>>. See also: Geiger C., Hilty R., Griffiths J, Suthersanen U., ‘Declaration A Balanced Interpretation Of The “Three-Step Test” In Copyright Law’, 1 (2010) *JIPITEC* 119 para 1; Hilty R., ‘Declaration on the “Three-Step Test”: Where do we go from here?’, 1 (2010) *JIPITEC* 83, para. 1.

12 Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122, 17.5.1991, p. 42-46. The Directive has meanwhile been codified. See: Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version) OJ L 111, 5.5.2009, p. 16-22.

13 Synodinou T. (*supra* n.1).

14 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77,27.3.1996, p. 20-28.

15 Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the implementation and effects of Directive 91/250/EEC on the legal protection of computer programs, Brussels, 10.04.2000 COM (2000) 199 final.

as an autonomous subject who is entitled to exercise certain legal prerogatives in the form of mandatory copyright exceptions. Indeed, the introduction of the concept of “lawful user” carries great symbolism, but it would have remained a purely theoretical advance if the lawful user’s capacity to enjoy the use of copyright-protected works was not safeguarded or guaranteed.

12 Indeed, effective means to secure a proper balance of interests in copyright law is to take into account the general interest through specific mechanisms of recognition of the users’ interests inside copyright law, such as through the establishment of users’ rights which could be enforced in courts.¹⁶ In this context, another unique feature of both Directives is that they establish some of the exceptions in favor of lawful users as mandatory, both in the sense that Member States shall provide for those exceptions and, more significantly, in the sense that these exceptions cannot be overridden by contractual terms. Specifically, Article 9 of Directive 91/250/EC states that any contractual provisions that limit or abrogate the right to create a back-up copy of a computer program, to observe, study and test the program and to decompile the program in order to achieve interoperability shall be considered as null and void.¹⁷ Article 15 of Directive 96/9/EC also declares the binding nature of some exceptions. Any contractual provision contrary to Articles 6 par. 1 and 8 of the Directive shall be treated as null and void. Assigning a mandatory nature to exceptions or limitations to copyright injects a new perspective into copyright exceptions. This development could be seen as an indirect recognition of the category of “user rights” as an essential counterbalance to copyright protection. So, in addition to the concept of “lawful use”, a new category of “legal prerogatives” also emerges: the “rights of the lawful user”.

13 In 2001, the adjacent concept of “lawful use” appears in the Information Society Directive.¹⁸ The Directive does not define the lawful user as the sole beneficiary of copyright exceptions. However, the mandatory

temporary copy exception provided for by Article 5 par. 1 presupposes either acts of reproduction whose sole purpose is to enable transmission by an intermediary on a network between third parties, or lawful use to be made of a work or other subject matter. Even though the “lawfulness” of the use is not directly assessed in relation to the user’s status as it is in the Software and the Database Directives, but in relation to the purpose of the act of reproduction,¹⁹ the concepts of “lawful user” and of “lawful use” in the three Directives must be deemed to have the same meaning and the same function.

14 While the Software Directive and the Database Directive did not provide a definition of the “lawful user”,²⁰ Recital 33 of the Information Society Directive defines “lawful use” broadly as any use which is authorized by the right holder or not restricted by law. There are two alternative criteria for assessing the “lawfulness” of the use. Either such use is authorized by the right holder (either expressly or implicitly if a work is made freely available through a website without any terms and conditions governing its use) or it is not restricted by law. In that sense, even though it is not entirely clear, it appears that a use would be lawful not only if it is based on a copyright exception or limitation,²¹ but also on other legal grounds outside the purview of copyright law. Especially with regard to the assessment of lawful use on the grounds of copyright exceptions, it strongly depends on the possibility of neutralizing copyright exceptions by technological protection measures (TPMs) and contractual agreements. Concerning the enforceability of exceptions against TPMs, Directive 2001/29 chose to respond under an umbrella solution in Article 6 (4), which gives great freedom to Member States to adopt appropriate measures for safeguarding the enjoyment of copyright exceptions,²² while this provision does not apply if the work is made available via on-demand services on agreed contractual terms.²³ Specifically, EU copyright legislation has

16 Geiger C., ‘Copyright as an Access Right, Securing Cultural Participation Through the Protection of Creators’ Interests’ in R. Giblin, K. Weatherall (eds.) *What if We Could Reimagine Copyright?*, (Canberra, ANU Press, 2017), pp. 73-109; Max Planck Institute for Innovation & Competition Research Paper No. 15-07, available at SSRN: <<https://ssrn.com/abstract=2643304>>. See also: Burrell R. and Coleman A., *Copyright Exceptions: The Digital Impact* (Cambridge University Press, 2005) 279; Riis T. and Schovsbo J., ‘User’s Rights, Reconstructing Copyright Policy on Utilitarian Grounds’ (2007) *European Intellectual Property Review* 1.

17 See Article 8 of Directive 2009/24/EC (codified version of Directive 91/250), supra n.3.

18 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L 167, 22/06/2001 P. 0010 – 0019.

19 Dussolier S., ‘Droit d’auteur et protection des œuvres dans l’univers numérique, Droits et exceptions à la lumière des dispositifs de verrouillage des œuvres’ (2005) *Larcier, Bruxelles*, p. 449.

20 For possible interpretations, see: Vanovermeire V., ‘The concept of the lawful user in the database directive’, (2000) *IIC*, Vol. 31, p. 63-81; Dusollier S., ‘L’utilisation légitime de l’œuvre: un nouveau sésame pour le bénéfice des exceptions en droit d’auteur?’ (2005) *Communication-Commerce Electronique* (11), pp 17-20; Aplin T., ‘Copyright Law in the Digital Society: The Challenges of Multimedia’, (2005), Hart Publishing, p. 181.

21 Van Eechoud M., Hugenholtz P. B., Van Gompel S., Guibault L., Helberger N., ‘Harmonizing European Copyright Law’ (2009), Wolters Kluwer, Kluwer Law International, p. 116.

22 Bechtold, S., ‘Information Society Directive, art. 6’, in: Dreier Th., Hugenholtz, P.B. (eds.), ‘Concise European Copyright Law’ (2006), Kluwer Law International, p. 391.

23 Article 6 (4) of Directive 2001/29/EC of the European

an ambiguous approach on this issue. Regarding the thorny issue of the tension between exceptions and overriding contractual terms, Directive 2001/29 did not provide a clear answer. Recital 45 states that “the exceptions and limitations referred to in Article 5(2), (3) and (4) should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law”. As Guibault highlights, this has led to somehow conflicting interpretations. Some commentators argue that the limitations of Articles 5(2) to 5(4) can be overridden by contractual agreements, while others consider that the ability to perform legitimate uses that do not require the author’s authorization is a factor that can be considered in the context of contractual agreements regarding the price.²⁴ Consequently, while certain exceptions might be safeguarded against TPMs in national copyright laws under the ambivalent conditions set by Article 6 par. 4 of Directive 2001/29, the question of the prevalence of copyright exceptions over contracts, or vice-versa, has been left mainly to the discretion of the Member States. An approach favoring a general prevalence of copyright exceptions over contractual clauses emerged in the *Verwertungsgesellschaft Wort (VG Wort)* cases,²⁵ where the CJEU appears to support the view that Member States generally have a choice over whether or not to allow exceptions to be overridden by, limited by, or otherwise dependent on contract terms. However, where contract or license terms are not expressly allowed by domestic copyright laws to limit the scope of an exception, the default position is that the exception will prevail over any rights holder authorization.²⁶ Whether this approach would become a prevailing principle in European copyright law remains to be seen, while in the meantime the question has only been harmonized for specific copyright exceptions.

- 15 Consequently, it appears that a use would be lawful on the grounds of a copyright exception or limitation, provided that this exception has not been

Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

- 24 Guibault L., ‘Relationship between copyright and contract law’ in: Derclaye, E.(ed.), *Research Handbook on the Future of EU Copyright*, (Edward Elgar,2009), p. 529.
- 25 Cases C-457/11 to C-460/11, *Verwertungsgesellschaft Wort (VG Wort) v Kyocera and Others (C-457/11) and Canon Deutschland GmbH (C-458/11) and Fujitsu Technology Solutions GmbH (C-459/11) and Hewlett-Packard GmbH (C-460/11) v Verwertungsgesellschaft Wort (VG Wort)*, ECLI:EU:C:2013:426.
- 26 See par. 37 of *VG Wort*, op.cit. : “Where a Member State has decided, pursuant to a provision in Article 5(2) and (3) of Directive 2001/29, to exclude, from the material scope of that provision, any right for the rightholders to authorise reproduction of their protected works or other subject-matter, any authorising act the rightholders may adopt is devoid of legal effects under the law of that State.”

contractually forbidden, unless European or national copyright law has established, either expressly or implicitly (by not expressly allowing contract or license terms to limit the scope of an exception), this exception as being resistant to contractual agreements.

