

### Editorial

by Karin Sein

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by the European Copyright Society

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by the European Copyright Society

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by Jure Globocnik und Stefan Scheuerer

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Thomas Dreier  
Axel Metzger  
Gerald Spindler  
Lucie Guibault  
Miquel Peguera  
Séverine Dusollier  
Chris Reed  
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# Editorial

by **Karin Sein**

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- 1 The editorial of our last issue started with admiring how fast and effectively the world shifted many activities to the digital realm during the COVID-19 crisis. Indeed, within a few weeks we all became experts of Zoom, Teams and BigBlueButton, hosted and attended webinars, and tested the options of various e-learning tools. While this certainly has been a tremendous leap forward, now, as this extraordinary summer semester has come to an end, maybe the time has arrived to assess the boundaries of going digital.
- 2 What I personally have been missing a lot, are these magical moments during the lecture when someone asks you a question and you must admit that you have never really thought about it from this perspective. Or, when students start debating a topic amongst each other so that you can happily just step aside feeling content that they are intrigued by the subject that you just introduced. These situations have not (yet) happened to me in online lectures. Surely, we have also become aware of how different we are concerning learning and teaching preferences – as some of us enjoy digital learning so much more than others.
- 3 And as the holiday season started, it has become obvious that it's not really possible to have an e-vacation: hiking in virtual mountains does not make you sweat and when swimming in the digital sea you do not feel the waves. And while of course we can send each other the 101<sup>st</sup> perfect sunset photo from the beach, we still cannot share the taste of wild strawberries or Aperol Spritz online.
- 4 But coming back to the possibilities of digital world and legal matters, our summer issue offers a lot of new insights regarding digital copyright and data privacy questions. Liliia Oprysk explores the broader implications of the CJEU's Tom Kabinet decision on secondary communication and advocates a casuistic approach which considers the initial authorisation of communication, remuneration obtained by the right holder, and the potential interference with a work's exploitation. Pinar Oruç analyses the copyright implications of the method, purposes and the level of collaboration in 3D digitisation of cultural heritage and argues that it is possible, and in some instances even very likely, that 3D projects lead to protectable outcomes under the EU copyright law. Andreas Rahmatian discusses the concept of dematerialised property and its application to debts, money and intellectual property. And a group of leading European copyright scholars, the European Copyright Society, have created an impressive set of comments on the implementation of different articles of the new DSM directive – surely extremely valuable guidelines for national legislators.
- 5 From the data protection side, Bart van der Sloot observes that the European Court of Human Rights has recently undergone a revolutionary transformation and now formally assesses the quality of Member States' laws and even advises the national legislators on how to make their legal systems Convention-compliant. He puts forward an intriguing argument that the European Court of Human Rights has thereby gradually turned into a European Constitutional Court for privacy cases. Maurice Schellekens, in turn, asks who is or who are the data controller(s) in a permissionless blockchain context and argues that there are good reasons to consider the administrators of nodes together with the core developers as joint controllers. However, he also admits that there is currently not enough coordination within the blockchain that is necessary for adequate data protection. Finally, the "Consumer Law Days 2019" conference report provides an elaborate overview on the discussions on designing the regulatory framework for data access in the digital economy with an emphasis on consumer interests and public welfare.

Have a nice summer and we hope you enjoy reading this issue!

Karin Sein, University of Tartu

# Comment of the European Copyright Society

## on the Implementation of the Extended Collective Licensing Rules (Arts. 8 and 12) of the Directive (EU) 2019/790 on Copyright in the Digital Single Market

by **The European Copyright Society**

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### A. EXECUTIVE SUMMARY

- 1 *The European Copyright Society (ECS) was founded in January 2012 with the aim of creating a platform for critical and independent scholarly thinking on European Copyright Law. Its members are renowned scholars and academics from various countries of the European Union, seeking to promote their views of the overall public interest. The Society is not funded, nor has been instructed, by any particular stakeholders. This ECS Comment concerns the implementation of Articles 8 and 12 of the Directive on Copyright in the Digital Single Market (DSM Directive or DSMD)<sup>1</sup> into national law.*
- 2 Articles 8 and 12 of the DSM Directive provide the first explicit legal basis for extended collective licences (ECL) in the EU copyright acquis. Article 8 is a mandatory rule on the use of out-of-commerce works and other subject matter by cultural heritage institutions, whereas Article 12 is an optional rule that applies to all kinds of works or other subject matter and all forms of use. Although Article 12 is optional, it harmonises national rules on ECLs and leaves some, but limited, freedom to the Member

States. Accordingly, national rules on ECL must comply with the safeguards in Article 12(3) and the stipulations in Article 12(2).

- 3 An ECL must be managed by a copyright management organisation (CMO) that complies with the conditions set out in Directive 2014/26/EU on collective management of copyright etc. The CMO must be sufficiently representative of rightholders in the relevant type of works or other subject matter and of the rights that are the subject of the licence. The ECS suggests that the representativeness requirement should not be construed too rigidly, for instance as a requirement that a majority of rightholders in the relevant field must be members of the mandated CMO. The representativeness requirement should be a flexible tool that safeguards the interests of rightholders and enables effective collective licensing.
- 4 The Directive is silent on further conditions for providing the CMO with the legal mandate to enter into collective agreements with extended effect. Hence, it is to be presumed that Member States are at liberty with regard to such conditions. The ECS recommends that an administrative authorisation scheme covering CMOs mandated to manage ECLs and the individual collective agreements with extended effect is implemented in each Member State. An authorisation scheme will provide for the highest degree of predictability and transparency for the process of determining which agreements will trigger the extension effect. Furthermore, an

<sup>1</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, *Official Journal of the European Communities* 2019 L 130, 92.

authorisation scheme enables the Member States to lay down further conditions for the CMO in order to safeguard the interests of unrepresented rightholders. Such further conditions could concern the extent to which the organisations shall employ resources in order to track down unrepresented right holders.

- 5 An ECL is only applicable in well-defined areas of use. This means that the area shall be clearly defined and must not be overly broad. Accordingly, the ECL agreement cannot be general in nature and comprise all kinds of works and all kinds of uses, but must do the job of specifying the uses subject to the ECL.
- 6 For all kinds of ECLs, it is a condition that unrepresented right holders should have the possibility of opting out of the ECL scheme easily and effectively and, in this way, regain the exclusivity of their copyrights. Member States that implement an ECL scheme shall, according to Article 12(3)(d), ensure that appropriate publicity measures are taken to inform rightholders about ECLs and Article 12's safeguards. According to the provision, publicity measures shall be effective without the need to inform each rightholder individually. In addition, opting out must not be so complicated and onerous as to discourage authors from doing so.

## B. Extended collective licences

- 7 Collective licensing is a necessary form of clearance for copyright and related rights, in particular with regard to mass uses. In many instances, however, collective licensing of all relevant rights is not possible because of limitations to the mandates of the relevant collective management organisations (CMOs). To remedy this and, at the same time, to secure both right holders' and users' interests, the so-called extended collective licence (ECL) was invented in the Nordic countries in 1960–1961, first in respect of broadcasting, then in respect of photocopying.<sup>2</sup> Under the ECL, the effect of agreements between CMOs and users of copyrighted works is extended by statute to works of right holders not represented by the CMO. This is called the 'outsider effect'. Today, ECLs are used for rights clearance in a large variety

of situations and in various countries. ECLs can be described as having the effectiveness of compulsory licences but, at the same time, leaving right holders in control with regard to negotiating the conditions for use.

- 8 In the European Union, the ECL has long been accepted as compatible with EU law and is mentioned in Article 3(2) of the Satellite and Cable Directive from 1993. Furthermore, recital 18 of the Infosoc Directive from 2001 states that the Directive "is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences". Accordingly, ECLs are not exceptions or limitations under EU law, despite the fact that, in respect of unrepresented rightholders, they function as compulsory licences (or exempted uses subject to compensation). In fact, ECLs are meant to "boost" the scope of voluntary licensing. For this reason, the ECL provisions of the DSM Directive are drafted carefully in order to preserve the interests of 'outsider rightholders' and provide a number of safeguards. These safeguards include the requirement that individual right clearance must be onerous and impractical and make required licensing transaction unlikely in order for the ECL to apply (Article 12(2)), and the right to 'opt out' of the ECL (Articles 8(4) and 12(3)(c)). Given that these and other conditions for the application of the ECL are satisfied, Member States may provide for ECLs irrespective of the 'exhaustive' list of exceptions and limitations permitted under the Directive. In addition, the preamble of the DSM Directive (DSMD) clarifies that the possibility that works might be used under an ECL does not influence the scope of the exceptions and limitations to the exclusive copyrights.<sup>3</sup>
- 9 The DSM Directive contains two different ECL provisions. Article 8(1) is a mandatory rule on use of out-of-commerce (OOC) works and other subject matter by cultural heritage institutions (CHI).<sup>4</sup> Article 12 provides for the general opportunity of "collective licensing with extended effect". The provision in Article 12 applies on the one hand to all kinds of works or other subject matter and uses, but on the other hand is optional in the sense that it

<sup>2</sup> See, for example, Thomas Riis, Ole-Andreas Rognstad, Jens Schovsbo, "Collective Agreements for the Clearance of Copyright – the Case of Collective Management and Extended Collective Licenses", in Thomas Riis (ed.), *User Generated Law. Re-Constructing Intellectual Property Law in a Knowledge Society*, Copenhagen (2016) 55–76, 59 – 62; Johan Axhamn, "The Consistency of the Nordic Extended Collective Licensing Model with International Conventions and EU Copyright Norms", *Nordiskt Immateriellt Rättsskydd (NIR)* (2017), 561–579, 563–567.

<sup>3</sup> Recital 43 regarding the ECL for out of commerce (OOC) works in Article 8.

<sup>4</sup> "Mandatory" in this context means that Member States must provide for a provision that extends the effect of a voluntary licence to works of non-represented authors. However, the fact that Article 8(2) also provides for a mandatory exception or limitation E&L to the exclusive rights, implies that the ECL will not cover use subject to the E&L, since a voluntary licence, and consequently the ECL providing for the extended effect, is not necessary in these situations.



leaves it to the Member States to decide whether or not, to implement it. A provision similar to Article 8 was included in the Commission's original proposal for the DSMD (September 16, 2016), whereas the general ECL-provision in Article 12 was not part of the original proposal, but was introduced in the Consolidated Presidency compromise proposal of 30 October 2017. This comment will concentrate on the special features of ECL implementation as such and not on specifics regarding OOC works.

- 10 Even though Article 12 is optional, some uncertainty exists as to the degree of freedom Member States have in shaping the specific ECL-provision. Normally, the Court of Justice states that a concept appearing in a directive without any reference to national laws must be regarded as an autonomous concept of European Union law and must therefore be interpreted uniformly throughout the European Union.<sup>5</sup> This suggests that Member States must conform to the exact wording of Article 12 as interpreted by the Court. However, on the other hand, recital 46 of the Directive states that "Member States should have the ability to maintain and introduce such mechanisms in accordance with their national traditions, practices or circumstances, subject to the safeguards provided for in this Directive and in compliance with Union law and the international obligations of the Union". Accordingly, Member States are free to shape provisions on extended collective licences on the condition that the four safeguards set out in Article 12(3) are available for all right holders. Still, as already pointed out, according to Article 12(2), ECLs are only to be applied where obtaining authorisations from rightholders on an individual basis is onerous and impractical. In addition, the ECL can only apply within well-defined areas of use and Member States must ensure that the licensing mechanism safeguards the legitimate interests of the right holders. Taking into consideration the Court of Justice's expansive and pro-integration style of interpretation, there is a strong argument that national provisions on ECL must comply with the conditions in Article 12(2) and not only the safeguards in Article 12(3). Since Article 12 is not a prerequisite for Member States to adopt provisions on ECL, the primary impact of Article 12 is the introduction of the safeguards and stipulations in Article 12(2) and (3). Furthermore, Article 12(2) contains additional conditions which, although not identical, are reminiscent of the formulation of the three-step test under the Berne Convention (Article 9) and the TRIPS Agreement (Article 13).

<sup>5</sup> See, for example, case C-467/08, *Padawan SL v. SGAE*, ECLI:EU:C:2010:620, para. 33; case C-201/13, *Johan Deckmyn Vrijheidsfonds VZW v. Helena Vandersteen et al*, ECLI:EU:C:2014:2132, para. 15.

- 11 The texts of Articles 8 and 12 both point in the direction of extended collective licensing as interpreted and practised in the Nordic countries. Article 8 provides for the extension of "a non-exclusive licence for non-commercial purposes" to works and other subject matter to right holders that have not mandated the CMO in question (ie. "irrespective of whether all rightholders covered by the licence have mandated the collective management organisation"). Similarly, the headline of Article 12 reads "collective licences with extended effect" and concentrates on extending the application of an agreement entered into by the CMO to right holders "who have not authorised that collective management organisation to represent them". Still, the recitals of the Directive make clear that the intention is to permit other licensing mechanisms than the traditional Nordic concept of ECL.

Thus, it follows from recitals 33 and 44 of the Directive that Member States have flexibility in choosing the type of licensing mechanism that they put in place for the use of out-of-commerce works or other subject matter by cultural heritage institutions. Flexibility is also highlighted in relation to Article 12. With regard to "the increasing importance of the ability to offer flexible licensing schemes in the digital age, and the increasing use of such schemes", recital 46 thus states on a general basis that "Member States should be able to provide for licensing mechanisms which permit collective management organisations to conclude licences, on a voluntary basis, irrespective of whether all rightholders have authorised the organisation concerned to do so". It is emphasised that "Member States should have the ability to maintain and introduce such mechanisms in accordance with their national traditions, practices or circumstances"<sup>6</sup>. On the other hand, Article 12(4)(2) explicitly states that the provision shall not apply to mandatory collective management of rights. In many countries, compensation for E&L or remuneration rights are subject to mandatory collective management; that is, they are managed "by legal mandate" exclusively by CMOs. Rights and licences under mandatory collective management are not bound by the rules set by Art. 12. Thus, a licence granted under mandatory collective management does not need to allow for opt-outs (in fact, opting-out would inherently contradict mandatory collective management).

- 12 This comment recognises that Member States have the flexibility to choose among various licensing models with extended effect in order to implement Articles 8 and 12 according to their legal traditions. Nevertheless, the comment will concentrate on extended collective licensing as the model of implementation in the sense that it is the extension of

<sup>6</sup> Recital 46, cf. also recital 33.

the effect of the *agreement* covered by the mandate of the CMO that will stay in focus and not the extended effect of the mandate. It is the extended effect of a negotiated licence agreement that characterises an ECL in the true sense, in contrast to situations where a general mandate to enter into agreements with users is extended to works of right holders that are not members of the CMO. It is believed that many of the problems that the CJEU pointed out in *Soulier and Doke*<sup>7</sup> could be avoided if emphasis is put on the extension of the agreement instead of the extension of a general legal mandate.<sup>8</sup> This is not to exclude the possibility that legal mandates and presumptions of representation may also comply with the principles established in that decision, in accordance with the assumptions in the recitals of the DSMD that Member States have freedom with regard to the implementation of Articles 8 and 12.

