

# Non-Commercial Quotation and Freedom of Panorama

## Useful and Lawful?

by **Eleonora Rosati\***

**Abstract:** This contribution seeks to assess both the practical implications and lawfulness of national copyright exceptions that – lacking a corresponding provision in Article 5 of Directive 2001/29 (the InfoSoc Directive) – envisage that the only permitted use of a copyright work for the sake of the applicability of a certain exception is a non-commercial one. By referring to different national exceptions allowing quotation and freedom of panorama as case studies, the paper shows some of the shortcom-

ings deriving from different approaches to the same permitted uses of copyright works across the EU, as well as the resulting (negative) impact on the very objective underlying adoption of the InfoSoc Directive: harmonization. This contribution concludes that – in general terms – diverging approaches to copyright exceptions, including limiting the availability of certain exceptions to non-commercial uses, may be both impractical and contrary to the system established by the InfoSoc Directive.

**Keywords:** Copyright; freedom of panorama; quotation; exceptions and limitations; InfoSoc Directive; non-commercial exceptions and limitations; for-profit; CJEU; Article 5 InfoSoc Directive

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## A. The system of the InfoSoc Directive

1 One of the objectives that EU legislature sought to achieve by adopting Directive 2001/29<sup>1</sup> (the InfoSoc Directive) was the harmonization of certain aspects

\* Associate Professor in Intellectual Property Law (University of Southampton). This study was prepared thanks to a grant of the Wikimedia's Free Knowledge Advocacy Group EU Grant Program. The views and opinions expressed are however only those of the Author, who can be contacted by email at [eleonora@e-lawnor.com](mailto:eleonora@e-lawnor.com).

1 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ, L 167, pp 10-19 ('InfoSoc Directive').

of substantive copyright law. Without intervention at the EU level, diverging national approaches would result in different levels of protection and – from an internal market perspective – restrictions on the free movement of services and products incorporating, or based on, intellectual property.<sup>2</sup> Such risk would also become more acute in light of the challenges facing technological advancement.<sup>3</sup>

2 In parallel with the harmonization of the exclusive rights of reproduction (Article 2), communication and making available to the public (Article 3), and distribution (Article 4), the InfoSoc Directive also

2 InfoSoc Directive, Recitals 6 and 7.

3 InfoSoc Directive, Recital 7.

harmonizes related exceptions and limitations (Article 5). With the exclusion of temporary copies (Article 5(1)), exceptions and limitations are optional for EU Member States to implement. All exceptions and limitations are subject to the three-step test contained in Article 5(5): they shall only be applied in certain special cases, which do not conflict with a normal exploitation of the work or other subject-matter, and do not unreasonably prejudice the legitimate interests of the rightholder.

- 3 The (formal) harmonization of exceptions and limitations may be regarded as limited also because the Directive itself states that their actual degree of harmonization should be based on their impact on the smooth functioning of the internal market, taking into account the different legal traditions in the various Member States.<sup>4</sup> It is essentially for this reason that the Directive includes a ‘grandfather clause’ in Article 5(3)(o), which allows Member States to retain existing (at the time of the adoption of the InfoSoc Directive) exceptions and limitations allowing uses of copyright works “in certain other cases of minor importance”. Such uses shall be allowed insofar as they only concern analogue uses and do not affect the functioning of the internal market, without prejudice to the other exceptions and limitations harmonized by the remaining provisions in Article 5.<sup>5</sup>

## B. National implementations: limitation to non-commercial uses

- 4 Several commentators have criticized the relatively weak harmonizing force of Article 5 of the InfoSoc Directive, with some even labelling the Directive as “a total failure, in terms of harmonization”.<sup>6</sup> Since the adoption of the InfoSoc Directive, not only have some exceptions and limitations not been adopted in

certain Member States<sup>7</sup>, but also – and more seriously – national exceptions and limitations have been designed in such a way as to have diverging scope across the EU. The language employed by national legislatures, in fact, may not correspond to the language in the relevant exception or limitation at the EU level, or even provide for different conditions than the ones established at the EU level. An example in this sense is the restriction – at the national level but not at the EU level – to non-commercial uses of a copyright work in relation to certain exceptions and limitations.

- 5 It is true that *some* InfoSoc exceptions and limitations are limited to non-commercial uses of copyright works. They are: temporary copies (Article 5(1); the copies made must not have independent economic significance<sup>8</sup>); private copying (Article 5(2)(b)); reproductions by libraries, educational establishments, museums, and archives (Article 5(2)(c)); reproductions of broadcasts by social institutions (Article 5(2)(e), although the provision refers the lack of commerciality not to the use made, but rather the mission pursued by the institution at issue); illustration for teaching or scientific research (Article 5(3)(a)); use for the benefit of people with a disability (Article 5(3)(b)); use for advertising the exhibition or sale of works of art (Article 5(3)(j), which prohibits any further commercial use).
- 6 However, there are national exceptions and limitations that only allow non-commercial uses of a copyright work, despite the lack of a corresponding requirement at the EU level. Instances of this tendency are numerous. This contribution intends to focus, as case studies, on quotation (Article 5(3)(d)) and freedom of panorama (Article 5(3)(h)), these being provisions that – at the level of individual Member States – have been implemented with significant differences, including with regard to the types of works eligible for the application of resulting exceptions and the possibility to only allow non-commercial uses. The experiences of systems belonging to different legal traditions – including common law countries (UK, Ireland), continental French-style systems (France, Italy, Belgium), Germany, and Nordic countries (Denmark,

4 InfoSoc Directive, Recital 31.

5 M van Eechoud *et al*, *Harmonizing European copyright law – The challenges of better lawmaking* (Wolters Kluwer:2009), p. 103. See also the discussion of the grandfather clause and flexibility under Article 5 in C Geiger – F Schönherr, ‘Limitations to copyright in the digital age’, in A Savin – J Trzaskowski (eds) *Research handbook on EU internet law* (Edward Elgar:2014), pp. 114-115.

6 PB Hugenholtz, ‘Why the Copyright Directive is unimportant, and possibly invalid’ (2000) 22(11) EIPR 499, p. 501. In the same sense, see MC Janssens ‘The issue of exceptions: reshaping the keys to the gates in the territory of literary, musical and artistic creation’, in E Derclaye (ed) *Research handbook on the future of EU copyright* (Edward Elgar:2009), p. 332, and bibliography cited in it. For similar criticisms expressed at the proposal stage, see M Hart ‘The proposed directive for copyright in the information society: nice rights, shame about the exceptions’ (1998) 20(5) EIPR 169, pp. 169–170.