- 16 The CJEU was called upon to interpret the prerequisite of “lawful use” laid down in Article 5 par. 1, in the *Infopaq II*, *Football Association Premier League* and the recent *Filmspelers* cases. As will be demonstrated, the CJEU’s stance in relation to the concept of lawful use is ambivalent, because while at first it embraced a flexible approach - which appears to comply with Recital 33 of the Information Society Directive - more recently it restricted its scope by linking lawfulness to the author’s consent and by establishing lawful access (interpreted as accessing the work via a “lawful source”) as a prerequisite for subsequent lawful use.
- 17 In point of fact, the Court first adopted a broad construction of the concept of “lawful use”, with reference to Recital 33 of the Information Society Directive.²⁷ In *Infopaq II*,²⁸ the Court confirmed that the specific authorization of the copyright holder is not required for asserting that the use is lawful. The Court held that the drafting of a summary of newspaper articles, even though it was not authorized by the copyright holders, was not restricted by the applicable legislation and the use could not be deemed unlawful. Similarly, in its judgment of 4 October 2011 in *Football Association Premier League*,²⁹ the Court was called upon to analyze whether the temporary copy exception could apply to the ephemeral acts of reproduction which were taking place upon the mere reception of satellite broadcasts by television viewers. It held that the picking up of such broadcasts and their visual display in a private context did not constitute an act restricted by the legislation and that such reception was to be considered lawful in the case of broadcasts from a Member State, when brought about by means of a foreign decoding device. In this context, the notion of lawfulness can therefore be defined as a specific application of the notion of good faith.
- 18 However, in the recent *Filmspelers* case,³⁰ the CJEU affirmed that the temporary copy exception of Article 5 par. 1 of the InfoSoc Directive cannot

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- 27 Seville C., *EU Intellectual Property Law and Policy*, (Edward Elgar, Cheltenham, 2016) p. 75.
- 28 *Case C-302/10, Infopaq International A/S v Danske Dagblades Forening*, [2012], ECLI:EU:C:2012:16, paras 44 and 45.
- 29 *Cases C-403/08 and C-429/08, Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd*, ECLI:EU:C:2011:631, par. 170 to 172.
- 30 *Case C-527/15, Stichting Brein v Jack Frederik Willems*, [2017], ECLI:EU:C:2017:300.

be relied on by users of Kodi boxes, and thus of multimedia players on which there are pre-installed add-ons, which modify the settings and allow the Kodi box user to have access to private servers on which copyright-protected works have been made available to the public without the right holders' consent. Even if the content is streamed to the device, a technical and temporary copy of the work is still held in the device's memory. The CJEU firmly rejects the application of the exception of temporary reproduction, since it is clear that these settings do not correspond to a lawful use. On the contrary, the temporary reproductions on the multimedia players are made in the course of an obviously illegal use, since the users of such devices are deliberately accessing a free and unauthorized database of protected works.³¹

- 19 Consequently, the users of the device are not lawful users and they are also infringing copyright law, because no copyright exception can be invoked in their favor in relation to the reproductions made. This stance taken by the CJEU is not surprising; since the seminal *ACI Adam* case,³² it would be impossible for users to invoke the private copy exception, due to the lack of a lawful source of the copy. As the Court stated, to accept that such reproductions may be made from an unlawful source would encourage the circulation of counterfeit or pirated works, thus inevitably reducing the volume of sales or of other lawful transactions relating to protected works, with the result that a normal exploitation of these works would be adversely affected. In line with the *ACI Adam's* argumentation, the CJEU in *Filmspelers* has also closed to users the escape route of the temporary copy exception. In order to arrive at this conclusion, the CJEU takes into account the *mens rea* of users of Kodi boxes, who deliberately access a free and unauthorized database of protected works, in order to conclude that they cannot rely on the temporary copy exception, because the temporary acts of reproduction take place in the context of a clearly illegal use.
- 20 From the above, it appears that the CJEU has opted for a flexible definition of the notion of "lawful use" based on the equally broad formulation of Recital 33 of the Information Society Directive, in the sense that a lawful use could also be any use which is not restricted by law, and therefore any use that can rely on copyright exceptions. However, as the *Filmspelers* judgment shows, the assessment made of the "lawfulness" of use on the grounds of a copyright exception is holistic, in the sense that the status of the user's knowledge in relation to the legality of the

source of the copy of the work, which is accessed and used, is also taken into consideration.

- 21 In this context, the lawfulness of use for end-users depends on two interrelated criteria: a) their access to the work via a lawful source; and b) their knowledge in relation to the lawfulness or unlawfulness of this source. This approach is pragmatic because it takes into consideration the informational asymmetry in relation to the assessment of the lawfulness of the source of a copyright protected work, which is used on the grounds of a copyright exception. If only the first criterion, which is an objective one, were to apply, this would make it impossible for users to invoke copyright exceptions every time they access the work via an unlawful source, regardless of whether they are reasonably in the position to know or assume the unlawfulness of the source. In this context, the second criterion, which is subjective, would enable users who are not in a position to know or to logically assume the unlawfulness of the source, to still invoke copyright exceptions and be regarded as lawful users.
- 22 As will be shown, this line of reasoning has been consolidated by the CJEU in the hyperlinking cases (*Svensson, Bestwater* and especially *GS Media*). Furthermore, the question of the "lawful source" has dynamically reappeared recently, through the analogous concept of lawful access. The latter has emerged as a new trend in the EU Digital Single Market Copyright Package, though in variant forms, while the nature of the relationship between lawful access and lawful use is not clear (C.).

C. "Lawful access" in the Digital Single Market Copyright Package: a new trend?

- 23 The concepts of lawful access or lawful use must not be confused with the concept of lawful user. In this case, lawfulness is attached to the act, not to the person. The concept of "lawfulness" is also present in the recently adopted Directive on Copyright in the Digital Single Market. Specifically, "lawful access" to works or other protectable subject-matter is a prerequisite for enjoyment of the text and data-mining exceptions.³³ The prerequisite of "lawful access" is not something new in the Digital Single Market Package, since Article 6 (4) of the Directive 2001/29 referred to the associated concept of "legal access".³⁴ When referring to "lawful access" as a

31 Ibid, par. 69.

32 Case C-435/12, *ACI Adam BV and Others v Stichting de Thuiskopie and Stichting Onderhandeligen Thuiskopie vergoeding*, [2014], ECLI:EU:C:2014:254.

33 Articles 3 and 4.

34 "6. 4. Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take

condition for enjoyment of the exception, the text closely follows the model of the UK text on the data-mining exception³⁵ and not the criterion set in the French text on the data-mining exception,³⁶ which covers reproductions from “lawful sources” (material lawfully made available with the right holders’ consent).³⁷

- 24 From the wording of the provision, it appears that lawfulness of access is a prerequisite for enjoyment of the exceptions as lawful use. Nonetheless, the text of the Directive does not define what “lawful access” is. Some indications are to be found in Recital 14 of the Directive, where it is explained that lawful access to copyright-protected content occurs, for example, when researchers have access through subscriptions to publications or open-access licenses. Furthermore, it is noteworthy that lawful access comprises also access to works which are freely available on the Internet.³⁸ Nonetheless, there is no indication whether lawfulness of access is to be assessed purely objectively or also by taking into consideration other factors, such as the presumed state of mind of the user in relation to the lawfulness of the source of the work. Consequently, a crucial question is to determine the relationship between “lawful use” and “lawful access”.
- 25 First, the two concepts could be differentiated chronologically: it could be argued that lawful access refers only to the initial access to the work via a lawful source. So, “lawful access” to the work is a first checkpoint of the lawfulness of the subsequent user’s acts. The underlying idea is that there cannot be lawful use of the work or the database without initial lawful access to it. The Proposal, however, remains silent on whether “lawful access” should only be interpreted as having access to the work

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”.

35 Copyright, Designs and Patents Act 1988, § 29A (UK).

36 Art .38 of the Law No. 2016-1231 for a Digital Republic added paragraph 10 to Art.L122-5 and paragraph 5 to Art. L 342-3 of the Intellectual Property Code (Code de la propriété intellectuelle, CPI).