- 13 Due to copyright law's choice of law rules, the extension effect of an ECL is limited to the territory of the Member State that has adopted a provision on ECL.<sup>9</sup> Accordingly, ECLs can only be used to clear rights throughout the EU if all Member States choose to adopt such provisions. We will come back to this in the closing section (G).

## C. The collective organisation

- 14 Pursuant to Article 12(1) of the Directive, "Member States may provide ... that where a collective management organisation that is subject to the national rules implementing Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [CRMD] in accordance with its mandates from rightholders, enters into a licensing agreement for the exploitation of works or other subject matter, ... such an agreement can be extended to apply to the rights of rightholders who have not authorised that collective management organisation to represent them". Article 8(1) also refers to a "collective management organisation". This must in turn mean

an "organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which is... owned or controlled by its members ... or organised on a not-for-profit basis" (CRMD Article 3(a)). At the same time, the term "subject to the national rules implementing [CRMD]" in Article 12 implies that the general requirements of the directive concerning transparency, distribution of remuneration and so on, thus implemented by the Member States, will apply to ECLs under Article 12.

- 15 A key element for the application of ECLs under Articles 8 and 12 is the representativeness requirement – that the CMO "on the basis of its mandates is sufficiently representative of rightholders in the relevant type of works or other subject matter and of the rights that are the subject of the licence" (Article 8(1)(a), Article 12(3)(a)). The representativeness requirement lies at the very core of the ECL as a rights clearance system and the legitimacy of the ECL model depends on this requirement.
- 16 According to recital 48 of the DSM Directive, relevant factors to determine the representativeness requirement are "the category of rights managed by the organisation, the ability of the organisation to manage the rights effectively, the creative sector in which it operates, and whether the organisation covers a significant number of rightholders in the relevant type of works or other subject matter who have given a mandate allowing the licensing of the relevant type of use, in accordance with Directive 2014/26/EU". Although it is crucial that "a significant number of right holders" is represented by the CMO, because that triggers the "outsider effect" of the ECL, it is also important that the requirement is interpreted in accordance with the purpose of the ECL and is not applied too rigidly or considered as a mere quantitative requirement with fixed numerical indicators.<sup>10</sup> Thus, for example, a "significant number" should not imply that a majority of rightholders in the relevant field must be members of the mandated CMO.<sup>11</sup> The representativeness requirement should be a flexible tool that, on the one hand, safeguards the interests of rightholders and, on the other, guarantees the effectiveness of

<sup>7</sup> Case C-301/15, *Marc Soulier and Sara Doke v Premier ministre and Ministre de la Culture et de la Communication*, ECLI:EU:C:2016:878, para 37 et seq.

<sup>8</sup> Compare Olav Stokmo, "The Extended Collective Licensing Agreement or the Extension of Voluntary Licensing Agreements around the World", *NIR* (2017) 593–603, 600–603. See also Lucie Guibault and Simone Schroff, "The Use of Extended Collective Licensing for the Use of Out of Commerce Works in Europe: a Matter of Legitimacy Vis à Vis Right Holders", *IIC* (2018), 916–939, 930 et seq.

<sup>9</sup> Cf. recital 46.

<sup>10</sup> See Guibault/Schroff, *supra* note 8, 929.

<sup>11</sup> Compare Guibault/Schroff, *supra* note 8, 929. See also Thomas Riis and Jens Schovsbo, "Extended Collective Licenses in Action" *IIC* (2012), 930–950, 937; Riis/Rognstad/Schovsbo, *supra* note 1, 65–66; Astri M. Lund, "The Nordic Extended Collective Licence – Particular Aspects", *NIR* (2017), 552–562, 556–557.



collective licensing where such “licensing based on an authorisation by rightholders does not provide an exhaustive solution for covering all works or other subject matters to be used” (DSMD, recital 45).

17 Instead of interpreting the representativeness requirement as a specific quantitative threshold, a number of factors should be relevant in assessing the representativeness of a CMO, some of them also of a qualitative nature, in order to secure the fulfilment of the purpose of an ECL. Recital 48 already mentions the ability of the organisation to manage the rights effectively. Other related factors could be how well-established the CMO is in the relevant field, the possibilities and position of the organisation with regard to entering into reciprocity agreements with other CMOs, the quality of the system for distribution of remuneration (cf. CRMD Article 13), and the level of transparency (CRMD Article 21).<sup>12</sup> It should be recalled that the possibility of ‘opt-out’ set out in Article 12(5) remedies the lack of formal consent on the part of the ‘outsider’ right holder. The practical situation is not much different from that of an individual right holder who has given the CMO, directly or indirectly through membership agreements, the mandate to negotiate agreements on his or her behalf. Many such right holders will not be aware of the specific agreements that the CMO has entered into and a right to opt out of the agreement may, for both categories of right holders (‘insiders’ and ‘outsiders’), be the only realistic way of exercising their private autonomy with regard to the individual agreement. Thus, the ability of the CMO to safeguard the interests of right holders, including the transparency of its practices with regard to represented and non-represented right holders, is at least equally crucial to the functioning of the ECL as the formal number of right holders represented by the CMO.

18 The legal mandate of the CMO is also of utmost importance to the legitimacy of the ECL. The ECL system is based on the agreement entered into by the relevant CMO and, in this respect, the CMO will explicitly have to be entrusted with a mandate to represent specific rights. Thus, Articles 8(1) and 12(1) DSMD refer to the CMO’s entering into agreements “in accordance with its mandates from rightholders”. Pursuant to Article 5(7) CRMD, the right holder must give consent specifically for each right or category of rights or type of works and other subject-matter which he authorises the collective management organisation to manage and any such consent shall be evidenced in documentary form.

19 The mandate to enter into agreements with users for the repertoire that the right holder has consented to

is crucial to the legal mandate that forms the basis for the ECL. Articles 8(1)(b) and 12(1)(b) the ECL – i.e. the statutory provisions triggering the outsider effect of the agreement – provide the CMO’s legal mandate to represent right holders who have not authorised the organisation. Since the Directive is silent on the further conditions for providing the legal mandate, it is to be presumed that Member States are at liberty with regard to such conditions. Here, there are different solutions in the Member States, and in the Nordic countries specifically. The ECS considers, however, that an administrative authorisation scheme will provide for the highest degree of predictability and transparency in determining which agreements will trigger the ECL (‘outsider’) effect. The authorisation procedure may relate to the specific agreements that the CMO enters into,<sup>13</sup> the CMO that will enter into agreements in the relevant field,<sup>14</sup> or both.

20 Article 9 of the Services Directive,<sup>15</sup> which deals with the freedom of establishment for providers, stipulates that Member States may only make access to a service activity or the exercise thereof subject to an authorisation scheme if:

- the authorisation scheme does not discriminate against the provider in question;
- the need for an authorisation scheme is justified by an overriding reason relating to the public interest; and
- the objective pursued cannot be attained by means of a less restrictive measure (proportionality).

21 The concept of ‘overriding reasons relating to the public interest’ must be construed in accordance with the case law of the Court of Justice in relation to Articles 49 and 56 of the Treaty on the Functioning of the European Union. A relatively broad concept, it covers, amongst other things, the protection of IP and cultural policy objectives.<sup>16</sup> National authorisation schemes for collecting societies are presumably justified by the protection of IP and cultural policy objectives. However, considerable doubt may arise as to whether various national authorisation schemes are non-discriminatory

13 See for example the Danish General ECL, set out in the Danish Copyright Act (1995) Section 50(4).

14 See the Norwegian Copyright Act (2018) Section 63 third paragraph and the Finnish Copyright Act (1961) Section 26 second paragraph.

15 Directive 2006/123/EC.

16 Recital 40 of the Services Directive.

12 Cf. Ole-Andreas Rognstad, *Opphavsrett*, 2nd ed., Oslo 2019, 369–370.

and proportional.<sup>17</sup> A particular issue is whether an authorisation scheme for CMOs managing ECLs should ensure that only one CMO is authorised to manage each type of rights. The DSM Directive is silent on that issue. It has been an established principle of Nordic copyright law that only one CMO can be entitled for each type of right. The primary rationale for this stipulation is that it follows from the nature of ECL, in particular, from the economies of scale and scope involved. On the other hand, a situation with only one authorised CMO creates the well-known competition-related concerns associated with natural and legal monopolies: inefficiency, dead weight loss, abuse of market power. This is no different from ordinary CMOs managing exclusive copyrights on a voluntary basis.

- 22 However, the management of ECLs is different in some respects from other forms of collective management of copyrights and, as a consequence, only one CMO ought to be authorised for each type of work. As a practical matter, if more than one organisation were entitled to manage the same type of rights for the same type of works, unrepresented right holders might be confused as to where to claim remuneration and users might be confused as to the works administered by each organisation. Furthermore, the amount of remuneration might not be the same in different collective agreements. In addition, an organisation that manages a collective agreement does not have incentives to promote the interest of right holders who do not belong to the organisation because unrepresented right holders cannot influence the decisions of the organisation and they constitute a sort of dead weight to the organisation. For this reason, Article 12(3) guarantees equal treatment of unrepresented right holders. However, Article 12 does not specify the requirements which the organisations must satisfy in respect of promoting the interests of unrepresented right holders. Particularly, the extent to which the organisations should employ resources to track down unrepresented right holders is not set out. Such requirements could be specified in an authorisation scheme.<sup>18</sup>

## D. The scope of the licence

- 23 The scope of the extended licence is not unlimited. The ECL cannot comprise any kind of unspecified use. According to Article 12(2), “the licensing mechanism ... is only applied within well-defined

areas of use”. Two different models of specifying the use are possible here. One is the so-called “specific ECL” which implies that the scope of the licence is specified in the statutory provision providing for the ECL. The licence for out of commerce (OOC) use pursuant to Article 8 is one example of a specific ECL, but the requirement of “well-defined areas of use” in Article 12(2) may also be fulfilled by other specific ECLs. For example, it could be possible, within the framework of Article 12, to provide for a statutory provision deciding that agreements entered into by a CMO for the use of protected content by online content-sharing providers, pursuant to Article 17, shall have extended effect, as long as the general conditions for ECLs are met. Some other possible examples of sector-specific ECLs are ECLs for copying for educational purposes, communication to the public of audiovisual works, digitisation of works in libraries’ collections, to mention some. It must be emphasised, though, that the scope of an ECL will never extend beyond the scope of the agreement entered into by the CMO.

- 24 The second possible model is the “general ECL”, where the statutory provision only provides that the CMO may enter into agreements “within well-defined areas of use” that will have extended effects. Here, the agreements will fully define the scope of the ECL. The requirement that the areas of use will have to be “well-defined” implies that the agreement cannot be general in nature and comprise all kinds of works and all kinds of uses, but must do the job of specifying the uses subject to the ECL. The term “general ECL” refers to the fact that the statutory provision legitimising the ECL is general in nature and that the specification is left to the agreement – not that the ECL escapes the requirement of specification. In practice, the general ECL will supplement specific ECLs, as it does in the Nordic countries. As the ECL for OOC works pursuant to Article 8 is mandatory, a general ECL will have to be supplementary to the former.
- 25 As already mentioned, it is an absolute condition for the application of an ECL under Article 12(2) that “obtaining authorisations from rightholders on an individual basis is typically onerous and impractical to a degree that makes the required licensing transaction unlikely, due to the nature of the use or of the types of works or other subject matter concerned.” “Typically onerous and impractical” is not tantamount to “impossible”, but it means that individual rights clearance is, for all practical purposes, not viable. It is, however, conceivable that the ECL might supplement individual rights clearance and apply to the extent there is no reason to believe that rights can be cleared individually. In order to implement this obligation, it ought to be sufficient to stipulate in statute that the ECL applies to the extent that obtaining authorisations

17 Thomas Riis, Collecting societies, competition, and the Services Directive, *Journal of Intellectual Property Law & Practice* (2011), 482–493, 491.

18 See Riis, *supra* note 16, 482–493, 492.

from right holders on an individual basis is typically onerous and impractical. The subsequent obligation to “ensure that such licensing mechanism safeguards the legitimate interests of rightholders” should be considered fulfilled as long as all the conditions for applying the ECLs set out in Article 12 are complied with. However, as follows from recital 47, special consideration should be taken to the fact that the ‘outsider effect’ often tends to affect non-nationals or non-residents of the Member State of the user seeking a licence and that foreign citizenship or residency should not in itself be a reason to consider the rights clearance onerous or impractical. Moreover, a bottom line, reflected in the requirement that Member States shall ensure that the licensing mechanism safeguards the legitimate interests of right holders, is that ECLs are meant to benefit right holders as much as users. Hence, the ECL system ensures that right holders are remunerated in situations in which it is likely that they would not otherwise have received compensation. This is particularly the case with respect to foreign right holders.

## E. Unrepresented right holders

- 26 This leads to the special safeguarding measures in Article 12(3) on the treatment of unrepresented right holders, including the non-discrimination obligation in Article 12(3)(b), which asserts that “all right holders are guaranteed equal treatment, including in relation to the terms of the licence”. The non-discrimination requirement is a vital element of the ECL, the very idea of which is to extend the effect of the agreement entered into by the CMO to the benefit both of the users and the right holders involved. One consequence is that whatever the CMO decides regarding the distribution of remuneration shall equally apply to non-represented right holders. This is at least partially already reflected in CRMD through obligations to ensure that the CMO distributes and pays amounts due to right holders (Article 13(1)), and to take all necessary measures to identify and locate right holders. Article 13(3) also applies to right holders who have withdrawn from the CMO (Article 5(5)). Article 12(3)(b) DSMD goes one step further and extends in effect the obligation also to right holders who have never been members of the CMO, since the right of equal treatment applies to all right holders that are not represented by the CMO in question.
- 27 Another important safeguard is set out in DSMD Article 12(3)(d) regarding the right to information.<sup>19</sup> The provision must be read in close context with

Article 12(3)(b), since the latter provides that obligations to inform right holders about relevant matters in licence agreements apply equally to non-represented right holders. Article 12(3)(d) emphasises the special importance of providing non-represented right holders with information about the ECL and the conditions of the licence which are applicable to their work. Thus, Member States must provide that “appropriate publicity measures are taken, starting from a reasonable period before the works or other subject matter are used under the licence, to inform rightholders about the ability of the collective management organisation to license works or other subject matter, about the licensing taking place in accordance with this Article and about the options available to rightholders as referred to in point (c)”. Again, obligations under CRMD are relevant, in particular Article 21 on the disclosure of information to the public, as non-represented right holders are to be considered as “the public” in this respect. Hence, information about general organisational statutes, revenue collection and distribution, details on dispute resolution procedures, etc. must be available also to non-represented right holders. In particular, appropriate publicity measures are, as pointed out in the DSMD Article 12(3)(d), of vital importance for the functioning of the ‘opt out option’ set out in Article 12(3)(c), which is discussed further below.