7 For an overview of the various exceptions and limitations adopted by the individual Member States, see <<http://copyrightexceptions.eu>>.

8 In *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08), EU:C:2011:631 (*Football Association Premiere League*), paras 174-179, the Court of Justice of the European Union (‘CJEU’) clarified that the notion of ‘economic significance’ refers to the fact that the use made of the copyright work by the defendant does not have any economic value other than the one inherent in the reception and viewing of the work. In this sense, see also *Public Relations Consultants Association Limited v The Newspaper Licensing Agency Limited and Others* [2013] UKSC 18, para 18.

Sweden) – will serve to appreciate the interpretative difficulties that arise with regard not just to the text of relevant provisions which limit the possible uses to non-commercial uses only, but also their judicial application.

- 7 Article 5(3)(d) of the InfoSoc Directive 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”.*

- 8 Article 5(3)(h) allows Member States to permit the “use of works, such as works of architecture or sculpture, made to be located permanently in public places”. There is no mention, in either provision, that the corresponding national implementations may be limited to non-commercial quotations or freedom of panorama.

## I. Quotation

- 9 National transpositions of Article 5(3)(d) of the InfoSoc Directive vary substantially. For instance, Italian law (Legge 633/1941)<sup>9</sup> allows quotations insofar as they: are for the purpose of criticism or discussion or for educational purposes (in this sense the Italian approach is similar to its French counterpart which, however, does not exclude for-profit uses);<sup>10</sup> remain within the limits justified for such purposes; and do not conflict with the commercial exploitation of the work. With particular regard to the online dissemination of images and music, Article 70(1bis) of Legge 633/1941 only allows it for educational or scientific purposes, insofar as the dissemination is of low resolution or degraded quality, and only in the case in which such use is for non-profit (‘lucro’) purposes.
- 10 This approach differs from the one adopted by UK legislature, which in 2014 introduced into the Copyright, Designs and Patents Act 1988 (‘CDPA’) a self-standing quotation exception (section 30(1ZA)). Albeit framed within fair dealing (and not tested in court yet), section 30(1ZA) CDPA does not in principle exclude quotations for commercial reasons. The relevant provision requires in fact that:

the work has been made available to the public; the use of the quotation is fair dealing with the work; the extent of the quotation is no more than what is required by the specific purpose for which it is used, and the quotation is accompanied by a sufficient acknowledgement (unless this is impossible for reasons of practicality or otherwise). There are no limitations as to the types of works that may be subject to the exception.<sup>11</sup>

- 11 Even more liberal are the approaches of Ireland, Belgium, Denmark, Sweden, and Germany. Section 52(4) of the Irish Copyright Act<sup>12</sup> states that “copyright in a work which has been lawfully made available to the public is not infringed by the use of quotations or extracts from the work, where such use does not prejudice the interests of the owner of the copyright in that work and such use is accompanied by a sufficient acknowledgement.” Article XI.189 of the Belgian Code de Droit Économique, Article 22 of the Danish Copyright Act,<sup>13</sup> and Section 22 of the Swedish Copyright Act<sup>14</sup> allow anyone, in accordance with proper usage and to the extent necessary for the purpose, to quote from works which have been made available to the public. Similarly, Section 51 of the German Copyright Act<sup>15</sup> allows the reproduction, distribution and communication to the public of a published work for the purpose of quotation, so far as such use is justified to that extent by the particular purpose.
- 12 Quotation has been regarded by some as a ‘right’ (rather than an ‘exception’) because the language of Article 10(1) of the Berne Convention<sup>16</sup> appears to require Member States to authorize quotations of

11 See A Cameron ‘Copyright exceptions for the digital age: new rights of private copying, parody and quotation’ (2014) 9(12) JIPLP 1002, pp. 1006-1007; YH Lee, ‘United Kingdom copyright decisions and legislative developments 2014’ (2015) 46(2) IIC 226, p. 235.

12 Copyright and Related Rights Act, 2000, OJ 28/2000.

13 Consolidated Act on Copyright 2014. An English of the Danish statute is available at <[https://kum.dk/fileadmin/KUM/Documents/English%20website/Copyright/Act\\_on\\_Copyright\\_2014\\_Lovbekendtgørelse\\_nr.\\_1144\\_\\_ophavsretsloven\\_\\_2014\\_\\_engelsk.pdf](https://kum.dk/fileadmin/KUM/Documents/English%20website/Copyright/Act_on_Copyright_2014_Lovbekendtgørelse_nr._1144__ophavsretsloven__2014__engelsk.pdf)>.

14 Copyright on Literary and Artistic Works Act (1960:729). An English translation of the Swedish statute is available at <<http://www.wipo.int/edocs/lexdocs/laws/en/se/se124en.pdf>>.

15 Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz, as amended by Law of 4 April 2016). An English translation of the German statute is available at <[https://www.gesetze-im-internet.de/englisch\\_urhg/englisch\\_urhg.html](https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html)>.

16 By adopting the InfoSoc Directive, among other things, the EU intended to implement into EU legal order the WIPO Internet Treaties (Recital 15) The WIPO Copyright Treaty requires compliance with Articles 1 to 21 of the Berne Convention.

9 Legge 22 April 1941, No. 633 Protezione del diritto d’autore e di altri diritti connessi al suo esercizio (OJ No. 166 of 16 July 1941) – consolidated text as of 6 February 2016 (Legislative Decree 15 January 2016, No. 8).