37 Geiger C., Frosio G., Bulayenko O., ‘The Exception for Text and Data Mining (TDM) in the Proposed Directive on Copyright in the Digital Single Market-Legal Aspects, In depth Analysis for the JURI Committee. European Parliament, E 604.941’ (2018), p. 17.

38 However, the exception of Article 4 is not applicable if the the use of works and other subject matter has been expressly reserved by their rightholders in an appropriate manner, such as machine readable means in the case of content made publicly available online. See: Art. 4, par.3.

with the consent of the author or other right holder, or whether there might be other legal grounds for having lawful access to the work.

- 26 On the other hand, it could also be argued that lawful access and lawful use should be perceived as the necessary complementary steps accompanying the act of use as a whole. In this sense, “lawful use” encompasses both access to the work and all uses made of it, either simultaneously or subsequently to accessing it. This approach has two advantages. Firstly, it consolidates the various existing terminologies found in the piecemeal EU copyright legislation (lawful acquirer,³⁹ person having a right to use a computer program,⁴⁰ lawful user,⁴¹ lawful use,⁴² legal access,⁴³ lawful access).⁴⁴ Secondly, instead of evaluating the lawfulness of the user’s acts in the form of two steps (access, other uses), it promotes a holistic approach to the lawfulness of users’ acts, which could enable more flexibility, but also injects an element of responsibility with regards to the users’ acts *vis-à-vis* copyright protected works.
- 27 Accordingly, lawful use should be endowed with a broad meaning. In the case of the text and data-mining exception this would mean that the exception could be enjoyed by every person who can use the work or the database, either on the grounds of a contract or license (in which case the license granted to the research institution will necessarily cover use by researchers), but also when their use is not prohibited by law. In this context, it would have been preferable to use the term “lawful use” in the text on the data-mining exception too, since the latter has been broadly defined and consolidated in CJEU case law; at least regarding the temporary copy exception established by the Information Society Directive.⁴⁵ However, such an interpretation could possibly be put forward by the CJEU if it is called on in the future to decide on relevant questions.

- 28 It is also noteworthy that the text on the data-mining exception of Article 3 is mandatory, since any contractual provision contrary to that exception will be unenforceable. The guarantee covering the exception against contractual clauses certainly strengthens the position of users, who can enjoy the

39 Article 5 (1) of Directive 91/250/EEC on the legal protection of computer programs.

40 Article 5 (3) of Directive 91/250/EEC on the legal protection of computer programs.

41 Articles 6, 8 and 9 of Directive 96/9/EC on the legal protection of computer programs.

42 Article 5 (1) of the Directive 2001/29 on the legal protection of computer programs.

43 Article 6 (4) of the Directive 2001/29 on the legal protection of computer programs.

44 Recital 14 and Articles 3 and 4 of the Directive on Copyright in the Digital Single Market.

45 Geiger C., Frosio G., Bulayenko O., (2018), p. 24.

exception as a reinforced legal prerogative akin to a “user right”. This is also in line with the reasoning of the Software and the Database Directives, where only “lawful users” can enjoy copyright exceptions. However, conversely this stance also embodies a more restrictive approach to enjoyment of the exception,⁴⁶ since as the European Copyright Society has pointed out, it makes the exception subject to private ordering. Indeed, the exception can effectively be denied to certain users by a right holder who refuses to grant “lawful access” to works or who grants such access on a conditional basis only.⁴⁷ So the concept will act restrictively if the condition of “lawful access” is interpreted in such a way that it will always depend on the terms of a contract or license. This is the reason why it is imperative to consolidate the terms of “lawful access” and “lawful use” into a single EU autonomous legal concept (that of “lawful use”) and to define it flexibly.

- 29 The Digital Single Market Copyright Package also introduced another mandatory copyright exception in the Portability Regulation,⁴⁸ which entered into force in April 2018. Specifically, Article 3(1) introduces an obligation for an online service provider to enable a subscriber to access and use the online content service when temporarily present in other Member States. Furthermore, Article 5 provides that any contractual provisions, including those existing between holders of copyright and related rights, those holding any other rights relevant to the use of content in online content services and service providers, as well as between service providers and subscribers, which are contrary to Articles 3(1) and 4, shall be unenforceable. Even though it is not expressly classified as a “lawful user’s right”, the obligation of portability established by the Regulation takes the form of a personal right in favor of a user/consumer. Indeed, the portability privilege presents the two essential features of a lawful user’s right. Firstly, it is not established generally in favor of the public, but in favor of a specific and distinct legal subject: the subscriber-consumer of an online content service who, on the basis of a contract for the provision of an online content service with a provider, may lawfully access and use such a service in his Member State of residence. Secondly, like the software and database lawful user’s rights and the text and data-mining exception of Article 3, portability is fully guaranteed against opposing contractual terms and cannot be

overridden by the contractual will.⁴⁹

- 30 Nonetheless, unlike the concept of “lawful use” in the Information Society Directive, the concept of the “lawful user” who can claim the portability right is defined narrowly in the Portability Regulation as the subscriber to the online content service. Consequently, beneficiaries of the portability privilege are the only persons who have been contractually granted the right to use the service. This is also explained in Recital 15 of the Portability Regulation. According to this provision, “This Regulation should apply to online content services that providers, after having obtained the relevant rights from right holders in a given territory, provide to their subscribers on the basis of a contract, by any means including streaming, downloading, through applications or any other technique which allows use of that content. For the purposes of this Regulation, the term contract should be regarded as covering any agreement between a provider and a subscriber, including any arrangement by which the subscriber accepts the provider’s terms and conditions for the provision of online content services, whether against payment of money or without such payment. A registration to receive content alerts or a mere acceptance of HTML cookies should not be regarded as a contract for the provision of online content services for the purposes of this Regulation”.
- 31 The restrictive definition of “lawfulness” in this case corresponds to the reality of the transactions of such services, which are normally provided against payment. In this context, the entire edifice of the portability mechanism is modelled on the case where a subscription contract exists, and therefore all the necessary checks on the user’s Member State of residence are based on information provided through the subscription contract. Consequently, the concept of “lawfulness” takes on a very specific meaning and has to be distinguished from the broader concept of “lawful use” contained in the Software, Database and Information Society Directives, as well as the notion of “lawful access” of the text and data-mining exceptions.

D. The implicit consolidation and expansion of the concept of “lawful use” in the CJEU’s case law

- 32 The concept of “lawful user” was expressly recognized in sectoral EU copyright law Directives (the specific cases of software and databases) and the temporary copy exception of the Information Society Directive, while the adjacent concept of

46 Dusollier S., ‘L’utilisation légitime de l’œuvre : un nouveau sésame pour le bénéfice des exceptions en droit d’auteur?’ (2005) 11 *Communication-Commerce Electronique*, pp 17-20, at 18.

47 European Copyright Society, ‘General Opinion on the EU Copyright Reform Package’, (2017).

48 Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market OJ L 168, 30.6.2017, p. 1–11.

49 Synodinou T (2016), p. 14.

“lawful access” is a criterion for enjoyment of the text and data-mining exception in the Directive in the Digital Single Market.