## F. Opt-out

- 28 Articles 8(4) and 12(3)(c) provide that rightholders must be able to exclude their works or other subject matter from the ECL mechanism (opt out) easily and effectively and, in this way, regain the exclusivity of their copyrights. Article 5(2) of the Berne Convention stipulates that the “enjoyment and exercise” of copyright “shall not be subject to any formality”. If a certain use is covered by an ECL-agreement and the ECL-rule allows right holders to opt out of the system and enforce their copyrights against an exploiter, it might be argued that the prohibition in Article 5(2) is contravened because the opting out constitutes a “formality” as to the exercise of copyright. Ginsburg points out that the ECL extension effect, with the possibility of opt-out, functions as a presumption of transfer of rights to the CMO managing the ECL, and the opt-out provides the means for authors to withhold their rights from the CMO, that is, to rebut the presumption of transfer.<sup>20</sup> According to this line of argument, the ECL scheme does not encroach on the enjoyment and exercise of copyright and thus falls outside the scope of Article 5(2). However,

<sup>19</sup> Regarding the OOC provision in Article 8, see the special information safeguards set out in Article 10.

<sup>20</sup> Jane C. Ginsburg, “Extended Collective Licenses in International Treaty Perspective: Issues and Statutory Implementation”, *NIR* (2019), 215–227, 218.

in *Soulier and Doke*, the Court of Justice of the EU (CJEU) found that a national rule that functions as a presumption of transfer of rights to the CMO conforms with Article 5(2) of the Berne Convention only if the associated opt-out provision satisfies a number of conditions.

- 29 *Soulier and Doke* concerned French legislation that gave an approved CMO the right to authorise the reproduction and communication to the public, in digital form, of out-of-print books, while allowing the authors of those books or their successors in title to oppose or put an end to that practice on conditions laid down in that legislation. The CJEU found that ‘opt-out’ must offer a mechanism ensuring that authors are actually and individually informed. Otherwise, it would not be inconceivable that some of the authors concerned would not, in reality, even be aware of the envisaged use of their works and, therefore, that they would not be able to adopt a position, one way or the other, on that use. In those circumstances, a mere lack of opposition on their part could not be regarded as the expression of their implicit consent to that use.<sup>21</sup> Furthermore, the Court stated that, in order to comply with Article 5(2) of the Berne Convention, an author of a work must be able to put an end to a third party’s exercise of rights of exploitation in digital format that he holds on that work. In so doing the author can prohibit that third party from any future use in such a format, without having to submit beforehand to a formality consisting of proving that other persons are not holders of other rights in that work.<sup>22</sup>
- 30 The judgment in *Soulier and Doke* provides guidelines for requirements for ECL schemes under the DSMD. However, *Soulier and Doke*’s requirement that authors should be individually informed of the possibility of opting out, is substituted by the provision of Article 12(3)(d) on ‘appropriate publicity measures’, which is a more relaxed condition than ‘individual information’. Nevertheless, the publicity measures must be effective. Apart from that, it must be assumed that Member States implementing an ECL scheme must not introduce any rule that requires others’ ownership of the rights to be disproved. Furthermore, it follows from *Soulier and Doke* that opting out must not be so complicated and onerous as to discourage authors from doing so.<sup>23</sup>

21 *Soulier and Doke*, *supra* note 7, para 44.

22 *Soulier and Doke*, *supra* note 7, paras 50–51.

23 *Soulier and Doke*, *supra* note 7, paras 50–51.

## G. Cross-Border Dimension and Solution for Online Platforms Rights Clearance

- 31 It follows from copyright’s choice of law rules that the extension effect of an ECL is limited to the territory of the Member State that has adopted an ECL provision, cf. the *lex protectionis* principle laid down in the Article 8(1) Rome II Regulation 864/2007/EC. Thus, where an infringement is claimed in a Member State which has not extended the effect of a collective agreement, a user cannot argue that the agreement applies to works of unrepresented authors. This result is recognized in Article 12(1) (“as far as the use on their territory is concerned”) and in Recital 46 of the DSM Directive, where it is emphasised that an ECL, and similar mechanisms, “should only have effect in the territory of the Member State concerned, unless otherwise provided for in Union law.”
- 32 One such provision exempting the application of the general choice of law rule is Article 9(1) of the same Directive regarding the ECL provision on OOC works under Article 8. According to this provision, Member States shall “ensure that licences granted in accordance with Article 8 may allow the use of out-of-commerce works or other subject matter by cultural heritage institutions in any Member State”. In other words, the ECLs for OOC works shall extend also beyond the territory of each Member states and have cross-border effect. The situation is, however, different for ECLs granted in accordance with Article 12, which does not contain a comparable provision but, on the contrary, confines the scope of the ECL to use on each Member State’s own territory.
- 33 This limitation has been characterised as the “main problem” in regard to the potential that the ECL system and Article 12 have as a mechanism to secure rights clearances for Online Content-Sharing Service Providers under Article 17 DSMD.<sup>24</sup> Nevertheless, the cumulative effect of Member States’ application of ECL provisions to platform uses may be that repertoires are cleared for such uses throughout the

24 See Matthias Leistner, “European Copyright Licensing and Infringement Liability Under Art. 17 DSM Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?”, forthcoming in *Intellectual Property Law Journal (IPL)* 2020, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3572040](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3572040), 35. Cf. the Comment of the European Copyright Society on Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market Into National Law, available at <https://europeancopyrightsociety.org/opinions/>, 6, pointing to the role that ECLs may have in regard to Article 17(4).



EU.<sup>25</sup> Thus, Member States can adopt the statutory basis for ECL in accordance with Article 12 for the purpose of clearance of exclusive rights pursuant to Article 17(1). If, despite negotiation, the CMO and the platform do not succeed in reaching a collective agreement, the platform is left with the possibility of escaping liability pursuant to Article 17(4). In the context of that provision, the mere existence of the statutory basis for ECL does not satisfy the “best effort obligation” under Article 17(4)(a). Best effort must be assessed in accordance with the efforts put into negotiating a prospective collective agreement. Hence, Member States are also encouraged to use the option under Article 12 with a view to the advancement of future regulation at the EU level.<sup>26</sup>

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<sup>25</sup> It should be noted, however, that there are also other obstacles to the effectiveness of Article 12 in order to solve problems under Article 17, like the risk of right holders “opting out”, see Leistner, *supra* fn 24, 34.

<sup>26</sup> Cf. Leistner, *supra* fn. 24, 36.



# Comment of the European Copyright Society

## on the Implementation of Art. 14 of the DSM-Directive 2019/790

by **The European Copyright Society**

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### A. Executive Summary

- 1 *The European Copyright Society (ECS) was founded in January 2012 with the aim of creating a platform for critical and independent scholarly thinking on European Copyright Law. Its members are renowned scholars and academics from various countries of the European Union, seeking to promote their views of the overall public interest. The Society is not funded, nor has been instructed, by any particular stakeholders. This ECS Comment concerns the implementation of Article 14 of the Directive on Copyright in the Digital Single Market (DSM Directive or DSMD)<sup>1</sup> into national law.*
- 2 Article 14 of the DSM-Directive obliges member States to limit the exclusive rights to faithful reproductions of copyrighted works of visual art that have fallen into the public domain. Any material resulting from an act of reproduction of a public domain work shall not be subject to related rights, unless said material is original in the sense that it is the author's own intellectual creation.
- 3 Article 14 is motivated by the fact that “in the field of visual arts, the circulation of faithful reproductions of works in the public domain contributes to the access to and promotion of culture, and the access to cultural heritage”. Moreover, “in the digital environment, the protection of such reproductions

through copyright or related rights is inconsistent with the expiry of the copyright protection of works”. The provision undertakes to correct a German court decision which granted a related right to non-original reproductions of public domain works.

- 4 Article 14 raises a number of questions.
  - To begin with, the formulation “works of visual art” in Article 14 raises the question as to the extent to which Article 14 also applies to the reproduction of public domain design works, works of architecture and maps. It is submitted for discussion that the term should be widely understood to cover all works that can be visually perceived.
  - Moreover, it is submitted that the effect of Article 14 should not be limited to non-original photographs, but that other related rights which may be found in some member States' national legislation.
  - In addition, ECS supports an understanding of the term “reproduction” as “faithful” reproduction (see Recital 53), so that not only 2D, but also faithful 3D-scans of public domain visual works would not give rise to a new exclusive right.

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1 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, *Official Journal of the European Communities* 2019 L 130, 92.

- Also, it is submitted that not only should new rights not come into existence after expiry of the term of protection of the work reproduced, but that all rights in faithful reproductions should end when the work reproduced falls into the public domain.
- Likewise, the reference to “digital environment” in Recital 53 should not limit the application of Article 14 to digital use acts, because the need to use reproductions in order to promote access to works and to cultural heritage likewise exists, and can be satisfied, by analogue reproductions.
- Finally, Article 14 should also apply where the object reproduced has never been protected by copyright. Also, it should be clarified that Article 14 cannot be undermined by invoking a property right in the object that is reproduced.

## B. Reproductions of works of visual art in the public domain

- Article 14 obliges Member States to “provide that, when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author’s own intellectual creation.”
- The wording of Article 14 appears, of course, somewhat clumsy in stating that the resulting reproduction “is not subject to copyright ..., unless [it] is original in the sense that it is the author’s own intellectual creation” because, on the one hand, in strict copyright terms, a mere reproduction is not an author’s own intellectual creation, and, on the other hand, once an author’s own intellectual creation can be found, copyright protection shall attach according to the very wording of the Article in question.
- What is, of course, meant is (1) that once the copyright of a work of visual arts has expired, it may not only be reproduced, communicated or used without the author’s consent since it is in the public domain, but that in addition, (2) no exclusive rights shall attach to any copy of a public domain work of art, unless the reproduction constitutes its author’s own intellectual creation.
- This is a remarkable provision which, for the first time in the EU, grants a positive status to works belonging to the public domain, by prohibiting any regaining of exclusivity therein. As defined by the CJEU, “[i]n order for an intellectual creation to be regarded as an author’s own it must reflect the author’s personality, which is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices” (see, to that effect, judgement of 29 July 2019, *Funke Medien NRW*, C- 469/17, ECLI:EU:C:2019:623, para. 19; judgment of 1 December 2011, *Painer*, C145/10, EU:C:2011:798, paragraphs 87 to 89). In addition, Recital 53 indicates that “faithful reproductions” of works of visual art are not to be considered as their authors’ own intellectual creation.
- According to Recital 53, the cutting back of exclusive rights of reproduction photographers is justified by two arguments. First, “[i]n the field of visual arts, the circulation of faithful reproductions of works in the public domain contributes to the access to and promotion of culture, and the access to cultural heritage”. Second, “[i]n the digital environment, the protection of such reproductions through copyright or related rights is inconsistent with the expiry of the copyright protection of works”.
- Article 14 is a direct reaction to a case decided by the German Federal Supreme Court (Bundesgerichtshof, BGH) in a judgement of 20 December 2018 (case I ZR 104/17, *Museumsfotos*), according to which photographs of paintings or other two-dimensional works are regularly (“regelmäßig”) subject to protection as simple photographs according to Article 72 of the German Copyright Act, i.e. irrespective of the fact whether the work photographed is still protected by copyright or whether it has already fallen into the public domain. Article 72 of the German Copyright recognises a right related to copyright for non-original “simple” photographs. This related right is not harmonized by EU law but explicitly permitted according to Article 6 sentence 2 of the Term-Directive 2006/116/EC (“Member States may provide for the protection of other photographs”).

## C. Questions regarding the implementation of Article 14

- Although the wording of Article 14 appears to be rather straightforward, it gives rise to a certain number of questions that need to be answered at the stage of implementation.

## I. Objects covered by Article 14: “works of visual art”

- 12 Article 14 only covers „works of visual art“. This gives rise to a question as to the extent to which Article 14 also applies to the reproduction of public domain design works, works of architecture and maps, which are also listed as works of visual arts in some Member States, but are listed in separate categories of copyrighted works in other Member States.
- 13 This question cannot easily be answered, since firstly, the EU Directives do not contain a binding, autonomous list of categories to be considered as “works”. Secondly, the language and systematic structure of international Conventions – to which the CJEU often refers when interpreting provisions of EU copyright law – does not help much, since rather than using the term “visual art”, Article 2 (1) of the Revised Berne Convention lists different objects which fall into this category (“works of drawing, painting, architecture, sculpture, engraving and lithography”). In addition, “photographic works” are listed in the Berne Convention as a separate category of works, as are “works of applied art”, “maps”, “sketches” and “three-dimensional works relative to ... architecture”.

If anything, the Berne Convention indicates that the term “works of visual art” should not be construed too narrowly.

- 14 Moreover, an understanding of “works of visual art” in a narrow sense would exclude copyrighted photographic works, technical drawings, and maps from the application of Article 14. The consequence of such a narrow understanding of the notion of “works of visual art” would be that exclusive related rights under national law could still attach to faithful reproductions of public domain photographs, old maps and the like. However, such a result would not be in line with the purpose of Article 14, as explained in Recital 53, which emphasises access to and promotion of culture, and access to cultural heritage.
- 15 Rather than adopting such a narrow understanding of “works of visual art”, the ECS supports a broader understanding, which focuses on the “faithfulness” of the reproduction laid down in Recital 53. According to such understanding, Article 14 would also apply to faithful – in other words, non-creative – reproductions of public domain photographic works, design works (works of applied art) and maps. To conclude otherwise would grant greater derivative protection to such works than to works of visual arts.

## II. Rights cut back by Article 14 (“copyright or related rights”)

- 16 Another question is which rights are affected by the operation of Article 14. This question gives rise to two remarks.
- 17 First, the reference to “copyright” as a right to which faithful reproductions of works in the public domain shall not be subject, is somewhat misleading, since according to Article 14 copyright does come into existence for reproductions of public domain works which constitute the author’s own intellectual creation. Therefore, unless a Member State grants, under its national law, copyright protection to works which are not an intellectual creation of its authors, Article 14 mainly, if not exclusively affects “related rights”.
- 18 Second, the most important of such related rights, at least as regards visual reproductions of copyright-protected works, is the related right in non-original photographs – and eventually non-original film stills – provided for by some Member States’ national laws (such as, e.g., in § 72 of the German Copyright Act). Moreover, copies protected by related rights for previously unpublished works as well as critical and scientific publications (Articles 4 and 5 of Directive 2006/116) are also affected by Article 14 of the DSM-Directive. In addition, according to its wording, Article 14 might also apply to other related rights granted by national laws, even if these rights are not (yet) harmonized by EU law, such as, e.g., the rights to non-original audiovisual recordings. Therefore, such rights, when they exist in national law, should likewise not apply to faithful reproductions.