10 Article L 122-5 No 3 (a) of the Code de la propriété intellectuelle – consolidated text as of 1 August 2017.

copyright works.<sup>17</sup> As argued elsewhere,<sup>18</sup> in the EU context it is doubtful whether the Berne Convention may trump the optional nature of the quotation exception in Article 5(3)(d) of the InfoSoc Directive. However, on consideration that quotation is part of the fundamental right to one's own freedom of expression/information as recognized by the European Convention on Human Rights<sup>19</sup> (Article 10) and the Charter of Fundamental Rights of the European Union<sup>20</sup> (Article 11), and freedom of expression/information also includes commercial expressions and information<sup>21</sup>, one might wonder whether a Member State that limits its own quotation exception to non-commercial quotations (lacking a corresponding limitation at the EU level), not only might be in breach of its obligations under EU law,<sup>22</sup> but also human rights law. A national law that compressed freedom of expression/information (of which the act of quoting, as also acknowledged

by the CJEU, is a manifestation)<sup>23</sup> beyond what is stated at the EU level would compress a fundamental freedom, and do so outside the conditions under which such compression is allowed.<sup>24</sup>

## II. Freedom of panorama

13 Turning to freedom of panorama<sup>25</sup>, France has recently introduced such exception into its own copyright regime (Article L 122-5 No 11 of the Code de la propriété intellectuelle),<sup>26</sup> but excluded its applicability to commercial uses. The provision, in fact, only allows reproductions and representations of works of architecture and sculpture, permanently located in public places and realized by physical persons, with the exclusion of any use that is directly or indirectly commercial.<sup>27</sup>

14 In this sense, French freedom of panorama differs from the more generous wording of the corresponding exception in UK law (section 62 CDPA). This provision applies to buildings, sculptures, models for buildings and works of artistic craftsmanship, if permanently

17 See J Cohen Jeroham, 'Restrictions on copyright and their abuse' (2005) 27(10) EIPR 359, p. 360; S von Lewinski, *International copyright law and policy* (OUP:2008), §5.163; P Goldstein - B Hugenholtz, *International copyright. Principles, law, and practice*, 3rd edn (OUP:2013), 391, R Xalabarder, 'The remunerated statutory limitation for news aggregation and search engines proposed by the Spanish Government - its compliance with international and EU law' (2014) IN3 Working Paper Series, available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2504596&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504596&download=yes)>, 2. Also speaking of a 'quotation right', see Written questions from the authorities of Belgium, Czech Republic, Finland, Hungary, Ireland and The Netherlands to the Council Legal Service regarding Article 13 and Recital 38 of the Proposal for a Directive on copyright in the Digital Single Market (25 July 2017), available at <<http://statewatch.org/news/2017/sep/eu-copyright-directive-ms-questions-council-legal-service-25-7-17.pdf>>.

18 E Rosati, 'Neighbouring rights for publishers: are national and (possible) EU initiatives lawful?' (2016) 47(5) IIC 569, pp. 588-589.

19 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).

20 Charter of Fundamental Rights of the European Union, OJ C 364, pp. 1-22.

21 See however European Court of Human Rights, *Ashby Donald and Others v France*, application No. 36769/08, para 39, clarifying that commercial expression may be subject to further compression than other forms of expressions, e.g. of a political nature. On the interplay between copyright protection and freedom of expression in the jurisprudence of the European Court of Human Rights, see C Geiger - E Izyumenko, 'Copyright on the human rights' trial: redefining the boundaries of exclusivity through freedom of expression', 45(3) IIC 316, pp. 321-322. Highlighting the difficulty of extracting guidelines from relevant case law, see D Voorhoof, 'Freedom of expression and the right to information: implications for copyright' in C Geiger (ed), *Research handbook on human rights and intellectual property* (Edward Elgar:2015), pp. 348-349.

22 See further below sub §4, and E Rosati, 'Copyright in the EU: in search of (in)flexibilities' (2014) 9(7) JIPLP 585, pp. 597-598.

23 In *Eva-Maria Painer v Standard VerlagsGmbH and Others*, C-145/10, EU:C:2011:798 ('Painer'), paras 134-135, the CJEU stated that: "134. Article 5(3)(d) of Directive 2001/29 is intended to strike a fair balance between the right to freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors. 135. That fair balance is struck, in this case, by favouring the exercise of the users' right to freedom of expression over the interest of the author in being able to prevent the reproduction of extracts from his work which has already been lawfully made available to the public, whilst ensuring that the author has the right, in principle, to have his name indicated."

24 See also M Husovec, 'Intellectual property rights and integration by conflict: the past, present and future' (2016) 18 CYELS 239, p. 260, suggesting a reading of Article 51(1) of the Charter of Fundamental Rights of the European Union in the sense of imposing a re-adjustment of possible differing levels of protection of fundamental rights at national and EU levels in order to comply with what the Charter, as a primary source of EU law, requires.

25 For an overview of a number of national approaches (both at the EU and non-EU levels) to freedom of panorama, see <[https://commons.wikimedia.org/wiki/Commons:Freedom\\_of\\_panorama](https://commons.wikimedia.org/wiki/Commons:Freedom_of_panorama)>. See also A Bertoni - ML Montagnani, 'Foodporn: experience-sharing platforms and UGC: how to make copyright fit for the sharing economy' (2017) 39(7) EIPR 396, pp. 400-401.

26 The provision states: "Lorsque l'oeuvre a été divulguée, l'auteur ne peut interdire [...] Les reproductions et représentations d'œuvres architecturales et de sculptures, placées en permanence sur la voie publique, réalisées par des personnes physiques, à l'exclusion de tout usage à caractère commercial."

27 For a critical assessment of the French exception, including in relation to the InfoSoc Directive, see C Manara, 'La nouvelle «exception de panorama». Gros plan sur l'Article L. 122-5 10 du code français de la propriété intellectuelle' (2016) 4049 Revue Lamy Droit de l'Immatériel 40, §2.



situated in a public place or in premises open to the public. It provides that copyright in such works is not infringed by: making a graphic work representing it; taking a photograph or film of it; or making a broadcast of a visual image of it. Nor is the copyright infringed by the issue to the public of copies, or the communication to the public, of anything whose making was not a copyright infringement. The French exception is also narrower than the Belgian provision, i.e. Article XI.190(2/1°) of the Code de Droit Économique. Introduced in 2015, Belgian freedom of panorama, while incorporating the language of the three-step test, does not necessarily exclude commercial uses.

- 15 With regard to Swedish law, Section 24(1) of the Swedish Copyright Act provides that works of fine art may be reproduced in pictorial form if they are permanently located outdoors on, or at, a public place. The provision does not appear to exclude commercial uses. An even more generous wording can be found in the German Copyright Act, where Article 59 clarifies that freedom of panorama is not limited to certain categories of works. In fact, the provision allows the reproduction, distribution, and making available to the public of works located permanently in public roads and ways or public open spaces. In the case of buildings, this authorization shall only extend to the façade. The wording of the Irish exception allowing freedom of panorama (section 93 of the Irish Copyright Act) is substantially identical to the UK provision. The Danish exception (Article 24(3) of the Danish Copyright Act), although limited to buildings, does not set any particular restrictions to the reproduction (only allowed in pictorial form) of eligible works and their making available to the public.