- 33 However, the appearances of these concepts are sporadic and inconsistent. In this context, even though the emergence of “lawful use” has a significant symbolic value, it still remains marginal in EU copyright legislation.
- 34 Nonetheless, the CJEU seems to have taken on the task of implicitly expanding and further elaborating the concept. As has been demonstrated in *ACI Adam*,⁵⁰ the CJEU introduced lawfulness of access to the work as a prerequisite for lawful use when affirming that the benefit of the private copy exception concerns only reproductions made from “lawful sources”.⁵¹ The Court takes a firm stance and considers that the application of the private copy exception is not possible under EU copyright law, basing its argumentation solely on the unlawful nature of the source, which is interpreted by reference to the three steps test. The CJEU does not give a precise definition of what constitutes an “unlawful source”, but it bases its argumentation mainly on the three steps test. In this context, the prerequisite of the lawful source appears to be emancipated from the specific private copy context and takes on the broader dimension of “lawful access”. Since the CJEU did not expressly link its line of reasoning to the private copy exception, it could be deduced that the same reasoning could apply to all copyright exceptions. This could imply a general underlying principle that only lawful users can claim the application of copyright exceptions.⁵²
- 35 It is noteworthy that the assessment of “lawfulness” is strictly linked to the source of the copy and does not take into consideration the end-user’s knowledge in relation to the unlawfulness of the source of the copy. As a result, end-users cannot claim the application of the private copy exception for illegal downloads. In this sense, lawfulness differs from the principle of good faith. The CJEU does not take its reasoning further to officially declare that end-users are not lawful users and are, therefore, copyright infringers. Nonetheless this is implied, even though for practical reasons and due to privacy concerns, individual users who download material from unlawful sources are not expected to face legal action.⁵³
- 36 In the subsequent *Copydan* judgment,⁵⁴ the CJEU was more explicit regarding the conditions governing the “lawful source”. In the Court’s view, the focal point for assessing the lawfulness of the source is the right holder’s consent. As the Court stated, reproductions made using unlawful sources are those which are made from protected works that are made available to the public without the right holder’s consent.⁵⁵ The lawfulness of the use (the making of a private copy in this case) is therefore conditional upon the way the source of the copy was made available to the public. If the work was made available to the public with the right holder’s consent, the source is lawful and its use by the end-user is lawful too. By doing so, the CJEU embodies in its reasoning a logic of exclusive control of the uses of copyright-protected works and of copyright exceptions by private ordering. It will be fairly straightforward to ascertain when the end-user has acquired a copy of the work or has lawfully accessed the work as a service on the basis of a license/contract concluded directly between the right holder and the user. There will, however, be grey areas if a work is made available without rights holders clearly indicating which acts are authorized.
- 37 Based on the finding that the lawfulness of the source is assessed according to whether the work was made available with or without the right holder’s authorization, the CJEU further elaborated on the lawfulness of linking the activities of users of copyright-protected works. First, in *Svensson*⁵⁶ and *Bestwater*,⁵⁷ the CJEU held that when an author published or authorized the publication of her work on a website without any technical restrictions, it is presumed that authorization was granted to all Internet websites to access this work via hyperlinking or framing. As the CJEU noted “..., it must be held that, where all the users of another site to whom the works at issue have been communicated by means of a clickable link could access those works directly on the site on which they were initially communicated, without the involvement of the manager of that other site, the users of the site managed by the latter must be deemed to be potential recipients of the initial communication and, therefore, as being part of the public taken into account by the copyright holders when they authorised the initial communication”. Consequently, the lawfulness of hyperlinking is dependent on the presumed consent of the author or right holder who, in the absence

50 Case C-435/12, *ACI Adam BV and Others v Stichting de ThuisKopie and Stichting Onderhandeligen ThuisKopie vergoeding*, [2014], ECLI:EU:C:2014:254.

51 Ibid, par. 39.

52 Lucas A., Lucas-Schloetter A., Bernault C., ‘Traité de la propriété littéraire et artistique’ (2017), LexisNexis, supra n.9, p.390, n 400.

53 Quintais J.P., de Leeuw A., ‘No more downloading from unlawful sources?’ (2014) Kluwer Copyright Blog. Available via <<http://copyrightblog.kluweriplaw.com/2014/05/12/>

no-more-downloading-from-unlawful-sources/>.

54 Case C-463/12, *Copydan Båndkopi v Nokia Danmark A/S*, [2015], ECLI:EU:C:2015:144.

55 Ibid, par. 74.

56 Case C-466/12, *Nils Svensson and Others v Retriever Sverige AB*, [2014], ECLI:EU:C:2014:76.

57 Case C-348/13, *BestWater International GmbH v Michael Mebes and Stefan Potsch*, [2014], ECLI:EU:C:2014:2315.

of any technical restrictions of access to the work, is supposed to have authorized the communication of the work to all Internet users. This has also been further affirmed in the case of *Soulier and Doke*,⁵⁸ where the CJEU held that in a situation in which an author had given prior, explicit and unreserved authorization for the publication of his articles on the website of a newspaper publisher, without making use of technical measures restricting access to these works from other websites, that author could be regarded, in essence, as having authorized the communication of these works to the general Internet public.

- 38 This objective approach of the concept of the public is broad, but still has its own limits. If the work is communicated to the public lawfully but without the author's consent by a user on the basis of a copyright exception, then third parties, such as search engines, which provide a link to the work, are not directly covered by the Svensson principles. This is because the fact that it is impossible for the author to prohibit use due to the prevalence of a copyright exception (where the author cannot by law prohibit specific uses) is not legally equivalent to the positive act of granting authorization or consenting to use.⁵⁹ However, the exceptional significance of hyperlinking for the Internet function could result in reversing this line of thinking, as for instance was the case in Germany, where despite GS Media's presumption of knowledge for profit-making linkers, the German Federal Court of Justice held that such a presumption would not apply to search engines and for links displayed by search engines, because of the particular importance of these subjects to the functioning of the Internet. Consequently, the Court concluded that Google had not infringed the claimant's copyrights by displaying thumbnails of and links to photographs publicly available on the Internet without the right holder's consent.⁶⁰
- 39 The CJEU's approach raises some additional questions in relation to what kind of restrictions the author should impose in order to avoid being presumed to have given his consent for communication of the work to all Internet users. Are contractual restrictions equivalent to technical restrictions, such as a "paywall overlay"? If a right holder adds a disclaimer below the work of mind, stating that linking to this work is not authorized, could it be possible that a potential link is not infringing

copyright? In *Renckhoff*,⁶¹ the CJEU concluded that the lack of warnings, disclaimers (and presumably other contractual restrictions of access) does not have any legal impact on the application of the right of communication to the public. This is relevant both for professionals and for normal, non-professional users, who do not have any profit-making intention to make primary communications of copyright-protected works to the public. The CJEU does not give an answer to the effect of contractual restrictions on the Svensson principle of free linking to content lawfully made accessible on the Internet without any technological access restrictions. Does a non-professional linker who does not have any profit-making intention have to diligently search for the existence of such contractual restrictions before linking? Although it could be risky to arrive at general conclusions, the significant level of importance that the CJEU attached to hyperlinking for the proper functioning of the Internet and for the exercise of online freedom of expression, could militate against such an approach.

- 40 Subsequently, in the *GS Media* case,⁶² the prototype of a "responsible linker" complements the CJEU's previous stance in relation to "lawful use" and to "unlawful sources". In *GS Media*, the Court takes a further step forward and sets the criteria governing a user's liability for copyright infringement, and specifically for the violation of the "making available right". The confirmation of the concept of "lawfulness" of the source/access in relation to the making available right is a strong indication that this concept is recognized by the CJEU as having a horizontal application, since it cuts across both the right of reproduction and the right of communication to the public and also copyright exceptions. The Court's reasoning is divided into two parts. Firstly, an assessment is made as to whether the work was made available with or without the right holder's authorization. If the work was made available without the right holder's consent, then the user's liability depends on whether he knew or ought to have known that the work was made available without the right holder's consent.
- 41 In the same way as a person who makes a private copy of a copyright-protected work from an unlawful source, a person who provides a link to copyright-protected content, which has been made accessible without the right holders' authorization, cannot be considered as a lawful user of the work. In the CJEU's reasoning, a linker is not a lawful user of a copyright-protected work if that person knew or ought to have known that the hyperlink

58 Case C-301/15, *Marc Soulier and Sara Doke v Premier ministre and Ministre de la Culture et de la Communication* [2016], ECLI:EU:C:2016:878.

59 See for such an approach: Varnerot, V., 'La gestion collective du droit de reproduction et de représentation des œuvres d'arts visuels par les services automatisés de référencement d'images', *Communication- Commerce Electronique* (1) 2018, p. 11.

60 Bundesgerichtshof, I ZR 11/16 - Preview III.

61 Case C-161/17, *Land Nordrhein-Westfalen v Dirk Renckhoff*, [2018], ECLI:EU:C:2018:279.

62 Case C-160/15, *GS Media BV v Sanoma Media Netherlands BV and Others*, [2016], ECLI:EU:C:2016:644.

he posted provides access to a work illegally placed on the Internet. Specifically, for profit-making linking activities, that knowledge is presumed.⁶³ In so doing, the CJEU's reasoning introduces elements of extra-contractual liability law into the core of copyright law, and thereby significantly alters the orthodox stance that copyright is established as an exclusive property right, the infringement of which does not take into account the *mens rea* of the infringer.⁶⁴ Indeed, in the CJEU's view, the question is no longer simply that of whether, objectively speaking, an act of communication to the public occurred: the assertion of the existence of the act itself is connected to subjective elements, such as the intention of the potential infringer's direct or constructive knowledge. This change is necessary in the online environment, where it is not possible for end-users who do not have a direct contractual relationship with the right holder to investigate and safely prove that the work is made available to the public without the author's consent.