## III. “Reproductions” which are not “the author’s own intellectual creation”

- 19 A question of prime importance is to know what is to be understood by “reproductions” which are not “the author’s own intellectual creation”, since it is only those non-original reproductions to which, according to Article 14, no new rights shall apply.
- 20 In the literature, it is often suggested that a line should be drawn between reproductions of 2D-works and reproductions of 3D-works (i.e., the reproductions which are supposed to be the author’s own intellectual creation). However, whereas it is true that reprographic photography of 2D-works is in most, if not all cases non-original, reproductions of 3D-works may or may not be the result of their authors’ own intellectual creation.

- 21 The ECS therefore supports an understanding of the term “reproduction” deriving from Recital 53’s reference to “faithful” reproduction. In other words, Article 14 should also cover faithful reproductions of 3D objects (e.g. by plaster casts, 3D-reproductions and prints) which are in the public domain, provided their purpose is merely to reproduce the original object in question faithfully and not to transform it in any creative way.

#### **IV. ....when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work ...”**

- 22 The formulation „...when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work ...” may give rise to two conflicting readings.
- 23 According to one reading, “when” would mark a point in time from which onwards reproductions newly made would not give rise to any new rights, whereas existing rights with regard to reproductions made before that point in time would continue to exist. Such an understanding would have the practical consequence that, even after the expiry of the term of protection of the work reproduced, users would have to inquire whether or not the reproduction was made before that date or thereafter.
- 24 According to another reading, however, the “when” marks the point in time after which *any* reproductions covered by Article 14 shall not be subject to exclusive rights, irrespective of the fact whether they have been made before or after the expiry of the term of protection of the work that has been reproduced. In other words, according to this understanding, the “when” refers to the time when the reproduction is being used rather than when it was made. This understanding appears to be more in line with the contribution to the access to and promotion of culture, and the access to cultural heritage described as the aim of Article 14 in Recital 53, even if it might involve a cutting back of already vested rights.
- 25 Consequently, ECS supports a reading of Article 14 which exempts all use acts undertaken regarding faithful, non-original reproductions after the term of the work reproduced has expired, irrespective of the date on which the reproduction in question was made.

#### **V. Transitional provision**

- 26 Because, if understood as just explained in point IV, Article 14 cuts back on already existing rights from the DSM-Directive’s implementation deadline, any implementation should contain a corresponding transitional provision.
- 27 This provision should make clear that beginning with the implementation date, Article 14 also applies to the use of reproductions which were made before the implementation date.

#### **VI. No additional restrictions**

- 28 It shall only briefly be mentioned that it may be reasonable to understand the reference to “digital environment” in Recital 53 as not limiting the application of Article 14 to digital use acts. The need to use reproductions in order to promote access to works and to cultural heritage exists, and can be satisfied, not only by digital but also by analogue reproductions.

#### **VII. Additional considerations**

- 29 Finally, in the view of ECS, it might be advisable for national legislatures implementing Article 14 to ensure that the “access to and promotion of culture, and the access to cultural heritage” aimed at according to Recital 53 is not unduly undermined.
- 30 Firstly, given that no rights can attach to faithful reproductions of once copyright-protected works that have fallen into the public domain, the same result should also, a fortiori, apply where the objects reproduced were never protected by copyright at all, such as works of visual art created before copyright could apply to them or even before the modern copyright laws were enacted (e.g., antique artefacts).
- 31 Secondly, from the point of view of access to material in the public domain, it might seem appropriate to extend the application of Article 14 DSM-Directive to other works than works of visual arts, such as documents, manuscripts and sheet music. Of course, courts might still find that faithful reproductions of such works are not original in the sense of being their authors’ own intellectual creations. However, it would seem justified and advisable to include these works in the course of national implementation of Article 14 DSM-Directive, in order to avoid the misleading information given by a ©-notice which is often affixed to such faithful – and hence not protected – reproductions of public domain works that are not visual.

- 32 Thirdly, when implementing Article 14, the national legislature might be well advised to adopt language to the effect that the freedom provided for by Article 14 cannot be eliminated by reference to a property right unlimited in time in the object that has faithfully been reproduced. The effect of such regulation would, of course, only affect the use of reproductions which are already freely available and would not give the person making the reproduction a right of access to the physical object to be reproduced vis-à-vis the owner of the respective object.
- 33 At any rate, national provisions that would curtail the freedom recognized in Article 14 endanger the effectiveness of harmonized EU law and are impermissible in light of the obligation to safeguard the *effet utile* of Union law.

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# Comment of the European Copyright Society

## Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law

by **The European Copyright Society**

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### A. Introduction

1 *The European Copyright Society (ECS) was founded in January 2012 with the aim of creating a platform for critical and independent scholarly thinking on European Copyright Law. Its members are renowned scholars and academics from various countries of the European Union, seeking to promote their views of the overall public interest. The Society is not funded, nor has been instructed, by any particular stakeholders. This ECS Comment concerns the implementation of Article 17 of the Directive on Copyright in the Digital Single Market (DSM Directive or DSMD)<sup>1</sup> into national law.*

2 Article 17 DSMD is one of the most complex – and most controversial<sup>2</sup> – provisions of the new

legislative package which EU Member States must transpose into national law by 7 June 2021.<sup>3</sup> Seeking to contribute to the debate on implementation options, the following Comment addresses several core aspects of Article 17 DSMD that may play an important role in the national implementation process.

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Giancarlo F. Frosio, “Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy”, *Northwestern University Law Review* 112 (2017), 19; R.M. Hilty/V. Moscon V. (eds.), “Modernisation of the EU Copyright Rules – Position Statement of the Max Planck Institute for Innovation and Competition”, *Max Planck Institute for Innovation and Competition Research Paper* No. 17-12, Max Planck Institute for Innovation and Competition: Munich 2017; R.M. Hilty/V. Moscon, “Contributions by the Max Planck Institute for Innovation and Competition in Response to the Questions Raised by the Authorities of Belgium, the 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”, available at: <http://www.ip.mpg.de/>; CREATE et al., “Open letter to Members of the European Parliament and the Council of the European Union”, available at: <http://www.create.ac.uk/policy-responses/eu-copyright-reform/>; E. Rosati, “Why a Reform of Hosting Providers’ Safe Harbour is Unnecessary Under EU Copyright Law”, *CREATE Working Paper* 2016/11 (August 2016), available at: <https://ssrn.com/abstract=2830440>; S. Stalla-Bourdillon/E. Rosati/M.C. Kettemann et al., “Open Letter to the European Commission – On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society”, available at: <https://ssrn.com/abstract=2850483>.

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1 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, *Official Journal of the European Communities* 2019 L 130, 92.

2 As to the debate during the legislative process (at the time concerning Article 13 of the proposed new copyright legislation), see Martin R.F. Senftleben/Christina Angelopoulos/Giancarlo F. Frosio/Valentina Moscon/Miguel Peguera/Ole-Andreas Rognstad, “The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform”, *European Intellectual Property Review* 40 (2018), 149; Christina Angelopoulos, “On Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market”, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2947800](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800); Giancarlo F. Frosio, “From Horizontal to Vertical: An Intermediary Liability Earthquake in Europe”, *Oxford Journal of Intellectual Property and Practice* 12 (2017), 565-575;

3 Article 29(1) DSMD.

- 3 Section B provides an executive summary. Section C deals with the concept of online content-sharing service providers (OCSSPs)<sup>4</sup> before section D embarks on a discussion of the licensing and content moderation duties which OCSSPs must fulfil in accordance with Article 17(1) and (4). Section E focuses on the copyright limitations mentioned in Article 17(7) that support the creation and dissemination of transformative user-generated content (UGC). It also discusses the appropriate configuration of complaint and redress mechanisms set forth in Article 17(9) that seek to reduce the risk of unjustified content removals. Section F addresses the possibility of implementing direct remuneration claims for authors and performers. Finally, section G includes the private international law aspect of applicable law – an impact factor that is often overlooked in the debate.

## B. Executive Summary

- 4 Member States implementing Articles 2(6) and 17 DSMD should make clear in their legislation or in the official memorandum that simple sharing services which offer users the mere function of uploading materials for the download of specific other users are not held liable for copyright infringement in accordance with Article 17(1), (4) DSMD. Since the level of control and advantages taken from uploaded content are much less intensive for those simple services than for “online content-sharing service providers” (OCSSPs) in the sense of Article 2(6) DSMD which organise and promote the materials uploaded by their users, Member States should continue to apply the general rules for secondary liability combined with a notice-and-take-down approach to the simple sharing services. In this regard, the safe harbour rules for hosting services laid down in Article 14 E-Commerce Directive, the ban of general monitoring obligations in Article 15 E-Commerce Directive and the fundamental freedoms of sharing service providers must be respected without restrictions of any kind.
- 5 The licensing and monitoring duties of OCSSPs under Article 17(1), 17(4)(a) and (c) DSMD should be applied gradually. If in case of Article 17(1) a licence agreement has already been concluded between the OCSSP and a rightholder, there are no further duties (scenario 1). In the absence of a licensing agreement, the OCSSP is obliged by Article 17(4)(a) to make “best efforts to obtain an authorisation”. The specific requirements of “best efforts,” however, should depend on the obviousness of the protectability of materials and on how publicly known the rightholders are. In case of obviously protected material and publicly known rightholders, OCCSPs should be obliged to actively contact rightholders and offer serious negotiations on licensing terms (scenario 2). In case of non-obvious materials or rightholders, they can remain passive until rightholders give notice. Upon receipt of a notice, OCCSPs must react immediately and enter into negotiations (scenario 3).
- 6 Considering the final wording of Article 17(4)(b), Member States should adopt a technology-neutral approach to measures that ensure the unavailability of works on online content platforms. This approach may include filtering technologies as long as they represent the best efforts and high industry standards of professional diligence. However, the approach should also allow courts to oblige OCSSPs to use different technical (or other) means once they are available on the market.
- 7 In implementing the copyright limitations that should survive the introduction of content moderation mechanisms in accordance with Article 17(7) DSMD, Member States can benefit from guidance which the CJEU has already provided with regard to the concepts of “quotation” and “parody.” (p. 11) These copyright limitations constitute user rights that strike a balance between copyright protection and freedom of expression. This rationale is particularly relevant to transformative UGC that reflects a sufficient degree of creative effort of the user. As long as UGC is the result of creative efforts that add value to underlying source material, user-generated remixes and mash-ups of third party content can be qualified as a specific form of transformative use falling under Article 11 CFR and Article 10 ECHR.
- 8 Implementing Article 17(7), Member States should take a fresh look at the concept of “pastiche” and clarify that the exemption of pastiches is intended to offer room for UGC. This approach offers Member States several options to regulate the scope of a UGC exemption. With regard to UGC that constitutes a “genuine” mix of styles and materials in the sense of an artistic “pastiche” that sufficiently plays with all underlying source materials, a mere clarification may suffice that the exemption of “pastiche” is intended to offer breathing space for UGC. Alternatively, Member States can decide to broaden the concept of “pastiche” to encompass not only uncontroversial pastiche scenarios with a “genuine” mix of styles and materials but also “non-genuine” forms of mixing pre-existing content, such as the combination of a self-created animal video with protected third-party music. With regard to this potential extension of the scope of the “pastiche” concept, it seems worth considering an obligation for OCSSPs to pay equitable remuneration.
- 9 It is advisable to make the submission of a complaint

4 See the definition in Article 2(6) DSMD.

against content filtering based on Article 17(9) as simple as possible. Otherwise, this might lead to a loss of an important safeguard against excessive algorithmic enforcement. In practice, the blocking of UGC should automatically lead to the opening of a dialogue box with a menu of standardized complaint options.

- 10 Members States should consider implementing direct remuneration claims for authors and performing artists which guarantee that the creative persons receive a fair share of the expected additional revenues obtained by rightholders under Article 17 DSMD. The Directive does not foresee such claims but tries to strengthen the position of authors and performers by contractual means under Article 18-23 DSMD. However, experiences with existing national legislation in this area show that it is doubtful whether these contractual means will suffice to redirect the revenue streams at least partly to the creative workers.
- 11 Questions of private international law are not covered by the DSMD, which leaves some room for manoeuvre for EU member states. However, Article 8 Rome II Regulation must be taken into account. At least for the procedural safeguards of Article 17(9), it should remain possible for member states to apply only one law.

## C. Definition of OCSSPs – Article 2(6) DSMD

### I. OCSSPs covered by Article 2(6)

- 12 Article 2(6) DSMD clarifies that the OCSSP concept underlying Article 17 DSMD covers providers of an information society service “of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes.” This definition leaves room for national legislation to introduce certain nuances with regard to *de minimis* activities. The reference to “a large amount of copyright-protected works or other subject matter” indicates that not each and every online platform with certain UGC features is automatically subject to the new liability regime following from Article 17 DSMD. By contrast, Recital 63 DSMD points in the direction of a fine-grained assessment “made on a case-by-case basis” – an assessment that “should take account of a combination of elements, such as the audience of the service and the number of files of copyright-protected content uploaded by the users of the service.”

- 13 As to the breadth of *de minimis* exclusions, Recital 62 DSMD confirms that the OCSSP definition is intended to target “only online services that play an important role on the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences.” The Recital also underlines that online platforms fall outside the scope of the OCSSP concept if they have a main purpose “other than that of enabling users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit from that activity.” Article 2(6) DSMD specifies in this regard that “not-for-profit online encyclopedias, not-for-profit educational and scientific repositories, open source software-developing and-sharing platforms, providers of electronic communications services as defined in Directive (EU) 2018/1972, online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use, are not ‘online content-sharing service providers’ within the meaning of this Directive.” In addition, Article 17(6) provides a privilege for start-up platforms which have been available to the public in the Union for less than three years and which have an annual turnover below 10 million €.
- 14 While these elements of the OCSSP concept do not seem to pose particular implementation challenges, the substantive requirement of organizing and promoting copyright-protected works or other protected subject matter uploaded by its users for profit-making purposes raises the question of the requisite degree of organization and promotion activities. Is it sufficient to offer a general website infrastructure that allows users to organize content more or less independently? Is the integration of a search tool sufficient? Or does the requirement of content organization imply that an OCSSP must provide a fixed framework of categories and be actively involved in the consistent organization of protected material in accordance with its own organization principle? If the latter, stricter standard is applied, social media services may fall outside the OCSSP definition because they leave a considerable degree of organization options and duties to their users. Similar questions arise from the promotion requirement. Is it necessary to promote specific forms of content that can be found on an online platform? Or does it suffice to promote more generally interactive features of the platform that enable users to upload content? Again, the stricter standard focusing on the promotion of concrete forms of content may lead to an OCSSP concept that does not cover social media services which may advertise their social media functions without announcing specific forms of content.