### C. Commercial and non-commercial uses

- 16 Standing the decision of certain legislatures to limit the availability of exceptions to non-commercial uses of a work, resulting provisions do not clarify what is to be intended as a ‘commercial’ or ‘for-profit’ use. As a result, uncertainties might subsist regarding the actual availability of a given exception in some cases. A further complexity, especially in the context of cross-border availability and exploitation of copyright content, may be due to the fact that, while a certain use of a work may be shielded from liability by means of an exception available under a particular EU Member State’s copyright law, the same act might be deemed unlawful under the law of another EU Member State. To this one should add that the Court of Justice of the European Union (‘CJEU’) has shown an increasing uneasiness towards national exceptions whose language and

scope depart from what is established in Article 5 of the InfoSoc Directive. In light of recent case law, it is questionable whether national legislatures are actually entitled to limit the availability of national exceptions to non-commercial uses of a work, lacking a corresponding limitation at the EU level.<sup>28</sup>

- 17 The different conditions of national exceptions and limitations thus raise issues of compatibility with EU law, as well as practical difficulties when it comes to determining the lawfulness of certain uses of a copyright work. Taking quotation and freedom of panorama as examples, the following case studies highlight the potential shortcomings deriving from this situation, which might become particularly challenging in the online environment. The first case study addresses the lawfulness (in principle) of making and disseminating a GIF/meme derived from a copyright work over the internet, and considers the relevant treatment under the quotation exceptions of the Member States mentioned above. The second case study tackles the lawfulness (in principle) of taking and posting on a publicly accessible website the photograph of a copyright-protected sculpture permanently located on public display. While other exceptions and limitations might be potentially available in the latter scenario (including quotation and incidental inclusion of copyright material), consideration is limited to the relevant treatment under the freedom of panorama exceptions envisaged in the laws of the Member States mentioned above.

#### I. The making of a GIF/meme from a copyright work and its online dissemination

- 18 A GIF (graphic user interface) is a computer file format for the compression and storage of visual digital information. Usually, GIFs are made from video files thanks to several tools available online (e.g. Wondershare Filmora, GIPHY, Photoscape, etc). Although potentially GIFs can have any length chosen by their maker,<sup>29</sup> they generally last a few seconds. Unlike GIFs, memes do not represent moving images, but rather captioned pictures or videos whose meaning is often distorted for satirical and humorous purposes. Popular examples include ‘Condescending Wonka’,<sup>30</sup> ‘Xzibit Yo Dawg’,<sup>31</sup> and the 2017 meme sensation known as ‘Distracted

28 See further sub §4.

29 A GIF can potentially take even 1,000 years to play: see <<https://nextshark.com/juha-van-ingen-janne-sarkela-longest-gif/>>.

30 See <<http://knowyourmeme.com/memes/condescending-wonka-creepy-wonka>>.

31 See <<http://knowyourmeme.com/memes/xzibit-yo-dawg>>.

Boyfriend'.<sup>32</sup>

19 With regard to GIFs and memes, the question that arises is whether their creation can fall under the scope of copyright protection or possibly protection by means of a *sui generis* right (as per the possibility expressly left open to Member States by Article 6 of Directive 2006/116, i.e. the Term Directive<sup>33</sup>) and, if so, whether permission from the relevant rights owner may be needed for their use. The question further becomes whether the reproduction at stake in a GIF (a video that lasts a few seconds) or in a meme is such as to fall within the scope of reproduction or reproduction in part under Article 2 of the InfoSoc Directive. The answer is in the affirmative, as long as the work or part thereof thus reproduced is “its author’s own intellectual creation”,<sup>34</sup> i.e. is sufficiently original, in the sense that it carries its “author’s personal touch”<sup>35</sup> and is ultimately the result of “free and creative choices”.<sup>36</sup> However, for photographs protected by means of *sui generis* rights pursuant to the freedom left to Member States by Article 6 of the Term Directive, there is not even a requirement that they possess a sufficient degree of originality.<sup>37</sup>

20 There is no particular reason to exclude *ex ante* that a video (or part thereof) or image reproduced in a GIF or meme would not possess the required level of originality and be, as such, excluded from copyright protection. In such case, in fact, the act of reproduction at issue in the GIF or meme would be under the exclusive control of the copyright owner, with the exclusion of situations governed by relevant copyright exceptions and limitations. In this regard, depending on the use made and by whom, as well as whether the reproduction is verbatim or altered, different exceptions and limitations might come into consideration, including parody (if the reproduction is altered and constitutes an expression of humour or mockery)<sup>38</sup> and quotation

(especially – although potentially not only<sup>39</sup> – if the reproduction is unaltered). With particular regard to the latter, and without engaging in a discussion of whether a quotation can be self-standing or rather needs to be incorporated into the user’s work,<sup>40</sup> what is the relevant treatment of a GIF or meme made by someone other than the copyright owner and shared on, say, one’s own blog? The answer may differ depending on the law applicable to the case at issue.

21 If the blog is in fact run for profit, e.g. because it displays advertisements and/or makes available items for sale/download, then it might be argued that the display of a good GIF or meme might contribute to making the overall blog environment more attractive and, as a result, contribute to the overall profit-making intention of its owner. Such a broad interpretation of profit finds support in CJEU case law which, in the context of decisions on the right of communication to the public within Article 3(1) of the InfoSoc Directive, has suggested that the presence of a profit-making intention should be assessed not having regard to the specific act of communication at hand, but rather the broader context in which the act is performed. It follows that the use made of the work might be regarded to be profit-driven and, as a result, commercial.

22 In such an interpretative context, should Italian law apply, it could be difficult to invoke successfully the exception within Article 70(1bis) of Legge 633/1941. The Italian quotation exception requires, for the online dissemination of images and music, that this is: for educational or scientific purposes; of low resolution or degraded quality; and for non-profit purposes. Part of scholarly literature suggests that the notion of ‘lucro’ (profit) is narrower than

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noticeably different from it, and secondly, to constitute an expression of humour or mockery.”