- 42 The end-user's constructive knowledge has to be assessed with reference to the prototype of the objective standard of the *bonus pater familias*, the "reasonable person", such as this concept is established in the law of obligations of each Member State (such as the common law concept of "the man on the Clapham omnibus" or the French law standard of the "*homme avisé*").⁶⁵ In this context, for example, a reasonable and prudent person would not have expected to access the latest Hollywood movie for free via an Internet link, and therefore lawful use will not occur if she/he further provides the link to the public. Similarly, the deliberate act of advertising the accessibility of copyright-protected works which were made available on the Internet without the copyright holders' consent, is an undeniable factor which reverses any argument in favor of the good faith of the person who provides the links.⁶⁶
- 43 While in such a flagrant case, it would be fairly easy to ascertain the unlawfulness of the use, more complex situations will certainly arise where the unlawfulness of the source/access will not be clear. This is the case when, for example, a work was placed on the Internet with the author's consent, but with a contractual prohibition on making it further available which is not mentioned on the relevant website from which the end-user accessed

the work, and without any technological barriers to accessing the work. Even though in such a case, it would not have been possible for a reasonable person to be aware of the contractual prohibition, the dependence of the assessment of the user's liability on complex legal reasoning would certainly be a deterrent factor against the use of the work. As the CJEU has not specifically defined the prototype of the "reasonable user", this assessment will have to be made on the basis of the variant relevant national legal standards.

- 44 It seems that for the CJEU, the delicate delineation between "lawful" and "unlawful" use will be decided on the grounds of the fundamental "*fraus omnia corrumpit*" legal principle. A manifestly illicit act (an unlawful source/access, the making available of the work without the right holder's authorization) is enough to contaminate the entire chain of reproductions and communications to the public of copyright-protected works, and even to rule out the application of copyright exceptions and limitations. Unless the use has been authorized, only those acting responsibly and in good faith could avoid liability and be considered as lawful users. Furthermore, there is a significant differentiation regarding the burden of proof of knowledge that the work was made available without the right holder's consent. The knowledge is presumed in the case of professional users (such as professional linkers), while the right holder carries the burden of proof for ordinary end-users who use the works in the context of a non-profit activity.
- 45 Indeed, a higher standard of care is generally expected from professionals in a specific field. So, while it is not absurd to pretend that online newspapers check whether the content they link to is authorized, no one could ever think that private users could always check and be aware of the legal status of the content they link to.⁶⁷ Nonetheless, the distinction in practice will not always be straightforward. The *GS Media* decision does not define the criteria which will be used to assess the profit-making activity (whether the link itself should generate profit, whether the website as a whole is 'for profit', whether the fact that the person creating the link is a commercial party is sufficient for the purpose of the 'for profit' criterion).⁶⁸ Furthermore, the dichotomy between the "professional" (profit-seeking) and "non-professional" linker is an artificial one, where both profit-seekers and amateur information providers are formally protected equally by freedom of

63 Synodinou T., 'Opinion, Decoding the Kodi Box: to link or not to link?' (2017), *EIPR* (12), pp. 733-736.

64 Dormont S., 'L'arrêt *GS Media* de la Cour de Justice de l'Union européenne : de précisions en distinctions, l'hyperlien lui fait perdre son latin...' *Communication Commerce Electronique* (2) (2017), p. 17.

65 For the concept of "responsible person" in the common law of negligence, see: *Blyth v. Birmingham Waterworks* [1856] 11 Exch 781 · *Hall v. Brooklands Auto-Racing Club* [1933] 1 KB 205.

66 *Filmspeler*, supra n.18, par. 50.

67 Bellan A., 'Compared to *Svensson*, *GS Media* is not that bad after all' (2016) Available via <<http://ipkitten.blogspot.com/2016/10/compared-to-svensson-gs-media-is-not.html>>.

68 Lokhorst G., '*GS Media* in the National Courts: Fresh Issues on the meaning of for profit', (2017) Available via <<http://copyrightblog.kluweriplaw.com/2017/01/17/gs-media-national-courts-fresh-issues-meaning-profit/>>.

expression, under Article 10 of the European Convention on Human Rights. It is also questionable whether this distinction is compatible with the Berne convention, but it is worth mentioning that the concept itself is not a novelty in European Media law. For instance, in the Pihl⁶⁹ case, the ECtHR ruled that a non-profit blog operator is not liable for defamatory users' comments in case of prompt removal upon notice. The process of ascertaining the profit-making nature of the activity has to take into consideration the particularities of the Internet. In this context, financing by means of advertising revenues linked to the website's traffic appears on the face of it to fall within the scope of profit-making activities.⁷⁰

- 46 Moreover, another question is whether and to what extent the lack of knowledge or of negligence of a user with a non-profit activity could generally be used as a decisive factor for denying her/his liability. Indeed, the issue at stake is that of whether the findings of the *GS Media* case as regards individual non-professional users could be applied more generally in relation to the reproduction and/or communication to the public of copyright-protected works which are accessible on the Internet with no technical constraints. The Advocate General Campos Sánchez-Bordona, in his Opinion on the *Renckhoff* case,⁷¹ clearly favored such an approach. The case concerned the posting by a pupil, on a school's website, of a photograph which had been published on another website with the author's consent and was freely accessible on the Internet. In the Advocate General's view, even though this case has to be distinguished from the *GS Media* case (which involved the question of hyperlinks to protected works that were freely available on another website without the copyright holder's consent), the reasoning in the *GS Media* case concerning the subjective component of the behavior of persons with no profit motive could be extrapolated, *mutatis mutandis*, to the *Renckhoff* case. Indeed, it may be difficult, "in particular for individuals", to ascertain whether the copyright holders of works on the Internet have consented to their works being posted on the site concerned. On the basis of the foregoing, the Advocate General had opined that neither the pupil nor the school had communicated the photograph to the public. On the other hand, it was suggested that there will be communication to the public where the copyright holders give notice that the work to which access is being provided has been "illegally placed on the Internet" or where access to the work is provided in such a way that users of the website on which it

is posted can "circumvent the restrictions taken by the site where the protected work is posted or where the author has notified the person seeking to publish his photograph on the internet that he does not give his consent".

- 47 However, the CJEU did not follow the Advocate General's Opinion.⁷² By clearly distinguishing this case from *GS Media*, it held that the posting by the pupil of the photograph required a new authorization by the author. As the CJEU stressed: "unlike hyperlinks which, according to the case-law of the Court, contribute in particular to the sound operation of the internet by enabling the dissemination of information in that network characterised by the availability of immense amounts of information, the publication on a website without the authorisation of the copyright holder of a work which was previously communicated on another website with the consent of that copyright holder does not contribute, to the same extent, to that objective".⁷³
- 48 Furthermore, for the Court to hold that the posting on one website of a work previously communicated on another website with the consent of the copyright holder does not constitute making available to a new public, would amount to applying an exhaustion rule to the right of communication. Lastly, it is irrelevant that the copyright holder did not limit the ways in which Internet users could use the photograph, since the enjoyment and the exercise of the right of communication to the public may not be subject to any formality.⁷⁴ The CJEU safeguarded the preventive and exclusive nature of copyright. It appears that the objective to establish a high level of protection for authors does not permit a liberal interpretation of the rights of the author in a way that the knowledge or the negligence of the users is taken into account in order to deny users' liability when assessing whether they have communicated a copyright-protected work to the public. On the other hand, in the specific case of links, given their significant contribution to the sound operation of the Internet by enabling the dissemination of information, a more lenient approach is possible.
- 49 The CJEU's stance in *Renckhoff* is in line with its previous findings in the *Vcast* case, where the lawfulness of the users' acts has also been approached restrictively, by taking into account the whole context of their access to copyright-protected works.⁷⁵ In the view of the Court, the users

69 ECHR, Rolf Anders Daniel PIHL against Sweden, 9 March 2017, app no 74742/14.

70 See the "Pirate bay" case: Case C-610/15, *Stichting Brein v Ziggo BV and XS4All Internet BV*, [2017], ECLI:EU:C:2017:456.

71 Opinion of the Advocate General Campos Sánchez-Bordona delivered on 25 April 2018, Case C-161/17, *Land Nordrhein-Westfalen v Dirk Renckhoff*, [2018], ECLI:EU:C:2018:279.

72 Case C-161/17, *Land Nordrhein-Westfalen v Dirk Renckhoff*, [2018], ECLI:EU:C:2018:279.

73 *Ibid*, par. 40.