## II. Implementation in EU Member States

15 Member States implementing Article 2(6) and 17 DSMD should make clear in their legislation or in the official memorandum that online sharing services that do not organize and promote the materials uploaded by their users are not held liable for copyright infringement in accordance with Article 17(1), (4) DSMD. There are numerous simple sharing services which offer users the mere function of uploading materials for the download of specific other users, without any focus on pirated content, search function, structured streams of suitable contents etc. For those simple upload and sharing services, the DSM Directive does not require any of the proactive duties of care as now stated in Article 17 DSMD. Since the level of control and advantages taken from the uploaded contents are much less intensive for those services than for OCSSPs, Member States should continue to apply the general rules for secondary liability combined with a notice-and-take-down approach. In this regard, the safe harbour rules for hosting services as laid down in Article 14 E-Commerce Directive, the ban of general monitoring obligations in Article 15 E-Commerce Directive and the fundamental freedoms of OCSSPs must be respected without restrictions of any kind.<sup>5</sup> The CJEU will have an opportunity to develop a tailor-made regime for those services in the currently pending case *Elsevier/Cyando*.<sup>6</sup> Timely publication of legislative drafts of Member States which propose rules along these lines for the future regime of simple sharing services could also be helpful for the CJEU.

5 Cf. CJEU, 23 March 2010, case C-236/08, *Google and Google France*, para. 114-118; CJEU, 12 July 2011, case C-324/09, *L'Oréal/eBay*, para. 120-122; CJEU, 16 February 2012, case C-360/10, *Sabam/Netlog*, para. 45-51. For commentary, see S. Kulk, *Internet Intermediaries and Copyright Law – Towards a Future-Proof EU Legal Framework*, Utrecht: University of Utrecht 2018; C. Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis*, Alphen aan den Rijn: Kluwer Law International 2016; M. Husovec, *Injunctions Against Intermediaries in the European Union – Accountable But Not Liable?*, Cambridge: Cambridge University Press 2017; M.R.F. Senftleben, “Breathing Space for Cloud-Based Business Models: Exploring the Matrix of Copyright Limitations, Safe Harbours and Injunctions”, *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 4 (2013), 87-103.

6 See the pending prejudicial questions in CJEU, case C-683/18.

## D. Duties of OCSSPs – Article 17(1) and (4) DSMD

16 Article 17 represents an innovative concept of an exclusive right: OCSSPs perform an act of communication to the public or an act of making available to the public when they give the public access to copyright-protected works or other protected subject matter uploaded by its users. They are not merely secondarily liable for the infringements committed by their users but directly liable. However, OCSSPs may be exempted from liability if they fulfil the duties of care explicitly stated in Article 17(4). These duties of care are integrated in the scope of the exclusive right itself.<sup>7</sup> The CJEU has paved the way for such a concept of the right of communication to the public.<sup>8</sup> It is nevertheless a remarkable deviation from the traditional way of tailoring exclusive rights. The following sections explain the interplay between the exclusive right of the rightholder and the necessary efforts of the OCSSP to obtain a license (section D.I.), provides guidance on the required use of filtering technology or other efforts to ensure the unavailability of works not licensed (section D.II.) and explores the notice-and-take-down and notice-and-stay-down measures required by Article 17 (section D.III.). It closes with general advice on the implementation of Article 17 into national law (section D.IV.).

### I. Efforts to obtain a license according to Article 17(1) and (4)(a) DSMD

17 Article 17(1)(2) seems to state the obvious. OCSSPs shall obtain an authorisation from rightholders if they want to avoid being held liable. However, the rights and duties of the rightholder and the OCSSP are more nuanced if Article 17(1) and 17(4) (a) are considered together. According to Article 17(4)(a), an OCSSP is exempted from liability if it makes best efforts to obtain an authorisation from the rightholder (and also complies with the other conditions laid down in lit. b and c). It may therefore suffice to make best efforts to obtain a license to avoid liability. This may appear as a contradiction to

7 For a more detailed discussion of this question, see M. Husovec/J. Quintais, “How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms,” available at: <https://ssrn.com/abstract=3463011>.

8 CJEU, 8 September 2016, C-160/15, *GS Media*; CJEU, 26 April 2017, C-527/15, *Filmsteil*; CJEU, 14 June 2017, C-610/15, *The Pirate Bay*.



Article 17(1) at first glance, but seems reasonable as long as Article 17(1) and 17(4)(a) are interpreted as expressions of the same duty of the OCSSP.<sup>9</sup>

- 18 If conceptualized as expressions of the same duty of the OCSSP, Article 17(1) and 17(4)(a) may be applied as a cascade of different rules for different scenarios. The same may be said about the further nuances in Article 17(4)(b) and (c). Obviously, OCSSPs are in compliance with Article 17(1) if they have concluded a license agreement with the rightholders, which today is a common practice for all contents that are “monetized” over OCSSP platforms.
- 19 Article 17(4)(a) is applicable if the OCSSP has not (yet) concluded a license agreement. In this case it may be exempted from liability – and as a consequence keep protected materials on its platform without authorisation<sup>10</sup> – if and as long as it makes best efforts to obtain a license. This raises the question of what best efforts means in this regard. One extreme position would be that the OCSSP must proactively search for each and every item of protected material and its rightholder and offer adequate license conditions.<sup>11</sup> Such an interpretation would entail a general monitoring obligation for all uploaded content,<sup>12</sup> and conflicts with Article 17(8) DSM Directive, Article 15 E-Commerce Directive and the fundamental freedom of OCSSPs to conduct a business pursuant to Article 16 of the Charter of Fundamental Rights.<sup>13</sup> Moreover, the danger of overblocking would be serious. The other extreme position would be to oblige the rightholders always to take the first step and inform the OCSSP that protected material is available without a license

(or even offer a license?).<sup>14</sup> This would lead to an interpretation of “best efforts” which would allow OCSSPs merely to react to rightholders.

- 20 Legislators and judges should avoid such extreme positions and define pragmatic approaches, which balance the interests of both stakeholders.<sup>15</sup> A possible middle ground could be that OCSSPs must contact publicly known rightholders proactively and offer negotiations on licensing terms. This would comprise collective management organisations (CMOs) but also major individual rightholders, which are known in the market for the respective rights/content (e.g. music, film, photographs, games, etc.). In respect of such publicly known rightholders, it seems bearable for OCSSPs to operate proactively. Such negotiations are already the daily business of OCSSPs. Once the OCSSP has offered serious negotiations on license agreements, it should be up to the rightholder to provide the OCSSP with the necessary information on the repertoire owned or represented by the rightholder. To arrive at an appropriate distribution of duties during the pre-contractual negotiation phase, the guidelines can serve as a reference point which the CJEU gave in *Huawei/ZTE* with regard to the FRAND requirement in standard essential patent cases.<sup>16</sup> In this regard, it should be clear that, different from the scenario in *Huawei/ZTE*, the duty to negotiate of the OCSSP under Article 17(4)(a) DSM Directive does not depend on a dominant position; also the right holder is under no obligation to conclude a license contract. Nevertheless, the guidelines developed in *Huawei/ZTE* for negotiations in good faith may still serve as a blueprint for negotiations under Article 17(4)(a). To offer judges a solid basis for recourse to the *Huawei/ZTE* guidelines in the context of Article 17(4)(a), it seems advisable to include a reference to those pre-contractual obligations in the legislation that transposes the DSM Directive into national law.
- 21 However, if the protected material and the respective rightholder are not publicly known, e.g. if the rights are held by small or medium-sized companies or by individual authors without a collective representation, “best efforts” should not

9 See Timm Pravemann, “Art. 17 der Richtlinie zum Urheberrecht im digitalen Binnenmarkt - Eine Analyse der neuen europäischen Haftungsregelung für Diensteanbieter für das Teilen von Online-Inhalten”, *Gewerblicher Rechtsschutz und Urheberrecht* 2019, 783 (786)..

10 Thomas Dreier, “Die Schlacht ist geschlagen – Ein Überblick zum Ergebnis des Copyright Package der EU-Kommission”, *Gewerblicher Rechtsschutz und Urheberrecht* 2019, 771 (776).

11 See e.g. the position paper by different rightholders associations during the legislative process, „Europe’s Creators, Cultural and Creative Industries’ Call to the European Council” of 12.4.2018, available at: [https://www.ifpi.org/downloads/EU\\_Creators\\_Cultural\\_and\\_Creative\\_Industries\\_Call\\_to\\_European\\_Council.pdf](https://www.ifpi.org/downloads/EU_Creators_Cultural_and_Creative_Industries_Call_to_European_Council.pdf)

12 Franz Hofmann, “Die Plattformverantwortlichkeit nach dem neuen europäischen Urheberrecht – »Much Ado About Nothing«?”, *Zeitschrift für Urheber- und Medienrecht* 2019, 617 (621).

13 CJEU, 16 February 2017, C-360/10, Sabam/Netlog.

14 Judith Steinbrecher, “Die EU-Urheberrechtsrichtlinie aus Sicht der Digitalwirtschaft - Zeit für Augenmaß und faktenbasierte Gesetzgebung”, *Multimedia und Recht* 2019, 639 (642).

15 Compare Dreier, *supra* note 10, at 776; Opinion of the German Association for Intellectual Property and Copyright Law (GRUR) of 5.9.2019, p. 62 et seq., available at: [http://www.grur.org/uploads/tx\\_gstatement/2019-09-05-GRUR-Stellungnahme\\_zur\\_DSM-\\_und\\_zur\\_Online\\_SatCab-RL\\_endg.pdf](http://www.grur.org/uploads/tx_gstatement/2019-09-05-GRUR-Stellungnahme_zur_DSM-_und_zur_Online_SatCab-RL_endg.pdf) [GRUR Opinion].

16 CJEU, 16 July 2015, case C-170/13, Huawei/ZTE, para. 63-69.



require extensive monitoring and search activities. For those materials, it must suffice for the OCSSP to react immediately to a notice by the rightholder.<sup>17</sup> Before such a notice, the OCSSP can remain passive. This will incentivize smaller rightholders to seek representation by CMOs or other collective entities. Also, Article 12 DSMD may play a role in this regard. The two approaches under Article 17(4)(a) should not be applied in a schematic way as a principle – OCSSP must always be active – and an exception – rightholders must never be active unless there are exceptional circumstances – but rather on a case-by-case basis.<sup>18</sup>

22 To sum up, the cascade of licensing duties under Article 17(1) and 17(4)(a) should be analysed according to the following scheme:

1. Article 17(1): license agreement concluded, no further best efforts required under Article 17(4)(a); (see *supra*)
2. Article 17(4)(a): no license agreement concluded, obvious protected materials and publicly known rightholders → best efforts: OCSSP must actively contact these known rightholders and offer serious negotiations on licensing terms;
3. Article 17(4)(a): no license agreement concluded, non-obvious protected materials or rightholders → best efforts: OCSSP can remain passive until rightholders (including CMOs) give notice but must react immediately after receiving such notice.

23 The testing scheme should be used as a starting point of the analysis. Courts should also take into account, according to Article 17(5), “the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service” but also criteria like the degree of specialisation of the OCSSP in kinds of content, the collective organisation or fragmentation of

rights etc.<sup>19</sup> In any case, all measures required from OCSSPs and rightholders must respect the principle of proportionality.

24 Member States should encourage OCSSPs and rightholders to take part in the stake holder dialogues foreseen in Article 17(10) and develop best practices on a national level which may also include framework agreements, such as agreements between OCSSPs and CMOs, on the best efforts prescribed by Article 17(4). Such practices and agreements on a national level, however, should not undermine the development of pan-European standards. By contrast, they should contribute to the identification of best practices and foster their broader application across EU Member States.

## II. Best efforts to ensure the unavailability of works according to Article 17(4)(b) DSMD

25 Even though filtering technologies have been at the heart of the European debate about Article 17 and the DSMD at large, the notion of “filter”, “filtering” or “upload-filter” is not used in the text of the DSMD, neither in the regulatory part nor in the exceptionally long Recitals 61-71 on Article 17. Instead, Article 17(4)(b) uses a generic, technology-neutral language. For being exempted from liability, OCSSPs must demonstrate

*“that they have (...) (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information.”*

26 This neutral language however can hardly disguise the fact that all parties involved in the legislative process had filtering technologies in mind when the provision was drafted, most obviously the famous Content-ID technology used by Google/Youtube.<sup>20</sup> Today, it is common knowledge that the major platforms covered by Article 17 DSMD already make extensive use of such filtering technologies under the current rules. In this regard, especially in light

17 See Rec. 66 para. 2; see also Matthias Leistner, “European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S.”, forthcoming *Intellectual Property Journal* 2020, at 26, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3572040](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3572040).

18 Otherwise the maxim „*exceptiones sunt strictissimae interpretationis*” would be applied with unwanted results; contra GRUR Opinion, *supra* note 15, p. 54 et seq.

19 Compare Opinion of the German Society for musical performing and mechanical reproduction rights (GEMA) of 6.9.2019, p. 46 et seq., available at: [https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Stellungnahmen/2019/Downloads/090619\\_Stellungnahme\\_GEMA\\_EU-Richtlinien\\_Urheberrecht.pdf?\\_\\_blob=publicationFile&v=3](https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Stellungnahmen/2019/Downloads/090619_Stellungnahme_GEMA_EU-Richtlinien_Urheberrecht.pdf?__blob=publicationFile&v=3) [GEMA Opinion].

20 See <https://support.google.com/youtube/answer/2797370>.

of the user rights in Article 17(7) and 17(9), certain aspects of the provisions may even be welcomed as a juridification of a practice of some OCSSPs which have suffered an adequate regulatory framework to date – and adequate safeguards against excessive use of filtering technology.

- 27 Based on the final wording of Article 17(4)(b), member states will be well advised to implement a technology-neutral provision which may include filtering technologies as long as they represent the best efforts and high industry standard of professional diligence, but which also allows courts to oblige OCSSPs to use different technical (or other) means once they are available on the market. As the technological development stands today, it would be incompatible with Article 17(4)(b) to ban filtering technologies.<sup>21</sup> Vice versa, member states should also abstain from designating filtering technologies as the only possible way to comply with Article 17(4)(b).
- 28 The more precisely filtering technologies are capable of spotting infringing materials on OCSSPs, the less problematic they are. By contrast, the more “false positives” they produce, the more significant their impact on the fundamental rights of users and the public at large will be.<sup>22</sup> Article 17 tries to mitigate the risk of overblocking filtering technologies by different means, especially by the rules on the preservation of legally uploaded content under Article 17(7), see below at 3.1-3.4 and by the procedural safeguards for users under Article 17(9), see below at 3.5.
- 29 Moreover, filtering or other technical solutions are only required insofar as the rightholder has provided the OCSSP with the relevant and necessary information. Any filtering must be restricted to those specific content items. It can be assumed that the preservation rules and procedural safeguards of Article 17(7) and 17(9) will incentivize OCSSPs to limit the number of “false positives” as much as possible. But the significance of this effect will depend on how active users – or user’s organisations and NGOs – will use the procedural safeguards of Article 17(9) which again depends on the implementation of the harmonized legal framework into member state law.
- 30 The closer determination of “industry standards of professional diligence” and “best efforts” expected from OCSSPs will depend both on the

“availability of suitable and effective means and their cost for service providers” and on the “the type, the audience and the size of the service and the type of works or other subject matter uploaded”, Article 17(5). Smaller OCSSPs with diverse forms of uploaded content should not be required to meet the same standards as bigger, specialised platforms.<sup>23</sup> Here, simple title-based filtering may suffice as a starting point, if more sophisticated ways of content identification are beyond reach in light of the volume of platform activities and diversity of materials, and if smaller OCSSPs do not have the chance of reducing costs by pooling resources and developing more sophisticated systems in collaboration with others.<sup>24</sup> As a superficial mode of identifying potentially infringing material, however, title-based filtering should be supplemented with safeguards against overblocking, such as easy access to complaint mechanisms that allow users to signal problematic content removals immediately under Article 17(9) DSMD. For derivative works a manual review may be required before blocking content.<sup>25</sup>

- 31 Also, the quality of the information provided by the rightholder will play an important role. For both parties, the principle of proportionality must be respected. If the proportionality test is applied effectively, it can also serve as a vehicle to prevent the requirements of Article 17(4)(b) from further strengthening the dominant market position of existing major platforms.<sup>26</sup> In this regard, the number of notified works and the diversity of platform content are not the only relevant parameters. In addition, the volume of uploads must be factored into the equation. An OCSSP receiving, on average, 1 million uploads every second can spread a 1 million € investment in a filtering system more broadly (1 € per upload) than an OCSSP receiving only 100.000 uploads per second (10 € per upload). However, the effectiveness of the proportionality test as a tool to level out these differences depends to a large extent on the interpretation of Article 17(4)(b) by the courts and finally the CJEU.