32 For background information regarding this viral meme, see <<https://petapixel.com/2017/09/18/story-behind-viral-distracted-boyfriend-meme-photo/>>.

33 Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version), OJ L 372, pp. 12-18.

34 *Infopaq International A/S v Danske Dagblades Forening*, C-5/08, EU:C:2009:465, paras 33-39.

35 *Painer*, cit, para 92.

36 *Ibid*, para 89, referring to *Football Association Premier League*, cit, para 98.

37 For instance, Articles 87-92 of Legge 633/1941 set the scope of protection for ‘simple’ photographs (“other photographs” to use the language of the directive), which lasts for twenty years from the production of the photograph.

38 In its decision in *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, C-201/13, EU:C:2014:2132, para 33, the CJEU clarified that “the essential characteristics of parody, are, first, to evoke an existing work, while being

39 In mid-2017 Germany’s Federal Court of Justice (Bundesgerichtshof - BGH) made a reference to the CJEU asking, among other things, whether the exception within Article 5(3)(h) of the InfoSoc Directive requires a quotation to be an unaltered reproduction of part of the original, or also allows the reproduction not to be identical. The case referred is: *Beschluss des I. Zivilsenats vom 27.7.2017 – I ZR 228/15* (see <<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2017&Sort=3&nr=79067&pos=0&anz=124>>).

40 In *Painer*, cit, paras 130 and 137, the CJEU held that a quotation within Article 5(3)(d) of the InfoSoc Directive does not require that the material which quotes a work or other protected subject-matter is not a literary work protected by copyright. However, quotation exceptions like the French one (Article L-122-5(3)(a) of the Code de la propriété intellectuelle) allow quotations insofar as they clearly indicate the name of the author and the source, and are justified for by the critical, polemic, educational, scientific or information of the work in which they are incorporated. For further discussion, see P Jougoux & TE Synodinou, ‘Holograms and intellectual property law: a multidimensional issue’ (2016) 38(8) EIPR 492, pp. 494-495.

that of commercial exploitation (to be intended under Italian copyright law as use of a work that competes with the one of the original work) and, therefore, that the applicability Article 70(1bis) is not necessarily excluded in a commercial context.<sup>41</sup> However, the degradation requirement – together with the restriction to certain, specified uses (this would be the case also under French law) – makes the exception applicable to a limited number of cases, and arguably not in a situation like the one considered in this section. This conclusion is further supported by CJEU case law, which intends the notion of ‘lucro’ (profit) broadly and, as a result, may make the exception unavailable in several instances, including the one at hand.

- 23 In the UK context, lacking a judicial interpretation of section 30(1ZA) CDPA, the case at issue would be assessed under the lens of fair dealing, also considering that the statute does not require the quotation to be for any particular purpose (“whether for criticism or review or otherwise”). The CDPA does not define the concept ‘fair dealing’, nor does it stipulate what factors are to be considered when assessing whether a certain dealing with a work is to be considered fair. The notion of ‘fair dealing’ has been thus developed through case law from the perspective of a “fair-minded and honest person”,<sup>42</sup> and has been traditionally considered a matter of degree and impression.<sup>43</sup> A number of considerations may inform the decision whether a certain use of a work is fair, although the relative importance of each of them will vary according to the case in hand and the dealing at issue.<sup>44</sup> One of the most relevant considerations is not whether the use of the work at issue is motivated by profit, but rather whether “the alleged fair dealing is in fact commercially competing with the proprietor’s exploitation of the copyright work, a substitute for the probable purchase of authorised copies, and the like”.<sup>45</sup> In the example discussed in this section, it may be doubtful whether a GIF or meme could be regarded as competing with the original video/film and whether a captioned meme is a potential substitute for the probable purchase of authorized copies of the original video or photograph.

41 See C Sappa, ‘Articolo 70 L. 22 aprile 1941, n. 633 (legge autore)’, in LC Ubertazzi (ed), *Commentario breve alle leggi su proprietà intellettuale e concorrenza*, 6<sup>th</sup> edn (CEDAM:2016), pp. 1730-1732.

42 *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch 143.

43 *Hubbard v Vosper* [1972] 2 QB 84.

44 See L Bently & B Sherman, *Intellectual property law*, 4<sup>th</sup> edn (OUP:2014), p. 224. See also R Arnold & E Rosati, ‘Are national courts the addressees of the InfoSoc three-step test?’ (2015) 10(10) *JIPLP* 741, p. 748; S Jacques, ‘Are the new ‘fair dealing’ provisions an improvement on the previous UK law, and why?’ (2015) 10(9) 699, p. 703.

45 *The Right Honourable Paddy Ashdown, MP PC v Telegraph Group Ltd* [2001] EWCA Civ 1142, para 70.

- 24 The assessment under Irish, Belgian, Danish, Swedish, and German laws might be more straightforward, in the sense that these Member States’ exceptions are substantially in line with what is required at the EU level, and the relevant analysis would be one that takes into account the boundaries of the three-step test, rather than the purpose of the quotation, whether this is for commercial or for-profit reasons, or fair dealing with the original work.
- 25 From the discussion above it becomes apparent that determination of the law applicable to a case like the one described might become key, in that the same use of a given work might be regarded as infringing in one Member State but not in another.

## II. The taking and posting on a publicly accessible website of the photograph of a copyright-protected sculpture permanently located on public display

- 26 Difficulties similar to those highlighted above would also subsist in relation to the different scope of national exceptions allowing freedom of panorama. In the event of a reproduction made of a publicly located sculpture, for instance, the Danish exception allowing freedom of panorama would be inapplicable at the outset due to the fact that the provision is limited to buildings.
- 27 Unlike – for instance – the UK exception within section 62 CDPA, the recently introduced French exception on freedom of panorama does not cover reproductions made by subjects other than physical persons and for reasons other than non-commercial ones. If one again interprets the concept of ‘profit’ broadly (as the CJEU appears to have done and the wording of the French provision confirms, by excluding uses that are directly or also merely indirectly commercial), then the applicability of the exception (not yet tested in court) would be likely excluded in relation to any reproductions done in a profit-making or commercial context, e.g. even a blog or online project that displays advertisements.
- 28 The wording of the UK freedom of panorama exception (section 62 CDPA) is such as to set a broader scope than the French provision, although this is potentially narrower than its InfoSoc counterpart. In fact, while the latter uses the phrase “such as works of architecture or sculpture” (emphasis added), similarly to the French, Belgian and Swedish provisions and unlike the case of the German provision, section 62 CDPA is limited to