74 *Ibid*, par. 36.

75 Case C-265/16, *VCAST Limited v RTI SpA*, [2017], ECLI:EU:C:2017:913.

of a broadcast digital recording mechanism cannot invoke the private copy exception in order to justify access to content that is hosted in the cloud by the recording service. Provided that the same content can be accessed by various users who subscribed to the service, the issue of lawfulness of use must be analyzed not only in light of the application of the right of reproduction, but also in light of the right of communication to the public.⁷⁶ In this context, even when online access could be permitted by an exception to the right to reproduction, the issue of the lawfulness of the user's access has to be examined broadly, in conjunction with the possible application of other rights, such as the right of communication to the public.

- 50 Consequently, in *Renckhoff* the CJEU closed the door to a possible application of extra-contractual liability evaluations when assessing lawfulness of use in relation to whether an act of the user falls within copyright monopoly because it has been communicated to the public without the author's consent. However, the CJEU did not examine whether the *GS Media* line of reasoning could find some application in relation to the assessment of lawful use on the basis of copyright exceptions and limitations. Indeed, *Renckhoff* should not be perceived as precluding the lawfulness of the users' acts on the grounds of copyright exceptions in general terms. In the present case it was clear that the essay with the photo was uploaded onto the school's website, while the possible application of the educational exception was not raised by the domestic court. The application of the educational exception was therefore not examined by the CJEU, which focused only on whether an act of communication to the public, with or without the author's consent, took place. As stated in para. 42 of the judgment, "it suffices to state that the findings set out in paragraph 35 of the present judgment, relating to the concept of 'new public', are not based on whether the illustration used by the pupil for her school presentation is educational in nature, but on the fact that the posting of that work on the school website made it accessible to all the visitors to that website".
- 51 Even though the use was deemed unlawful, because it did not lie outside the scope of the right of communication to the public, the *Renckhoff* case does not preclude that the use might have been considered lawful on the grounds of the educational copyright exception. It is noteworthy that the argument has also been discussed in the ALAI Opinion on this case,⁷⁷ where it was stated that in relation to the

assessment of lawful use by way of illustration for teaching, the crucial question, from the viewpoint of the Berne Convention (Article 10(2)), is whether communication on a website that is accessible to all Internet users and is not restricted solely to the school community, can still be characterized as use by way of illustration for teaching and whether such use is compatible with fair practice. The ALAI Opinion concludes that communication of a work on a website open to everyone, even if it is made by a school, doubtless exceeds the scope of a broadcast by way of illustration for teaching. Therefore, article 10(2) cannot justify it. However, it has also been argued that communication on a school's website with more restricted access might prove to be perfectly compatible with the Convention's norms.

- 52 In this context, the *Renckhoff* case does not answer the question of whether the unlawful nature of the source, or more broadly unlawful access to a copyright-protected work, contaminates all subsequent uses, and thus necessarily neutralizes lawful use on the grounds of copyright exceptions as well. This is because in *Renckhoff*, the work was made available to the travel website without any technical restrictions, with the author's consent. Therefore, the source of the photo on the Internet was lawful, even though the author's consent was contractually limited to use on the travel website. Since the educational exception could apply if the photo was made available with more restricted access, it can be deduced that the existence of contractual restrictions, which constitute in *personam* limitations regarding the use of the photograph other than on the travel website, would not have been a sufficient legal basis for rendering uses based on copyright exceptions unlawful. In this context, *Renckhoff*, like *Svensson*, implicitly promotes an "in rem" approach to the effect of the author's consent, in the sense that the presence of the work on a website without any technical restrictions and with the author's consent, could not exclude the lawful use of this work on the grounds of a copyright exception.
- 53 Certainly, there is no answer to the question of whether the existence of express contractual restrictions on the travel website, in the form of a disclaimer issued by the right holder or the licensee (the travel website's owner) would render use of the photograph on the grounds of copyright exceptions unlawful. In this case, the user's access to the work via the website containing the disclaimer would be seen as an implied acceptance by the user of the terms and conditions of access mentioned in the disclaimer. Could a contractual restriction of this type in relation to how much or what part of a work

⁷⁶ Jouglaux P., 'Access to works protected by copyright law' in Synodinou T. (ed), 'Pluralism or Universalism in international copyright law' (Kluwer Law International, Alphen aan den Rijn, Netherlands: Wolters Kluwer, forthcoming in 2019).

⁷⁷ Opinion on case Case C-161/17, *Land Nordrhein-Westfalen*

v Dirk Renckhoff, [2018], ECLI:EU:C:2018:634, Available at: <<http://www.alai.org/en/assets/files/resolutions/180529-opinion-land-nordrhein-westfalen-en.pdf>>.

can be quoted or used for illustration purposes for teaching, render a use that does not respect those conditions unlawful? Here again comes the question of enforceability of copyright exceptions against contractual restrictions and the possible scope and specifically the effect of these restrictions regarding works found without any technical restrictions on the Internet. The CJEU dealt with this question in the *Ryanair* case only in the specific context of a database that was not protected under the terms of the Database Directive, either by copyright or by the sui generis right, and held that the author of such a database is not prevented from laying down contractual limitations on its use by third parties. It was furthermore concluded that the author or producer of such a database is not obliged to safeguard a minimum level of free use of the database content for the users, such as the right for a lawful user to extract and reuse an insubstantial part of the database content for any reason, even for commercial purposes.

- 54 Furthermore, the contractual method of delimiting the use of information has its own inherent limits. The principle of privity of the contract (or the principle of the relative force of obligations in civil law countries) precludes the imposition of contractual obligations on third parties. So, where a copyright-protected work accessed by the user via a website with contractual restrictions which restrict or neutralize copyright exceptions is further disseminated on the Internet, the author or the website's right holder cannot invoke these restrictions against third parties who did not access the work via the website on which it was published with these restrictions, but accessed it from other sources where the restrictions were not mentioned. This is, however, applicable only in relation to copyright exceptions which have been established as *ius cogens* by European copyright law or by domestic copyright laws.
- 55 Leaving aside the complex issue of unlawfulness of use due to contractual restrictions, the basic question still remains of whether users can invoke copyright exceptions when they have accessed the work via an unlawful source, such as where the photograph had been uploaded to the travel website without the author's consent. As the law stands now, there is no straightforward answer. The unlawfulness of the source/access would normally render copyright exceptions unacceptable as a basis for lawful use - as has already been clarified first in *ACI Adam* and later in *GS Media* - in relation to hyperlinks pointing to works which have been made available to the Internet without the author's consent. Accepting the contrary would somehow result in "laundering" the unlawfulness of the source/access via the mechanism of copyright exceptions. However, even though it is limited to hyperlinking, *GS Media* has

also shown that there is a difference between the status of responsibility to be expected from non-commercial and from for-profit users. Knowledge of the unlawfulness of the source is presumed in the case of for-profit users, while the right holder carries the burden of proof for ordinary users who use the works in the context of a non-profit activity. The importance of hyperlinking for freedom of expression on the Internet, combined with the technicalities of this mode of communication (lack of control of the source of the work, since the linker is pointing and recomunicating an existing communication) was crucial in reaching this conclusion.