23 René Houareau, “Die EU-Urheberrechtsrichtlinie aus Sicht der Musikindustrie – Plattform-Haftung, Lizenzpflicht und Harmonisierung – auf dem Weg zu einem resilienten Markt”, *Multimedia und Recht* 2019, 635 (637).

24 GEMA Opinion, *supra* note 19, p. 47.

25 GEMA Opinion, *supra* note 19, p. 48.

26 Torsten J. Gerpott, “Artikel 17 der neuen EU-Urheberrechtsrichtlinie: Fluch oder Segen? – Einordnung des Streits um „Upload-Filter“ auf Online-Sharing-Plattformen”, *Multimedia und Recht* 2019, 420 (423).

21 See also Geralt Spindler, Report commissioned by the parliamentary group of the German Greens of 14.12.2019, p. 44, available at: [https://www.gruene-bundestag.de/fileadmin/media/gruenebundestag\\_de/themen\\_az/netzpolitik/pdf/Gutachten\\_Urheberrechtsrichtlinie\\_01.pdf](https://www.gruene-bundestag.de/fileadmin/media/gruenebundestag_de/themen_az/netzpolitik/pdf/Gutachten_Urheberrechtsrichtlinie_01.pdf) [Spindler Report].

22 Pravemann, *supra* note 9, at 787.

### III. Notice-and-take-down according to Article 17(4)(c) DSMD

- 32 OCSSPs have to comply with all three obligations listed in Article 17(4)(a-c) to be exempted from liability. They must therefore – besides best efforts to obtain authorisation (a) and best efforts to ensure unavailability of certain works (b) – also (c) demonstrate that they have

*“acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).”*

- 33 Lit. c) takes up the known concept of “notice-and-take-down” and supplements it with a “notice-and-stay-down” principle.<sup>27</sup> OCSSPs must not only disable access to the specific content notified by the rightholder but they must also take measures to prevent their future uploads which again will be achieved, at least for the time being, by use of filtering technologies. In this regard, it would be reasonable for implementing member states to clarify the extent of this stay-down obligation, e.g. whether the global reference to “the notified works or other subject matter” in Article 17(4)(c) still leaves room for confining the stay-down obligation to repeated uploads by the same user of the identical material<sup>28</sup> or whether it also implies an obligation to prevent uploads by other users and perhaps even of slightly modified material. Without such a clarification, circumvention strategy by users would be unduly facilitated.<sup>29</sup> In this regard, it should be noted that the CJEU recently held in a case concerning defamatory statements on a social media platform, that Article 15 E-Commerce-Directive “does not preclude a court of a Member State from ordering a host provider to remove information which it stores, the content of which is identical to the content of information which was previously declared to be unlawful, or to block access to that information, irrespective of who requested the storage of that information.”<sup>30</sup> Such an order should also be possible under Article 17(4)(c).

27 See already CJEU, 12 July 2011, C-324/09, L'Oréal/eBay, para. 144.

28 CJEU, 12 July 2011, C-324/09, L'Oréal/eBay, para. 141, pointed in this direction by referring to “further infringements of that kind by the same seller...”

29 GRUR Opinion, *supra* note 15, p. 61.

30 CJEU, 3 October 2019, C-18/18, Eva Glawischnig-Piesczek/Facebook Ireland, Ruling.

### IV. Implementation in EU Member States

- 34 Given the fact that the DSM Directive is a full harmonisation instrument, every specification of the rights and duties of the parties under Article 17(1) and (4) by the legislator is at risk of being overruled by the CJEU. Most of the terms of the Directive are subject to an autonomous interpretation by the CJEU. Member States should therefore consider carefully whether they should deviate or specify the provisions on the national level or whether they should choose a language similar to the DSM Directive<sup>31</sup> and give further explanation, such as guidance on underlying objectives and interpretative preferences, in an official explanatory memorandum or other legislative materials. Even a full harmonisation instrument leaves some room for manoeuvre for Member States which should be used for a fertile regulatory competition among different approaches, be it codified in the legislative measures of Member States or in explanatory memoranda or case law.

### E. Use Privileges and Complaint and Redress Mechanisms – Article 17(7) and (9) DSMD

- 35 Article 17 DSMD concerns not only the new licensing and filtering duties that have been discussed in the preceding section. The provision also concerns certain measures to preserve breathing space for forms of UGC that may be qualified as “transformative” in the light of the creative input which the user added to pre-existing third-party content. Article 17(7) DSMD underlines the need to safeguard copyright limitations for creative remix activities, in particular use for the purposes of “quotation, criticism and review,” and “caricature, parody and pastiche.”<sup>32</sup> As these use privileges enhance freedom of expression and information, they are important counterbalances to the new licensing and filtering obligations (following section E.I.).<sup>33</sup> Against this

31 See e.g. the French Projet de Loi of 5.12.2019, MICE1927829L/Bleue-1, p. 28 et seq.

32 Article 17(5) DSMD.

33 P.B. Hugenholtz/M.R.F. Senftleben, *Fair Use in Europe. In Search of Flexibilities*, Amsterdam: Institute for Information Law/VU Centre for Law and Governance 2011, 29-30. For a discussion of new UGC use privileges under the umbrella of EU copyright law, see J.-P. Triaille/S. Dusollier/S. Depreeuw/J.B. Hubin/F. Coppens/A. de Francquen, Study on the Application of Directive 2001/29/EC on Copyright

background, Member States may consider the opportunity of combining the implementation of the DSM Directive, in particular Article 17(7) DSMD, with the introduction of a broader “pastiche” limitation covering a wider spectrum of UGC (section E.II.). If a broad limitation infrastructure for UGC – based on the open-ended concept of “pastiche” – is combined with the payment of equitable remuneration, Article 17(7) DSMD will also generate new revenue streams that support the general policy objective of the new EU legislation to close the so-called “value gap” (section E.III.). Even though platform providers will still have to distinguish between permissible pastiche and prohibited piracy, the introduction of new use privileges for UGC is a gateway to the development of algorithmic content identification tools that follow a different filtering logic. Instead of focusing on traces of protected third-party content that may render user uploads impermissible, a filtering system looking for quotations, parodies and pastiches focuses on creative user input that may justify the upload (section E.IV.). In addition, Article 17(9) DSMD supplements the guarantee of certain use privileges in Article 17(7) DSMD with a complaint and redress mechanism that may also play an important role for creative users in the EU (section E.V.).

## I. Impact of Freedom of Expression

- 36 Article 17(7) DSMD leaves little doubt that the use of algorithmic enforcement measures must not erode areas of freedom that support the creation and dissemination of transformative amateur productions that are uploaded to platforms of OCSSPs:

*“The cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation.*

*Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services:*

and Related Rights in the Information Society, Study prepared by De Wolf & Partners in collaboration with the Centre de Recherche Information, Droit et Société (CRIDS), University of Namur, on behalf of the European Commission (DG Markt), Brussels: European Union 2013, 522-527 and 531-534 [Triaille et al.].

(a) quotation, criticism, review;

(b) use for the purpose of caricature, parody or pastiche.”

- 37 Use of the formulation “shall not result in the prevention” and “shall ensure that users [...] are able” give copyright limitations for “quotation, criticism, review” and “caricature, parody or pastiche” an elevated status. In Article 5(3)(d) and (k) of the Information Society Directive 2001/29/EC (ISD),<sup>34</sup> these use privileges were only listed as limitation prototypes which EU Member States are free to introduce (or maintain) at the national level. The adoption of a quotation right and an exemption of caricature, parody or pastiche remained optional. Article 17(7) DSMD, however, converts these use privileges into mandatory breathing space for transformative UGC.<sup>35</sup> This metamorphosis makes copyright limitations in this category particularly robust: they “shall” survive the application of automated filtering tools. In case national legislation does not already provide for the exemption of “quotation, criticism, review” and “caricature, parody or pastiche”, the use of “shall” in Article 17(7) imposes a legal obligation on Member States to introduce these use privileges.<sup>36</sup> The reference to “existing” exceptions or limitations must not be misunderstood in the sense of pre-existing national quotation and parody rules. By contrast, it only reflects the fact that these are long-standing EU limitation prototypes that belong to the “existing” canon of permissible use privileges laid down in Article 5 ISD.<sup>37</sup> This solution also makes sense from the perspective of harmonization in the internal

34 Article 5(3)(d) and (k) of 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 2001 L 167, 10).

35 Cf. J. Quintais/G. Frosio/S. van Gompel/P.B. Hugenholtz/M. Husovec/B.J. Jütte/M.R.F. Senftleben, “Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics”, *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 10 (2020), 277 (278, para. 11) [Quintais et al.].

36 Favoring a mandatory nature of exceptions and limitations in the form of user’s rights, in particular when justified by fundamental rights such as freedom of expression, see the previous Opinion of the European Copyright Society: C. Geiger/J. Griffiths/M. Senftleben/L. Bently/R. Xalabarder, ‘Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union, Opinion on the Judgment of the CJEU in Case C-201/13, *Deckmyn*’, *International Review of Intellectual Property and Competition Law* 46 (2015), 93 (97, para. 22).

37 *ibid.*, 279, para. 14-15.



market. Only if all Member States provide for these use privileges in the context of UGC uploads, can filtering systems be applied across territorial borders and can OCSSPs apply the same system configuration and standard of review throughout the EU. This, in turn, ensures that EU citizens enjoy the same freedom of transformative use and a shared UGC experience regardless of territorial borders.

- 38 In implementing Article 17(7) DSMD, Member States can benefit from guidance which the CJEU has already provided with regard to the concepts of “quotation” and “parody.” In *Painer*, the CJEU underlined the need for an interpretation of the quotation right following from Article 5(3)(d) ISD that enables its effectiveness and safeguards its purpose.<sup>38</sup> The Court clarified that Article 5(3)(d) ISD was “intended to strike a fair balance between the right of freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors.”<sup>39</sup>
- 39 In its more recent decision in *Pelham*, the CJEU clarified that an essential characteristic of a quotation was

*“the use, by a user other than the copyright holder, of a work or, more generally, of an extract from a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user, since the user of a protected work wishing to rely on the quotation exception must therefore have the intention of entering into ‘dialogue’ with that work...”*<sup>40</sup>

38 CJEU, 1 December 2011, case C-145/10, *Painer*, para. 132-133.

39 CJEU, *ibid.*, para. 134.

40 CJEU, 29 July 2019, case C-476/17, *Pelham*, para. 71. As to the background of this decision, see L. Bently/S. Dusollier/C. Geiger et al., “Sound Sampling, a Permitted Use Under EU Copyright Law? Opinion of the European Copyright Society in Relation to the Pending Reference Before the CJEU in Case C-476/17, *Pelham GmbH v. Hütter*”, *International Review of Intellectual Property and Competition Law* 2019, 467 (486-487); for a critique of the dialogue requirement, see Tanya Aplin/Lionel Bently, “Displacing the Dominance of the Three-Step Test: The Role of Global, Mandatory Fair Use”, in: Wee Loon Ng/Haochen Sun/Shyam Balganes (eds.), *Comparative Aspects of Limitations and Exceptions in Copyright Law*, Cambridge: Cambridge University Press 2018 (forthcoming), 6-8, available at: <https://ssrn.com/abstract=3119056>; Lionel Bently/Tanya Aplin, “Whatever Became of Global Mandatory Fair Use? A Case Study in Dysfunctional Pluralism”, in: Susy Frankel (ed.), *Is Intellectual Property Pluralism Functional?*, Cheltenham: Edward Elgar 2019, 8-36.

- 40 With regard to the parody exemption in Article 5(3)(k) ISD, the CJEU provided guidance in *Deckmyn*. As in its earlier *Painer* decision, the Court underlined the need to ensure the effectiveness of the parody exemption<sup>41</sup> as a means to balance copyright protection against freedom of expression.<sup>42</sup>
- 41 As these decisions demonstrate, the fundamental guarantee of freedom of expression plays a crucial role.<sup>43</sup> Relying on Article 11 of the Charter of Fundamental Rights of the EU (CFR) and Article 10 of the European Convention on Human Rights (ECHR), the CJEU interpreted the quotation right and the parody exemption less strictly than limitations without a comparably strong freedom of speech underpinning.<sup>44</sup> The Court emphasized the need to achieve a “fair balance” between, in particular, “the rights and interests of authors on the one hand, and the rights of users of protected subject-matter on the other.”<sup>45</sup> The Court thus referred to quotations and parodies as user “rights” rather than mere user “interests.” In *Funke Medien* and *Spiegel Online*, the Court explicitly confirmed the status of user rights by pointing out that, “although Article 5 of Directive 2001/29 is expressly entitled ‘Exceptions and

41 CJEU, 3 September 2014, case C-201/13, *Deckmyn*, para. 22-23. For a detailed comment on this ruling, see ECS, *supra* note 36.

42 CJEU, *ibid.*, para. 25-27.

43 For a discussion of the status quo reached in balancing copyright protection against freedom of expression, see Christophe Geiger/Elena Izyumenko, “Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way”, *European Intellectual Property Review* 41 (2019), 131 (133-136).

44 As to the influence of freedom of speech guarantees on copyright law in the EU, see Christophe Geiger/Elena Izyumenko, “Copyright on the Human Rights’ Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression”, *International Review of Intellectual Property and Competition Law* 45 (2014), 316; Christophe Geiger, “Constitutionalising’ Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union”, *International Review of Intellectual Property and Competition Law* 37 (2006), 371; Alain Strowel/F. Tulkens/Dirk Voorhoof (eds.), *Droit d’auteur et liberté d’expression*, Brussels: Editions Larcier 2006; P. Bernt Hugenholtz, “Copyright and Freedom of Expression in Europe”, in: Niva Elkin-Koren/Neil Weinstock Netanel (eds.), *The Commodification of Information*, The Hague/London/Boston: Kluwer 2002, 239.