specified categories of works.<sup>46</sup> However, unlike the InfoSoc provision, the UK exception applies to buildings irrespective of their location.<sup>47</sup> This said, it is worth highlighting that the UK provision is not even framed within fair dealing. Notwithstanding potential uncertainties regarding the definition of the concepts used by UK legislature (and also the fact that there has been no real judicial application of the provision to date), there is no reason to exclude that the defence would not also be available to reproductions done for commercial reasons, as has been the case under UK law since the 1911 Copyright Act.<sup>48</sup> In any case, however, the application of section 62 CDPA (and the Irish exception) could be subject to additional considerations, including the three-step test in Article 5(5) of the InfoSoc Directive. This would be the case should one conclude that Article 5(5) is not just aimed at national legislatures when transposing the InfoSoc Directive into their own copyright systems, but also national courts when applying the resulting national exceptions and limitations.<sup>49</sup> Unlike other Member States, the UK has not transposed the language of the three-step test within Article 5(5) of the InfoSoc Directive into its own copyright law. The reason is that, at the time of implementing the InfoSoc Directive into its own legal system, the UK Government took the view that relevant copyright exceptions already complied with Article 5(5)<sup>50</sup> and the notion of ‘fair dealing’ would be substantially the same as what is required under the three-step test.<sup>51</sup> It is possibly due to this consideration that in UK case law the InfoSoc three-step test has received limited consideration over time.<sup>52</sup>

46 R Burrell – A Coleman, *Copyright exceptions: the digital impact* (CUP:2005), pp. 233-234. See also, M Iljadica, ‘Copyright and the right to the city’ (2017) 68(1) NILQ 59, p. 74.

47 On the scope of section 62 CDPA, see further G Davies *et al*, *Copinger and Skone James on copyright*, 17<sup>th</sup> edn (Sweet&Maxwell:2016), Vol I, §§9.266-9.268.

48 As explained by M Iljadica, ‘Copyright and the right to the city’ (2017), *cit*, pp. 70-71, despite concerns that arose during the Parliamentary debate regarding third-party commercial exploitation of artworks placed in public, the UK legislature eventually opted for a broad public placement exception.

49 See Arnold & Rosati, ‘Are national courts the addressees of the InfoSoc three-step test?’, *op. cit*. See also, arguing that the question of the addressees of the InfoSoc three-step test remains open, J Griffiths, ‘The “three-step test” in European copyright law – problems and solutions’ (2009) 2009/4 IPQ 428, p. 431.

50 Arnold & Rosati, ‘Are national courts the addressees of the InfoSoc three-step test?’, *op. cit*, p. 743.

51 *England and Wales Cricket Board Limited and Others v Tixdaq Limited and Another* [2016] EWHC 575 (Ch), para 89. Wondering whether this decision signals beginning of more frequent references to the three-step test in UK case law, see I Fhima, ‘Fairness in copyright law: an Anglo-American comparison’ (2017) 34 Santa Clara High Tech LJ 44, p. 51.

52 See E Rosati, ‘To what extent do current exclusions and limitations to copyright strike a fair balance between the rights of owners and fair use by private individuals and

29 A direct application of the three-step test in relation to freedom of panorama may be found in a recent (2016) decision of the Swedish Supreme Court.<sup>53</sup> In a dispute involving a Swedish collecting society and the operator of an online publicly accessible free database over the reproduction and making available, by the latter, of copyright works to which the former administers the relevant rights, the Supreme Court ruled that section 24(1) of the Swedish Copyright Act does not go as far as granting an online publicly accessible database the right to make photographs of artworks located permanently outdoors or in public spaces available to the public. According to the court, the value of exploiting works through the internet should be reserved – arguably in any situation – to copyright owners: an unauthorized communication to the public, e.g. by means of a publicly accessible database, would unreasonably compress the authors’ legitimate interests.<sup>54</sup> As such, allowing such use of a copyright work without providing, at least, for any compensation to the copyright owner, would go against the three-step test in the InfoSoc Directive. The decision of the Supreme Court was applied by the referring court in 2017.<sup>55</sup>

## D. Assessment of national exceptions limited to non-commercial uses

30 The assessment of national exceptions that – lacking a requirement in this sense in the InfoSoc Directive – only allow non-commercial uses of copyright content should be undertaken from both the point of view of their practical effects and their lawfulness under EU law.

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others? - UK Report, in *LIDC contributions on antitrust law, intellectual property and unfair competition* (forthcoming: Springer), available at <<http://www.ligue.org/uploads/documents/Cycle%202017/rapports%20B%20Rio/UKB.pdf>>, §3.

53 Swedish Supreme Court, Case No. Ö 849-15, 4 April 2016. An English translation of the decision is available at <[https://upload.wikimedia.org/wikipedia/foundation/e/ec/The\\_SwedishSupremeCourtsDecisionBUSvWikimediaFINAL-English\\_Translation.pdf](https://upload.wikimedia.org/wikipedia/foundation/e/ec/The_SwedishSupremeCourtsDecisionBUSvWikimediaFINAL-English_Translation.pdf)>.

54 However, according to a survey conducted by Wikimedia in 2017 among over 600 Italian-based architects (as a EU Member State, Italy has not expressly implemented Article 5(3)(h) of the InfoSoc Directive, but see G Cavagna di Gualdana, ‘Freedom of panorama in Italy: does it exist?’ (14 July 2017), The IPKat, available at <<http://ipkitten.blogspot.com/2017/07/freedom-of-panorama-in-italy-does-it.html>>, over 70% of respondents considered freedom of panorama in positive terms. A preliminary discussion of the survey results is available at <[https://meta.wikimedia.org/wiki/Research:Freedom\\_of\\_panorama\\_survey\\_among\\_architects\\_of\\_Italy](https://meta.wikimedia.org/wiki/Research:Freedom_of_panorama_survey_among_architects_of_Italy)>.