- 56 Could a similar line of reasoning apply in relation to the assessment of lawfulness of use on the grounds of copyright exceptions as well? In our view, this should not be excluded with reference to *Renckhoff*, since the latter did not deal with this question, but simply excluded the CJEU's hyperlinking line of reasoning only in relation to the assessment of whether a communication to the public took place with or without the author's consent and not in relation to the assessment of lawfulness of use on the grounds of copyright exceptions. Certainly, there is no "one size fits all" approach to all copyright exceptions. Firstly, in some cases, such as for example in the case of the exception of quotation,⁷⁸ the lawfulness of the source has been expressly established by law as a condition for enjoyment of the exception. This was also highlighted recently by AG Spuznar in his Opinion on the *Spiegel Online* case, where the necessity of the prerequisite of the lawfulness of the first publication of the work being quoted was firmly stated because it safeguards the author's moral right

78 See Article 10 of the Berne Convention: "(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries." See also Article 5(3)(d) of the Directive 2001/29 that authorizes Member States to allow: "quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose". As it is mentioned by Rosati, "quotation has been regarded by some as a 'right' (rather than an 'exception') because the language of Article 10(1) of the Berne Convention appears to require Member States to authorize quotations of copyright works". See: Rosati E., 'Non-Commercial Quotation and Freedom of Panorama: Useful and Lawful?', (2017) JIPITEC 8 4. For such an approach see: Goldstein P., Hugenholtz P.B., 'International copyright. Principles, law, and practice', (OUP:2013), p. 391; Tawfik M. J., 'International Copyright Law: W[h]iter User Rights?', in Michael Geist (ed.), *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 66.

of divulgation.⁷⁹ The assessment of the lawfulness of the source in the event of quotation, but also possibly in other cases of copyright exceptions, the basis for justification of which is freedom of expression, deserves a special analysis through the prism of fundamental rights. Indeed, the prerequisite of the lawfulness of the source in this case functions as a safeguard for protection of the author's freedom of expression regarding the decision on whether and when the work should be released to the public, which in copyright law is guaranteed through the author's moral right. It is noteworthy that this is expressly recognized by AG Spuznar in his Opinion on *Spiegel Online*, where it is stressed that the author's exclusive control over his own work is based both on protection of the author's personality (moral right) and on his/her freedom of expression. This enhanced focus on the fundamental rights basis of copyright when it comes to the protection of the author's moral interests has the potential to assert moral rights as a powerful limitation on the dissemination of copyright-protected works on the grounds of copyright exceptions in European copyright law. This is also in line with the CJEU's findings in *Deckmyn*, where the legitimate interest of authors in ensuring that their works are not associated with a racist and discriminatory message has been recognized by the CJEU.⁸⁰ The prerequisite of the lawfulness of the source in the quotation exception, both in Berne and in Article 5 of Directive 2001/29, should however, be interpreted broadly in the sense that what is important is that the first divulgation of the work to the public was made with the author's consent or under a compulsory license, regardless of the means of divulgation (it does not have to be a "lawful published work" within the meaning of article 3 (3) of the Berne Convention)⁸¹ and, presumably, of possible further contractual restrictions on it. Since the underlying idea is that it should be the author's decision as to whether, and if so when, he or she wants to render the work public,⁸² if the author consented to publication of the work on an Internet source, such as on a website or on a public profile on a social media account, the condition of lawfulness of the source should normally be met for subsequent uses of the work on the basis of the quotation exception.

57 Furthermore, the unlawfulness of the source should not in any case render a use that is based on copyright exceptions unlawful and, as a result, lead to the user being held liable for copyright infringement. The fact that it may be impossible – or at least extremely difficult – to know or presume that the source is unlawful, especially in the case of sources found online, should be taken into consideration as part of a holistic assessment of the user's liability. In this context, there should be cases of lawful non-commercial use of a copyright-protected work accessed via an unlawful source, provided that, in line with *GS Media's* underlying principle, the user could not reasonably have been in a position to know or assume the non-manifest unlawfulness of the source of the work. Conversely, uses from a manifestly unlawful source would not qualify as lawful use, even for non-commercial users, unless there is a specific background which renders the specific use lawful, such as if use on the grounds of the exception is absolutely necessary to safeguard freedom of expression.⁸³ However, according to the *GS Media* principles, this benefit would not apply to the use of unlawful sources of copyright-protected works for news reporting, parody or quotation by media professionals who operate on a commercial/profit-making basis, since their knowledge of the sources' unlawfulness will be presumed.

58 Is it possible to include in European copyright law a horizontal analysis of the non-commercial user's state of mind in relation to lawfulness of the source of the work that is being used on the grounds of a copyright exception, even in cases such as the exception of quotation, where the lawfulness of the source is a criterion directly imposed by the Berne Convention and EU Copyright law? Provided that this assessment is made in relation to the user's liability and not in relation to the scope of copyright protection (rights and exceptions) such as the latter is defined in international copyright law, the introduction into European copyright law of such an exemption-from-liability clause - in favor of non-commercial users who could not reasonably be in a position to know or presume that a source of a work that they use on the basis of copyright exceptions is unlawful - would be possible. Clauses which alleviate copyright users' liability are not completely unknown in copyright legislation,⁸⁴ although these

79 Case C-516/17, *Spiegel Online GmbH contre Volker Beck*, Opinion (2019), ECLI:EU:C:2019:16, par. 55.

80 Case C-201/13, *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, ECLI:EU:C:2014:2132, par. 31.

81 Ricketson S., Ginsburg J., 'International Copyright and Neighbouring Rights, The Berne Convention and Beyond', (2005) Vol. I, (OUP), p. 785, 786.

82 Lewinski V., Walter M., 'Information Society Directive, Article 5', in Lewinski V., Walter M., 'European Copyright Law, A Commentary' (OUP, 2019), p. 1049.

83 Case C-516/17, *Spiegel Online GmbH contre Volker Beck*, Opinion (2019), ECLI:EU:C:2019:16.

84 See for instance Article 13 (6) of the Cypriot copyright law 59/1976, where it is provided that : "(6) At any time in an action for copyright infringement right it is proved or admitted that - (a) there was an infringement, but (b) at that time the defendant was unaware of, but had no good reason to believe that the he work to which the claim relates is copyright protected, the claimant shall not be entitled under this Article to any compensation from the defendant for the offense but shall be entitled to the benefits derived from the infringement irrespective of the granting or not of

clauses are often applicable only when calculating the amount of damages or other sanctions imposed on the infringer. This clause would be part of a dynamic concept of lawful use which consolidates and further advances the existing *acquis* on lawful use and lawful source/access.

59 In fact, “lawful use” should be perceived as a flexible concept which allows a comprehensive evaluation of the user’s acts by taking into account both fairness and reasonable expectations of responsibility. Hitherto, the CJEU’s piecemeal elaboration of the concept of lawful use has established its perimeter in a one-dimensional format only, by focusing mainly on the restrictive dimension of lawfulness and not on its inherent enabling dynamic. However, lawfulness could also be interpreted openly, in a way that ensures that legal norms such as reasonableness and fairness are also taken into account via a variety of legal mechanisms both inside and outside the scope of copyright law. It is noteworthy that in his Opinion in the *Spiegel Online* case, AG Szpunar argued that the courts might intervene in exceptional circumstances to safeguard a fundamental right (freedom of expression in this case), even in the absence of a specific corresponding exception (when the “essence of a fundamental right” is at stake), since it is within the competence of the legislator to strike a fair balance between copyright and other fundamental rights.⁸⁵ This finding should not be seen only as a restriction, but as a hint that it is within the competence of the EU legislator to shape the general perimeter of “sensitive” copyright norms associated with flexible and fundamental rights under a taxonomy of lawful use.

60 This presupposes the consolidation and restructuring by the EU legislator of the core of the concept of lawful use, which now appears amorphous. This dynamic definition should consolidate the existing *acquis* on the lawfulness of use through the elaboration of a definition of lawful use which is sensitive to fundamental rights, accompanied by a catalogue of examples of categories of lawful use.⁸⁶ Under such an approach, the problematic of lawful source/lawful access (gained by contract or thanks to other legal grounds within copyright, such

any other remedy under this Article”.

85 See on this point: Geiger C. and Izyumenko E., ‘Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way’ (2018), *European Intellectual Property Review*; Centre for International Intellectual Property Studies (CEIPI) Research Paper N°2018-12. Available at SSRN: <<https://ssrn.com/abstract=3293735>> or <<http://dx.doi.org/10.2139/ssrn.3293735>>.

86 For this approach, see: Synodinou T., ‘Who is lawful user in European copyright law? From a variable geometry to a taxonomy of lawful use’, in: Synodinou T., Jougleux Ph., Markou Ch., Prastitou Th. (eds.), ‘EU Internet law in the digital era’, Springer (forthcoming in 2019).

as exhaustion and copyright exceptions) should be seen as part of a comprehensive assessment of the lawfulness of the user’s act and of the user’s liability. This holistic assessment should be made on the basis of two mutually complementary pillars: a) by means of a fundamental rights’ analysis of copyright norms⁸⁷ combined with the application of abstract legal principles embodying elements of fairness and of natural justice, such as interpreting and performing a contract/license of use in accordance with good faith or analogous legal concepts such as “unconscionability” in common law jurisdictions;⁸⁸ or b) by assessing the users’ behavior on the grounds of established principles of extra-contractual liability in line with the *GS Media* logic and by introducing an exemption-from-liability clause in favor of non-commercial users who could not reasonably be in a position to know or presume that the source of a work that they used on the basis of copyright exceptions was unlawful.