45 CJEU, 1 December 2011, case C-145/10, *Painer*, para. 132; CJEU, 3 September 2014, case C-201/13, *Deckmyn*, para. 26; see also CJEU, 29 July 2019, case C-476/17, *Pelham*, para. 32, 37 and 59.



limitations', it should be noted that those exceptions or limitations do themselves confer rights on the users of works or of other subject matter."<sup>46</sup>

- 42 The CJEU's line of reasoning stemming from quotation and parody cases sheds light on a common denominator of the copyright limitations listed in Article 17(7): these user rights strike a balance between copyright protection and freedom of expression. This rationale is particularly relevant to transformative UGC. As long as UGC is the result of creative efforts that add value to underlying source material,<sup>47</sup> user-generated remixes and mash-ups of third party content can be qualified as a specific form of transformative use falling under Article 11 CFR and Article 10 ECHR.<sup>48</sup>

## II. Cultivation of the Concept of "Pastiche"

- 43 Bearing this insight in mind, it can be of particular importance during the implementation process to consider not only the well-established concepts of "quotation" and "parody" but also the less developed concept of "pastiche." In *Deckmyn and Pelham*, the CJEU established the rule that the meaning of limitation concepts in EU copyright law had to be determined by considering the usual meaning of those concepts in everyday language, while also taking into account the legislative context in which they occur and the purposes of the rules of which they are part.<sup>49</sup> The Merriam-Webster English Dictionary defines "pastiche" as "a literary, artistic, musical, or architectural work that imitates the style of previous work."<sup>50</sup> It also refers to a "musical,

literary, or artistic composition made up of selections from different works."<sup>51</sup> Similarly, the Collins English Dictionary describes a "pastiche" as "a work of art that imitates the style of another artist or period" and "a work of art that mixes styles, materials, etc."<sup>52</sup>

- 44 Evidently, the aspect of mixing pre-existing materials and using portions of different works is of particular importance to UGC. In many cases, the remix of pre-existing works in UGC leads to a new creation that "mixes styles, materials etc." and, in fact, is "made up of selections from different works." Hence, the usual meaning of "pastiche" encompasses forms of UGC that mix different source materials and combine selected parts of pre-existing works. Against this background, "pastiche" can be an important reference point for lawmakers seeking to offer additional freedom for creative platform users who express themselves in transformative UGC – additional room that goes beyond the long-standing concepts of "quotation" and "parody."<sup>53</sup>

- 45 Until now, EU Member States have not made effective use of this option to regulate UGC. Implementing Article 17(7), they could take a fresh look at the concept of "pastiche" and clarify that the exemption of pastiches is intended to offer room for UGC.<sup>54</sup> In this clarification process, Member States have several options depending on the scope of the UGC exemption which they consider appropriate:

51 *ibid.*

52 Collins English Dictionary, available at: <https://www.collinsdictionary.com/dictionary/english/pastiche>.

53 Cf. the detailed analysis conducted by Emily Hudson, "The pastiche exception in copyright law: a case of mashed-up drafting?", *Intellectual Property Quarterly* 2017, 346 (348-352 and 362-364), which confirms that the elastic, flexible meaning of the term "pastiche" is capable of encompassing "the utilisation or assemblage of pre-existing works in new works" (at 363); in the same sense Florian Pötzlberger, "Pastiche 2.0: Remixing im Lichte des Unionsrechts", *Gewerblicher Rechtsschutz und Urheberrecht* 2018, 675 (681); see also João P. Quintais, *Copyright in the Age of Online Access – Alternative Compensation Systems in EU Law*, Alphen aan den Rijn: Kluwer Law International 2017, 235 [Quintais], who points out that the concept of "pastiche" can be understood to go beyond a mere imitation of style. In line with the results of the study tabled by Triaille et. al., *supra* note 33, at 534-541; Quintais, *ibid.*, 237, nonetheless expresses a preference for legislative reform.

54 As to guidelines for a sufficiently flexible application of the pastiche exemption in the light of the underlying guarantee of free expression, see Hudson, *supra* note 53, at 362-364.

46 CJEU, 29 July 2019, case C-516/17, *Spiegel Online*, para. 54; CJEU, 29 July 2019, case C469/17, para. 70; for a more detailed discussion of this point, see C. Geiger/E. Izyumenko, "The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, but Still Some Way to Go!", *International Review of Intellectual Property and Competition Law* 51 (2020), 282 (292-298).

47 OECD, 12 April 2007, "Participative Web: User-Created Content", Doc. DSTI/ICCP/IE(2006)7/Final, available at: <https://www.oecd.org/sti/38393115.pdf>, 8.

48 Florian Pötzlberger, *Kreatives Remixing: Musik im Spannungsfeld von Urheberrecht und Kunstfreiheit*, Baden-Baden: Nomos 2018.

49 CJEU, 3 September 2014, case C-201/13, *Deckmyn*, para. 19; CJEU, 29 July 2019, case C-476/17, *Pelham*, para. 70.

50 Merriam-Webster English Dictionary, available at: <https://www.merriam-webster.com/dictionary/pastiche>.

- with regard to UGC that constitutes a “genuine” mix of styles and materials in the sense of an artistic “pastiche” that sufficiently plays with all underlying source materials, a mere clarification may suffice that the exemption of “pastiche” is intended to offer breathing space for UGC. This focus on “genuine” pastiche cases, however, may fail to cover widespread forms of UGC, such as funny animal videos with unmodified, copyrighted music in the background. As the music is not part of a transformative mix with other forms or styles of music, this limited version of a pastiche exemption may require a license and related measures under Article 17(1) and (4) DSM. The animal video as such, however, testifies the creative efforts of the uploading user. Against this background, the regulation of this creative form of UGC on the basis of Article 17(1) and (4) DSM may appear too harsh in the light of the described need to reconcile copyright protection with freedom of expression and information – in this case, the freedom of expression of amateur creators;
- alternatively, the concept of “pastiche” could be broadened to encompass not only uncontroversial pastiche scenarios with a “genuine” mix of styles and materials but also “non-genuine” forms of mixing pre-existing content, such as the combination of a self-created animal video with protected third-party music. As, in this scenario with a “non-genuine” form of pastiche, the music is simply added, but not mingled with other materials, it seems worth considering to introduce – with regard to this extension of the scope of the “pastiche” concept – an obligation for OCSSPs to pay equitable remuneration. In this alternative scenario, the remuneration would thus not follow from licensing deals under Article 17(1) and (4) DSM. Instead, the remuneration would follow from statutory remuneration rules that are administered by CMOs and lead to the distribution of remuneration payments in accordance with applicable repartitioning schemes.

### III. Payment of Equitable Remuneration

- 46 As to the introduction of an appropriate remuneration mechanism in the latter scenario of “non-genuine” forms of pastiche, it is important to point out that the combination of use privileges with the payment of equitable remuneration is not an anomaly in the European copyright tradition. In a 1999 case concerning the Technical Information Library Hanover, the German Federal Supreme Court, for example, permitted the library’s practice of copying and dispatching scientific articles on request by single persons and industrial undertakings even though

this practice came close to a publisher’s activities.<sup>55</sup> To ensure the payment of equitable remuneration, the Court deduced a payment obligation from the three-step test in international copyright law and permitted the continuation of the service on the condition that equitable remuneration be paid.<sup>56</sup>

- 47 Under harmonized EU copyright law, the CJEU adopted a similar approach. In *Technische Universität Darmstadt*, the Court recognized an “ancillary right”,<sup>57</sup> allowing libraries to digitize books in their holdings for the purpose of making these digital copies available via dedicated reading terminals on the library premises. To counterbalance the creation of this broad use privilege, the Court deemed it necessary – in light of the three-step test in Article 5(5) ISD – to insist on the payment of equitable remuneration. Discussing compliance of German legislation with this requirement, the Court was satisfied that the conditions of the three-step test were met because German libraries had to pay adequate remuneration for the act of making works available on dedicated terminals after digitization.<sup>58</sup>
- 48 Hence, it is not unusual in the EU to establish an obligation to pay equitable remuneration with regard to use privileges that have a broad scope. The courts derive the obligation to pay equitable remuneration from the three-step test in international and EU copyright law.<sup>59</sup> Considering this practice, there can be little doubt that EU Member States that already provide for an exemption for pastiches (based on Article 5(3)(k) ISD), or that introduce such an exemption in implementing the DSM Directive, could supplement this user right with an obligation to pay equitable remuneration for “non-genuine” forms of pastiches, such as the aforementioned animal video with unaltered background music.

55 German Federal Court of Justice, 25 February 1999, case I ZR 118/96, “TIB Hannover”, *Juristenzeitung* 1999, 1000.

56 German Federal Court of Justice, *ibid.*, 1005-1007.

57 CJEU, 11 September 2014, case C117/13, *Technische Universität Darmstadt*, para. 48.

58 CJEU, *ibid.*, para. 48.

59 See Article 9(2) BC, Article 13 TRIPS and Article 10 WCT at the international level, and Article 5(5) ISD in EU copyright law. For a more detailed analysis in the light of the three-step test, see M.R.F. Senftleben, ‘User-Generated Content – Towards a New Use Privilege in EU Copyright Law’, in: T. Aplin (ed.), *Research Handbook on IP and Digital Technologies*, Cheltenham: Edward Elgar 2020, 136-162; C. Geiger/D. Gervais/M.R.F. Senftleben, ‘The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law’, *American University International Law Review* 29 (2014), 581-626.

In this way, it becomes possible to broaden the scope of the pastiche exemption and cover not only “genuine” but also “non-genuine” forms of mixing different source materials in UGC.<sup>60</sup> OCSSPs could use advertising revenue to finance the remuneration payments. As a result, users would remain free to create and upload creative content mash-ups and remixes, even if they contain unaltered third-party components, such as background music. OCSSPs, however, would be obliged to pay equitable remuneration for the dissemination of UGC that falls within the scope of the new, broadened category of “non-genuine” pastiche.<sup>61</sup>

- 49 A remunerated UGC privilege would have the advantage of creating a continuous revenue stream for authors and performers. While licensing and filtering agreements between copyright owners and OCSSPs may predominantly benefit the content industry (as to the option of introducing direct remuneration claims of authors and performers, see section F below), the repartitioning scheme of

collecting societies receiving UGC levy payments could ensure that authors and performers obtain a substantial part of the UGC remuneration, even if they have transferred their copyright and neighbouring rights to exploiters of their works and performances.<sup>62</sup>

## IV. Reverse Filtering Logic

- 50 Quite clearly, Article 17(7) DSMD does not entail a full immunity from filtering obligations. Even if an OCSSP decides to focus on permitted quotations, parodies and pastiches, it will still be necessary to introduce algorithmic enforcement measures to separate the wheat from the chaff. The platform provider will have to distinguish between permissible pastiche and prohibited piracy. Nonetheless, the robust use privileges for UGC in Article 17(7) DSMD offer important impulses for the development of content identification systems that seek to find creative input that renders the upload permissible instead of focusing on third-party content that makes the upload problematic.<sup>63</sup>

- 51 The exemption of quotations, parodies and pastiches paves the way for a markedly different approach to the assessment of content. Instead of focusing on traces of protected third-party content in UGC (and starting points for blocking content), it becomes critical to establish whether the user has added sufficient own creativity to arrive at a permissible form of UGC.

60 Admittedly, this solution leads to the dilemma that a creative form of use is subjected to the obligation to pay equitable remuneration. Traditionally, this has not been the case, cf. Reto M. Hilty/Martin R.F. Senftleben, “Rückschnitt durch Differenzierung? – Wege zur Reduktion dysfunktionaler Effekte des Urheberrechts auf Kreativ- und Angebotsmärkte”, in: T. Dreier/R.M. Hilty (eds.), *Vom Magnettonband zu Social Media – Festschrift 50 Jahre Urheberrechtsgesetz (UrhG)*, Munich: C.H. Beck 2015, 317 (328–329) [Hilty/Senftleben]. However, see the broader concept of a general use privilege for creative reuse (not limited to UGC) developed by Christophe Geiger, “Freedom of Artistic Creativity and Copyright Law: A Compatible Combination?”, *UC Irvine Law Review* 8 (2018), 413 (443–454); Id., “Statutory Licenses as Enabler of Creative Uses”, in: Kung-Chung Liu/Reto M. Hilty (eds.), *Remuneration of Copyright Owners – Regulatory Challenges of New Business Models*, Berlin: Springer 2017, 305 (308–318); Id., “Promoting Creativity through Copyright Limitations, Reflections on the Concept of Exclusivity in Copyright Law”, *Vanderbilt Journal of Entertainment and Technology Law* 12 (2010), 515 (541–544), who proposes a remunerated statutory limitation for commercial creative uses, administrated by an independent regulation authority which could solve ex post disputes between original and derivative creators on the price to be paid for the transformative use via mediation.

61 Cf. Matthias Leistner, “Copyright law on the internet in need of reform: hyperlinks, online platforms and aggregators”, *Journal of Intellectual Property Law & Practice* 12, No. 2 (2017), 146–149; Id., *supra* note 17, at 37; Matthias Leistner/Axel Metzger, “Wie sich das Problem illegaler Musikknutzung lösen lässt”, *Frankfurter Allgemeine Zeitung*, 4 January 2017, available at: <http://www.faz.net/aktuell/feuilleton/medien/gema-youtube-wie-sich-urheberrechts-streit-schlichten-liesse-14601949-p2.html>; Hilty/Senftleben, *supra* note 60, at 327–328.

62 In the context of repartitioning schemes of collecting societies, the individual creator has a relatively strong position. As to national case law explicitly stating that a remuneration right leads to an improvement of the income situation of the individual creator (and may be preferable over an exclusive right to prohibit use for this reason), see German Federal Court of Justice, 11 July 2002, case I ZR 255/00, “Elektronischer Pressespiegel”, 14–15; for a discussion of the individual creator’s entitlement to income from the payment of equitable remuneration, see Guido Westkamp, “The ‘Three-Step Test’ and Copyright Limitations in Europe: European Copyright Law Between Approximation and National Decision Making”, *Journal of the Copyright Society of the U.S.A.* 56 (2008), 1 (55–59); Quintais, *supra* note 53, at 335–336, 340–341, 347–349 and 356–357; European Copyright Society, *Opinion on Reprobel*, available at: <https://europeancopyrightsociety.org/opinion-on-reprobel/>.