55 Stockholms Tingsrätt Patent- och marknadsdomstolen, Case No. PMT 8448-14, 6 July 2017.



- 31 In relation to the former, it is necessary to understand how and where the line between commercial or for-profit uses and non-commercial uses of a copyright work should be drawn. In this sense, also CJEU case law stands as a demonstration of the complexities underlying such an evaluation. When determining whether the act of communication at issue falls within the scope of Article 3(1) of the InfoSoc Directive, the CJEU has placed increasing relevance on a number of considerations other than the two primary requirements of having ‘an act of communication’ directed to a ‘public’. Such considerations include, among other things, whether the defendant has a profit-making intention. The CJEU has not yet examined the question whether and to what extent the concepts of ‘for-profit intention’ (in relation to exclusive rights) and commercial use (in relation to InfoSoc exceptions and limitations) overlap. However, relevant case law on the former shows – on the one hand – the difficulties of making such a determination and – on the other hand – that the notion of for-profit intention is broad.
- 32 In its relatively recent Grand Chamber judgment in *Reha Training v GEMA* (C-117/15), the CJEU considered the profit-making intention of the defendant somewhat reductively, stating that such criterion role is relevant, yet not decisive.<sup>56</sup> However, more recent decisions – notably *GS Media v Sanoma* (C-160/15)<sup>57</sup>, *Stichting Brein v Filmspeler* (C-527/15)<sup>58</sup>, and *Stichting Brein v Ziggo and XS4All Internet* (C-610/15)<sup>59</sup> – suggest that consideration of the profit-making intention of the defendant is central to the assessment of *prima facie* liability.<sup>60</sup> The Court has not yet clarified – in express terms – whether the profit-making intention of the defendant should be assessed having regard to the unauthorized restricted act put in place or, rather, the surrounding context in which the act is performed. Nonetheless it appears that the latter interpretation may be the one more in line with existing case law. In *SGAE v Rafael Hoteles* (C-306/05)<sup>61</sup>, *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media*

*Protection Services Ltd* (C-429/08)<sup>62</sup>, and *Reha Training v GEMA* (C-117/15)<sup>63</sup> the CJEU, in fact, considered that the profit-making nature of the communication at issue could be determined by considering that the defendants transmitted the relevant works in their own establishment (hotels, a public house, and a rehabilitation centre, respectively) in order to benefit therefrom and attract customers to whom the works transmitted would be of interest. The same approach has been maintained in more recent decisions. In *GS Media v Sanoma* (C-160/15), the Court granted the profit-making intention of the defendant a central role. Although it failed to elaborate further on how this should be assessed, from the first national applications of that judgment it appears that the context in which the act is performed is key to the determination of the profit-making intention of the defendant.<sup>64</sup> This finds further support in the recent decisions in *Stichting Brein v Filmspeler* (C-527/15) and *Stichting Brein v Ziggo and XS4All Internet* (C-610/15). In the former, the CJEU identified the profit-making intention of the defendant in the circumstance that the relevant multimedia player “is supplied with a view to making a profit, the price for the multimedia player being paid in particular to obtain direct access to protected works available on streaming websites without the consent of the copyright holders.”<sup>65</sup> The more recent decision in *Stichting Brein v Ziggo and XS4All Internet* (C-610/15) substantially consolidates the CJEU position regarding the broad construction and centrality of the profit-making intention of the user/defendant.<sup>66</sup>

- 33 All this suggests that determining when a use is ‘commercial’ or ‘for-profit’ might prove particularly challenging, especially in situations in which the for-profit or commercial aspect is merely indirect or ancillary to the contested use. Removing at the outset any possibility of a commercial or for-profit use of a certain work may thus contribute to the overall complexity and uncertainty of the system.<sup>67</sup>

56 *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)*, C-117/15, EU:C:2016:379 (*Reha Training*), para 49, recalling *Football Association Premier League*, para 204.

57 *GS Media BV v Sanoma Media Netherlands BV and Others*, C-160/15, EU:C:2016:644.

58 *Stichting Brein v Jack Frederik Willems*, C-527/15, EU:C:2017:300 (*Filmspeler*).

59 *Stichting Brein v Ziggo BV and XS4All Internet BV*, C-610/15, EU:C:2017:456.

60 See further E Rosati, ‘The CJEU *Pirate Bay* judgment and its impact on the liability of online platforms’ (2017) 39(12) *EIPR* 737, pp. 739-740.

61 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, C-306/05, EU:C:2006:479, para 44.

62 *Football Association Premier League*, *cit.*, paras 205-206.

63 *Reha Training*, *cit.*, paras 63-64.

64 *Rebecka Jonsson v Les Éditions de l’Avenir SA*, FT 11052-15 (Sweden); *LG Hamburg*, 310 O 402/16 (Germany). See further E Rosati, ‘GS Media and its implications for the construction of the right of communication to the public within EU copyright architecture’ (2017) 54(4) *CMLRev* 1221, pp. 1237-1238.

65 *Filmspeler*, *cit.*, para 51.

66 See further Rosati, ‘The CJEU *Pirate Bay* judgment and its impact on the liability of online platforms’, *cit.*, pp. 739-740. See also the discussion in P Savola, ‘EU copyright liability for internet linking’ (2017) 8(2) *JIPITEC* 139, pp. 145-146.

67 This is in line with the European Commission’s position regarding the proposal for a text and data mining exception: see further below.