61 In this sense, the comprehensive approach could be used not only to broaden the concept of lawful use and to avoid unjust effects but could also function in the opposite direction as an inner restriction on lawful use itself, in case of misuse. Good faith and fair practice could be used as criteria to judge whether lawful use really is lawful or whether it still remains lawful. This, in turn, would result in losing the option of invoking the rights of the lawful user under certain specific circumstances. For instance, a lawful acquirer – such as a purchaser of a copy of a software package who stores a back-up copy of the software on an insecure server to which everyone has free access – is offering other users of the server, either intentionally or by negligence, the possibility to reproduce the program. This user is violating the principle of good faith and abusing the right

87 For Hugenholtz, the fair balance of copyright with other fundamental rights, such as freedom of expression, the right to privacy or the right to conduct business, would be a source for flexibility in European Copyright Law that is alongside the existing structure of well-defined limitations and exceptions. See: Hugenholtz P. B., ‘Flexible Copyright, Can the Author’s Rights Accommodate Fair Use?’, in: Okediji R (ed.), *Copyright Law in an Age of Limitations and Exceptions*, (Cambridge University Press, 2017), p. 287-289. For the “fair balance” of copyright with other fundamental rights in the CJEU’s case law, see: Griffiths J., ‘Constitutionalising or Harmonising? The Court of Justice, the Right to Property and European Copyright Law’ (2013) 38 *European Law Review* 65-78. Available at SSRN: <<https://ssrn.com/abstract=2217562>>.

88 As Waddams notes, “Good faith, unconscionability and reasonable expectations are concepts that sound somewhat similar, and the terms are sometimes used together to signify (usually with approbation) what might be summarised as a flexible approach to contract law, avoiding rigid rules, and emphasising justice in the individual case, even at the cost of stability and predictability”. See: Waddams S. M., ‘Good Faith, Unconscionability and Reasonable Expectations’, (1995) 9 *Journal of Contract Law*, p.58.

to make a back-up copy of the program and could also be deemed to be in breach of his duty of care. Consequently, even if the initial lawful acquisition of the copy of the computer program has made him a lawful user, his use could still not be considered as lawful under these specific circumstances.

- 62 Additionally, the core of “lawful use” is intrinsically connected to the broader question of the recognition and effective protection of users’ interests in European copyright law. The user of copyright-protected works has gradually emerged as a new norm in the CJEU’s case law.⁸⁹ In this context, in *UPC Telekabel*,⁹⁰ the CJEU stressed the need to safeguard Internet users’ right to lawfully access information when Internet service providers adopt measures to bring an end to a third party’s infringement of copyright. As Geiger notes, the Court in *Telekabel*, “clearly adopted the language of users’ rights as a counterbalance to the disproportionately extensive enforcement of copyright”.⁹¹ It is noteworthy that this is the first time that the CJEU gives a more concrete substance to users’ rights by accompanying them with a procedural safeguard, since, as the Court states, national procedural rules must provide a possibility for Internet users to assert their rights before the court once the implementing measures are known.⁹² A user could therefore address a complaint to the court that the specific blocking method chosen affects his/her fundamental rights.⁹³ However, the scope of these rights is still imprecise. Shall this *locus standi* principle apply exceptionally only in the case of general injunctions, such as those provided by Austrian law in the *UPC Telekabel* case, or should it be extended to all blocking injunctions, even the specific ones that are issued by the courts?

- 63 The effective safeguarding of lawful users’ rights necessarily presupposes a number of structural changes in the copyright ecosystem, both at a substantial and at a procedural level. First, copyright exceptions should be established as real lawful user’s right in the sense that they are *jus cogens* that cannot be overridden by technological protection measures (TPMs) and by contracts. This change must be accompanied by the introduction of procedural mechanisms, such as the establishment of *locus standi* of lawful users to bring a claim before a court against the neutralization or restriction of copyright exceptions, and the establishment of out-of-court redress mechanisms for the settlement of these disputes. This is also the path that has been taken by Article 17 (former Article 13) of the Directive on Copyright in the Digital Single Market, where it is provided that various mechanisms shall be established by the Member States in relation to the effective enjoyment of copyright exceptions by users of the services offline providers. First, an obligation is imposed on online service providers to establish complaint and redress mechanisms in order to safeguard the effective enjoyment of quotation, criticism, review and parody. Furthermore, Member States should also ensure that users have access to out-of-court redress mechanisms for the settlement of disputes, which should allow these to be resolved impartially. Users should also have access to a court or other relevant judicial authority in order to assert the use of an exception or limitation to copyright rules.

E. Conclusion

- 89 See, for instance: Case C-117/13, *Technische Universität Darmstadt v Eugen Ulmer KG* (*‘Ulmer’*), [2014], par. 43 · Case C-201/13, *Deckmyn*, [2014] (CJEU, Judgment of the Court (Grand Chamber) of 3 September 2014, par. 26.
- 90 Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH Hand Wega Filmproduktionsgesellschaft mbH* (*‘UPC Telekabel’*) [2014], Judgment of the Court (Fourth Chamber) of 27 March 2014).
- 91 Geiger C., ‘Copyright as an Access Right, Securing Cultural Participation Through the Protection of Creators’ Interests’ in R. Giblin, K. Weatherall (eds.) *What if We Could Reimagine Copyright?*, (Canberra, ANU Press, 2017), pp. 73-109; Max Planck Institute for Innovation & Competition Research Paper No. 15-07. Available at SSRN: <<https://ssrn.com/abstract=2643304>>.
- 92 Synodinou T., ‘Intermediaries’ liability for on line copyright infringement in the EU: evolutions and confusions’ (2015) 31 *Computer Law and Security Review*, 57-67.
- 93 Savola P., ‘Website blocking in copyright injunctions: a further perspective’ (2014). Available at: <<http://the1709blog.blogspot.com/2014/03/website-blocking-in-copyright.html>>; Savola, P. ‘Proportionality in Fundamental Rights Conflicts in National Measures Implementing EU Law’ (2014). Available at SSRN: <<http://ssrn.com/abstract=2432260>> or <<http://dx.doi.org/10.2139/ssrn.2432260>>.
- 64 The concept of lawful use could be seen as an oxymoron in EU copyright law. On the one hand, it is used as a means for restricting the use of copyright-protected works, in the sense that there is a trend towards only lawful users being able to avoid liability for copyright infringement when accessing or using works. On the other hand, the effective enjoyment of copyright exceptions has hitherto been safeguarded only for lawful users, since lawful users are the only ones who enjoy exceptions in terms of user rights, which cannot be overridden by contract. The two facets of the concept of “lawful user” are organically interlinked. Indeed, the concept of “lawful user” makes sense if, in addition to being subject to obligations, the lawful user also possesses certain rights, in the sense that copyright exceptions are mandatory.
- 65 The concept of “lawful use” first made its appearance in sectoral EU copyright legislation in relation to information goods. It also appeared sporadically in various EU copyright provisions in the field of copyright exceptions. Even though the concept is

marginal in EU copyright legislation, the CJEU has implicitly consolidated the concept of “lawful use” and expanded its application in relation to the main economic rights granted by copyright law for all categories of works.

- 66 The EU law principle of legal certainty is based on the fundamental premise that those who are subject to the law must know what the law is in order to be able to plan their actions accordingly, so that they can have legitimate expectations, otherwise they will regard the law as arbitrary.⁹⁴ In this context, it is vital to favor a dynamic definition of the concepts of “lawful user” and of “lawful use” in European copyright legislation. This definition shall consolidate the existing *acquis* on the lawfulness of use through a taxonomy of lawful use. This taxonomy could be based on a broad definition of lawful use accompanied by a catalogue of examples.⁹⁵ The concept must be clarified and given a broad meaning in order to cover both uses which are authorized by the right holders, but are also not restricted by law, by taking into account the legal ideals of fairness and reasonableness. This change must be accompanied by the recognition of all copyright exceptions as *jus cogens* and the establishment of effective procedural mechanisms to safeguard the enjoyment of lawful users’ rights
- 67 In the author’s view, the dual function of the concept, which acts both as an enabling and as a restrictive clause, has the potential to provide an enhanced calibration of the interests of both copyright holders and users.

94 Tridimas T., *The General Principles of EC Law* (OUP, Oxford 2000), p. 163.

95 For this approach, see: Synodinou T., ‘Who is lawful user in European copyright law? From a variable geometry to a taxonomy of lawful use’, in: Synodinou T., Jougleux Ph., Markou Ch., Prastitou Th. (eds.), ‘EU Internet law in the digital era’, Springer (forthcoming in 2019).