- 34 Turning to consideration of the system of the InfoSoc Directive, two points arise. The first is whether the legislative restriction of the applicability of a certain exception to non-commercial uses of a work presents any particular advantages over the kind of assessment that, in any case, is required under the three-step test (especially if one deems it directed at Member States' courts) and national concepts of fairness and reasonableness. The second is whether, in light of the rationale underlying the adoption of the InfoSoc Directive as also interpreted by the CJEU, EU law actually allows Member States the freedom to introduce conditions in national copyright exceptions other than those envisaged at the EU level.
- 35 In relation to the first point (limitation to non-commercial uses only), uncertainties surrounding determination of what is to be regarded as commercial or for-profit use may exclude the availability of a certain exception at the outset. This issue has arisen not just at the national level, but also at the EU level. Under the umbrella of its Digital Single Market Strategy<sup>68</sup>, the European Commission is engaged in the reform of the copyright *acquis*. Among other things, its proposal for a Directive on Copyright in the Digital Single Market<sup>69</sup> contains provisions that, if adopted, would introduce new (mandatory) exceptions at the EU level, including a new exception allowing text and data mining (Article 3). In the Impact Assessment accompanying the proposal, the Commission concluded that the option of allowing both commercial and non-commercial text and data mining for scientific research would be preferable.<sup>70</sup> This is because an exception for commercial and non-commercial uses (although for a limited group of beneficiaries) alike would provide greater legal certainty and result in a reduction of transaction costs for researchers than what a non-commercial only option would do.<sup>71</sup> In particular, the option chosen by the Commission “would remove the legal uncertainty and the grey area as regards the research projects carried out by public organisations with a possible commercial outcome, including in cooperation of these organisations with private partners”.<sup>72</sup>
- 36 In addition, the scrutiny undertaken under lenses such as fairness, reasonableness, and the three-step test (whose language some Member States have directly transposed into their own national laws),<sup>73</sup> would allow courts to determine whether the commercial exploitation at issue should be reserved for copyright owners. In this sense, an *ex ante* limitation to non-commercial uses might have limited sense.
- 37 Although the present analysis has focused on quotation and freedom of panorama, it appears possible to conclude more generally that, lacking a corresponding limitation at the EU level, it is doubtful whether Member States are actually entitled to have corresponding national exceptions only allowing non-commercial uses. As explained more at length elsewhere,<sup>74</sup> over time the CJEU has become particularly reluctant to consider national exceptions whose language and scope depart from the corresponding exceptions and limitations in the InfoSoc Directive compatible with EU law. By relying also on the (increasing) need to consider relevant concepts in exceptions and limitations as autonomous concepts of EU law, as well as prompted by internal market concerns, the CJEU has contested the lawfulness of a number of national exceptions and limitations whose scope differ from the one provided for in the InfoSoc Directive.<sup>75</sup> The approach of the Court is correct and in line with what is established at Recital 32 in the preamble to the InfoSoc Directive, i.e. that Member States should arrive at a coherent application of Article 5 exceptions and limitations. Except where so expressly provided by the Directive (e.g. Article 5(2)(c), which refers to ‘specific acts of reproduction’ to be defined at the national level), the InfoSoc Directive does not arguably allow Member States to alter the scope of the exceptions

68 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Single Market Strategy for Europe*, COM(2015) 192 final.

69 Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, {COM(2016)593}.

70 European Commission, Commission staff working document – Impact assessment on the modernization of EU copyright rules accompanying a Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, {COM(2016) 593} {COM(2016) 594} {SWD(2016) 302}, §4.3.2.

71 *Ibid.*, §4.3.4.

72 *Ibid.*

73 Examples include France, Czech Republic, Greece, Hungary, Italy, Luxembourg, Malta, Poland, Portugal, and Slovakia: see L Guibault – G Westkamp – T RieberMohn, *Study on the implementation and effect in Member States' laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the Information Society* (2012), Amsterdam Law School Research Paper No 2012-28, p. 57.

74 Rosati, ‘Copyright in the EU: in search of (in)flexibilities’, *cit.*

75 See, eg, *DR and TV2 Danmark A/S v NCB – Nordisk Copyright Bureau*, C-510/10, EU:C:2012:244 (Danish exception for ephemeral recordings made by broadcasters); *ACI Adam BV and Others v Stichting de Thuiskopie and Stichting Onderhandeligen Thuiskopie vergoeding*, C-435/12, EU:C:2014:254 (‘ACI Adam’, Dutch private copying exception); *Hewlett-Packard Belgium SPRL v Reprobel SCRL*, C-572/13, EU:C:2015:750 (Belgian private copying exception).

and limitations they have decided to import into national copyright regimes. An incoherent national drafting of exceptions and limitations frustrates the objectives that the EU intended to achieve by adopting the InfoSoc Directive, notably establishing a level playing field for copyright. It may also amount to a breach of Member States' obligations under EU law, including the doctrine of pre-emption.<sup>76</sup>

## E. Conclusion

- 38 While some exceptions and limitations only allow non-commercial uses of a copyright work, a number of copyright exceptions and limitations within the InfoSoc Directive does not exclude in principle that a commercial use of a work rules out the availability of a certain exception. With particular regard to this group of exceptions and limitations, some national implementations have nonetheless resulted in the addition of a requirement that the use of the copyright work at issue must be a non-commercial or not-for-profit one. The present contribution has focused, as case studies, on quotation and freedom of panorama, and highlighted the shortcomings of such an approach, which appears overall questionable for a number of reasons.
- 39 First, diverging national implementations of InfoSoc provisions defeat the very goal underlying intervention at the EU level, i.e. harmonization of substantive copyright law. The InfoSoc Directive, as also interpreted by the CJEU, requires a greater degree of compliance with the scope of its provisions than what has been so far the case in practice. Over the past few years, the CJEU has highlighted that the incorrect transposition of relevant InfoSoc provisions frustrates internal market goals. A national exception or limitation limited to non-commercial uses of a copyright work could be regarded as equally inconsistent with the InfoSoc Directive, lacking such a limitation in the corresponding Article 5 provision thereof.
- 40 Secondly, as the discussion around an EU text and data mining exception also highlights, an *ex ante* exclusion of any commercial use of, may defeat important policy objectives, including legal clarity and reduction of transaction costs.
- 41 Thirdly, from a practical standpoint, determination of what amounts to a commercial or for-profit (and, as such, forbidden) use of a work may prove uncertain. Relevant CJEU case law on Article 3(1) of the InfoSoc Directive highlights the difficulty of

determining a profit-making intention on the side of the defendant.

- 42 Finally, also in light of the three-step test, it does not appear correct to think that a commercial use of a work should always require the authorization of the relevant rightholder. Rather, the assessment should be more sophisticated, in the sense of entailing consideration, not of whether the use is driven by a particular intention or is for a particular reason *per se*, but rather what the effects on the market for the original work could be. In this sense, a use should be regarded as unlawful not because it is inherently commercial or driven by a 'profit-making intention', but rather because it is such as to result in the unreasonable diminution of lawful transactions relating to a protected work<sup>77</sup> and, therefore, in a violation of the three-step test.

<sup>76</sup> On the rather embryonic doctrine of EU pre-emption, see R Schütze, *European constitutional law* (CUP:2012), p. 364, and P Craig – G de Búrca, (2015), *EU law – Text, cases and materials*, 6<sup>th</sup> edn (OUP:2015), pp. 84-85.

<sup>77</sup> *Filmspelers*, cit, para 70, referring to *ACI Adam*, cit, para 39.