63 Cf. Niva Elkin-Koren, “Fair Use by Design”, *UCLA Law Review* 64 (2017), 1082 (1093–1096).

52 Admittedly, it remains to be seen whether (and how) this reverse filtering logic can be implemented in practice.<sup>64</sup> It is conceivable, for instance, that users could upload not only their final pastiche but also a file containing exclusively the self-created material which they have combined with protected third-party content. In the case of separable input (the funny animal video on the one hand, the added background music on the other), the user creation can be included as a separate content item in the identification system. In this way, the system could be made “aware” that UGC contains different types of creative input.<sup>65</sup> Accordingly, it could factor this “insight” into the equation when calculating the ratio of own content to third party content. In addition, the potential of artificial intelligence and self-learning algorithms must not be underestimated. Filtering machines may be able to learn from decisions on content permissibility taken by humans. As a result, algorithmic content screening could become more sophisticated. It may lead to content identification systems that are capable of deciding easy cases and flagging difficult cases which could then be subject to human review.<sup>66</sup>

## V. Procedural Safeguards

53 Article 17(9) DSMD supplements the safeguards for creative user involvement laid down in Article 17(7) DSMD by offering procedural remedies. It provides for an “effective and expeditious complaint and redress mechanism” for users who are confronted with unjustified content blocking. Complaints shall be processed “without undue delay.” The content industry must “duly justify the reasons for their requests” vis-à-vis content blocking and removal. In the light of this substantiation of the filtering request, OCSPs will have to take a final decision on the status of the upload at issue.

64 For critical comments on the ability of automated systems to distinguish between an infringing copy and a permissible quotation, parody or pastiche, see the contribution of Peter K. Yu; Mark A. Lemley, “Rationalizing Internet Safe Harbors”, *Journal on Telecommunications and High Technology Law* 6 (2007), 101 (110-111); Dan L. Burk/Julie E. Cohen, “Fair Use Infrastructure for Rights Management Systems”, *Harvard Journal of Law and Technology* 15 (2001), 41 (56).

65 As to the creation of digital reference files in content identification systems, see Maayan Perel/Niva Elkin-Koren, “Accountability in Algorithmic Copyright Enforcement”, *Stanford Technology Law Review* 19 (2016), 473 (513-514); Lauren G. Gallo, “The (Im)possibility of “Standard Technical Measures” for UGC Websites”, *Columbia Journal of Law and the Arts* 34 (2011), 283 (296).

66 Elkin-Koren, *supra* note 63, at 1096-1098.

54 For this procedural safeguard to work well in practice, a high degree of efficiency and reliability is crucial. Evidence from the application of the counternotice system in the U.S.<sup>67</sup> shows quite clearly that users are unlikely to file complaints in the first place.<sup>68</sup> If users must wait a relatively long time for a final result, it is foreseeable that the complaint and redress mechanism will be incapable of safeguarding freedom of expression. In the context of UGC, it is often crucial to react quickly to current news and film, book and music releases. If the complaint and redress mechanism finally establishes that a lawful content remix or mash-up has been blocked, the significance of an affected quotation, parody or pastiche may already have passed.<sup>69</sup>

55 Against this background, it is advisable to make the submission of a complaint against content filtering as simple as possible. If users must fill in a complicated form and add lengthy explanations to substantiate their request, Article 17(9) will remain a dead letter. To avoid this loss of an important safeguard against excessive algorithmic enforcement, the blocking of UGC should automatically lead to the opening of a dialogue box with a menu of standardized complaint options, such as “The content blocking is unjustified because my upload is a permissible pastiche,” “...my

67 As to this feature of the notice-and-takedown system in U.S. copyright law, see Miquel Peguera, “The DMCA Safe Harbour and Their European Counterparts: A Comparative Analysis of Some Common Problems”, *Columbia Journal of Law and the Arts* 32 (2009), 481.

68 See the study conducted by Jennifer M. Urban/Laura Quilter, “Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act”, *Santa Clara Computer and High Technology Law Journal* 22 (2006), 621, showing, among other things, that 30% of DMCA takedown notices were legally dubious, and that 57% of DMCA notices were filed against competitors. While the DMCA offers the opportunity to file counter-notices and rebut unjustified takedown requests, Urban and Quilter find that instances in which this mechanism is used are relatively rare; however, cf. also the critical comments on the methodology used for the study and a potential self-selection bias arising from the way in which the analyzed notices have been collected by F.W. Mostert/M.B. Schwimmer, “Notice and Takedown for Trademarks”, *Trademark Reporter* 101 (2011), 249 (259-260).

69 Apart from the time aspect, complaint systems may also be implemented in a way that discourages widespread use, cf. Perel/Elkin-Koren, *supra* note 65, at 507-508 and 514. In addition, the question arises whether users filing complaints are exposed to copyright infringement claims in case the user-generated quotation, parody or pastiche at issue (which the user believes to be legitimate) finally proves to amount to copyright infringement, cf. Elkin-Koren, *supra* note 63, at 1092.



upload is a permissible parody,” “...is a permissible quotation” etc. The user should then be able to launch the complaint by simply clicking the box with the applicable argument supporting the review request.<sup>70</sup>

- 56 Ideally, this click should lead to the appearance of the contested content on the platform. As copyright owners will seek to minimize the period of online availability of allegedly infringing content, this appearance ensures that they avoid delays in the review process and “duly justify the reasons for their requests.” In addition, it is important to pave the way for complaint and redress mechanisms that also allow collective and concerted reactions, in particular based on initiatives taken by consumer organizations and NGOs.
- 57 Obviously, the crux of this regulatory model lies in the question of liability for the appearance of potentially infringing content until a final decision is taken on the status of the content item at issue. As Article 17(9) DSMD also gives users access to impartial out-of-court settlement mechanisms and, if this does not help, access to the courts, the period of uncertainty about the status of the content may be quite long. If OCSSPs are liable for harm flowing from content availability during this period, they will eschew the introduction of the described regulatory model. To solve this dilemma and allow the appearance of contested UGC directly after the uploading user has launched a complaint, platforms must not be exposed to liability for content which, in the end, is found to infringe copyright. Therefore, a liability shield should be available at least when an OCSSP can demonstrate that it has checked whether the user has not simply clicked one of the complaint buttons to play the system and make content available which, evidently, is mere piracy and very far from constituting a permissible quotation, parody or pastiche.<sup>71</sup>
- 58 If these checks and balances are in place, however, the contested UGC should become available on the OCSSP platform. Otherwise, the potentially lengthy procedure for clarifying the status of the UGC at issue may frustrate the goal to safeguard freedom of expression and information which, as explained above, underlies the user rights of Article 17(7) DSMD.

70 Cf. Quintais et al., *supra* note 35, at 280, para. 24..

71 Cf. Quintais et al., *supra* note 35, at 280-281, para. 27-28.

## F. Direct remuneration claims

- 59 Members States should consider implementing direct remuneration claims for authors and performing artists which guarantee that the creative persons receive a fair share of the expected additional revenues obtained by rightholders under Article 17 DSMD. The Directive does not foresee such claims but tries to strengthen the position of authors and performers by contractual means under Article 18-23 DSMD. However, experiences with existing national legislation in this area show that it is doubtful whether these contractual means will suffice to redirect the revenue streams at least partly to the creative workers.<sup>72</sup>
- 60 The German Government in its Protocol Declaration on Article 17 DSMD<sup>73</sup> has declared that it will examine the possibility of such direct remuneration claims. Such a claim would fit well into the system of direct remuneration claims that already exist in the *acquis communautaire* and in national copyright legislation, especially the unwaivable right to equitable remuneration in Article 5 Rental right and lending right Directive 2006/115/EC. In this regard, it should be noted that Article 17 DSMD does not preclude such direct remuneration claims.<sup>74</sup> Rather, the provision is neutral with regard to the allocation of rights. However, to avoid individual claims raised by single authors or performers, such direct remuneration claims should be administrated by CMOs.

## G. Applicable Law

### I. Possible deviations from a territorial approach

- 61 A topic of high practical importance for OCSSPs which has hardly been addressed during the legislative process or in academic writing is private international law.<sup>75</sup> Which law applies to the different

72 For instance, see M.R.F. Senftleben, ‘More Money for Creators and More Support for Copyright in Society - Fair Remuneration Rights in Germany and the Netherlands’, *Columbia Journal of Law and the Arts* 41, No. 3 (2018), 413-433.

73 Statement by the Federal Republic of Germany on the DSMD; in particular on Article 17 of the Directive of 15.4.2019, available at: [https://www.bmjv.de/SharedDocs/Pressemitteilungen/DE/2019/041519\\_Erklaerung\\_Richtlinie\\_Urheberrecht.html](https://www.bmjv.de/SharedDocs/Pressemitteilungen/DE/2019/041519_Erklaerung_Richtlinie_Urheberrecht.html).

74 Contra Houareau, *supra* note 23, at 636.

75 But see Spindler Report, *supra* note 21, at 70-72.

rights and duties under Article 17 DSMD? Can OCSSPs comply with one legislation implementing Article 17 DSMD or do they have to comply with 27 different national rules?

- 62 The only directly applicable European principle on this question is Article 8(1) Rome II-Regulation:

*“The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.”*

- 63 According to the traditional interpretation of this provision, rightholders would have to plead copyright infringement against OCSSPs in each of the countries for which they seek protection.<sup>76</sup> If they claim protection for multiple countries, the laws of these multiple countries would apply (“mosaic approach”) irrespective of the fact that available content may not be substantially used in each of those countries. The effect of such a literal application of Article 8(1) Rome II would be that OCSSPs would either apply geoblocking technology to comply with the requirements of the different member states or comply with the strictest regime all over Europe. Both approaches seem detrimental for the further development of a rich and diverse European landscape of information and cultural expression and also for the internal market of the European Union.
- 64 Two possible solutions should be considered when implementing Article 17 into national law. Firstly, member states could take up academic proposals for concentration of cases of ubiquitous infringement on the Internet under one applicable law.<sup>77</sup> Such proposals have been developed with a specific focus on platforms held liable for infringements committed by the users. For those platforms, it is hardly foreseeable which battlegrounds will be chosen by the rightholder. Here, it should be possible to apply the one law to the multistate infringement, being the law with the closest connection. However, if a member state would apply such an approach, it would in the end be up to the CJEU to decide upon the issue of compatibility with Article 8(1) Rome II. Secondly, it is questionable whether all issues regulated in Article 17 DSMD are to be characterized as questions of copyright infringement in the sense of Articles 8, 15 Rome II. One may argue that at least the procedural safeguards of Article 17(9) are not covered by Articles 8, 15 Rome II which would

give implementing member states more flexibility, especially to apply the country-of-origin principle of Article 3(2) E-Commerce-Directive on a voluntary basis.<sup>78</sup>

## II. Implementation in EU member states

- 65 Questions of private international law are not covered by the DSMD, which leaves some room for manoeuvre for EU member states. However, Article 8 Rome II Regulation must be taken into account. If one follows the approach suggested here, the law applicable to ubiquitous infringement of OCSSPs is arguably not dealt with in Article 8 Rome II Regulation. Therefore, member states may determine the law of the closest connection as being applicable instead of multiple laws under a territorial approach. At least for the procedural safeguards of Article 17(9), it should remain possible for member states to apply only one law. Whether the legislature or the courts apply such an approach, it will finally be up to the CJEU to decide whether this solution is compatible with the Rome II Regulation.

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<sup>76</sup> See Axel Metzger, Commentary on Article 8 Rome II, in: U. Magnus/P. Mankowski (eds.), *European Commentaries on Private International Law: Rome II Regulation*, Köln: Otto Schmidt 2019, Article 8, N° 23-32.

<sup>77</sup> See Article 3:604 CLIP-Principles.

<sup>78</sup> Member states are under no obligation to apply the country of origin principle to intellectual property, see Article 3(2) and Annex to the Directive.

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# Comment of the European Copyright Society

## Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market

by **The European Copyright Society**

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### A. EXECUTIVE SUMMARY

- 1 *The European Copyright Society (ECS) was founded in January 2012 with the aim of creating a platform for critical and independent scholarly thinking on European Copyright Law. Its members are renowned scholars and academics from various countries of the European Union, seeking to promote their views of the overall public interest. The Society is not funded, nor has been instructed, by any particular stakeholders. This ECS Comment concerns the implementation of Articles 18 to 22 of the Directive on Copyright in the Digital Single Market (DSM Directive or DSM-D)<sup>1</sup> into national law.*
- 2 The European Copyright Society (ECS) welcomes the protection that Articles 18 to 22 of the Directive on copyright in the digital single market offer to authors and performers in their contractual dealings with economic actors to whom they transfer or license their rights. The ECS advises the Member States to give full force and efficiency to this part of the Directive.
- 3 The fundamental objectives of Articles 18-22 are to entitle authors and performers to an appropriate and proportionate remuneration; to information about the exploitation of their work/performance; and to mechanisms to complain about or revoke an unfair contract. The protection of authors and performers is thus the core principle which should

inform the interpretation and implementation of these provisions in the Member States. That principle implies the following:

- Articles 18-22 have a binding nature and cannot be contractually overridden, except insofar as expressly permitted by the Directive.
- Exclusions from the scope of application of the Articles 18-22, despite their role in balancing the different interests of all stakeholders, have to be interpreted in a strict manner and should not serve as ways to exclude some contracts or situations from the protective provisions to the detriment of authors and performers. In particular, Member States should ensure that any of the permissible derogations for computer programs, employment contracts, contracts by CMOs, open access licences, do not circumvent the protection that the Directive provides for authors/performers;
- The choice of law applicable to transfer or licence contracts should not deprive the authors and performers of the benefit of the mandatory provisions of the Directive;
- Articles 18-22 should apply, as a matter of principle, to existing contracts, as laid down by Article 26.
- Authors and performers are entitled to an equal level of protection, as a matter of principle, but performers may choose to accept a differentiated treatment if this is better for them in the light of their specific circumstances.

1 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, *Official Journal of the European Communities* 2019 L 130, 92.



- 4 The Directive does not provide for a maximal harmonisation as far as the contractual protection of authors/performers is concerned. Its primary objective is to ensure the principle of an appropriate and proportionate remuneration, and the means to guarantee it, as well as a right to revoke the contract where there is insufficient exploitation. Member States are permitted to maintain or enact greater protection to authors and performers relation to transfer/licensing contracts.
- 5 Even though Articles 18-22 apply to all contracts, not just those related to digital exploitation of works/performances, the ECS suggests that Member States particularly consider, when transposing and interpreting these measures, the specific economic conditions of digital modes of exploitation and markets, to enable authors and performers to benefit fully from the opportunities of the information society. Such attention to the digital environment would be in line with the overall objective of the CDSM Directive to ensure a fair digital single market.
- 6 The ECS believes that the Articles 18-22 and the rights they confer, could benefit from collective bargaining agreements, establishing sectoral codes of practices or model schemes and conditions, or agreeing upon adaptations of standard legal provisions. Member States are encouraged to have recourse to such collective negotiations in specific sectors and to ensure their fairness and the representativeness of all stakeholders.

As to individual articles, the ECS recommends:

**Article 18 – Right to an appropriate and proportionate remuneration:** “Appropriate” and “proportionate” are two distinct elements of the remuneration to which authors and performers are entitled. Proportionate refers to a percentage of the actual or potential economic value of the rights and constitutes a principle that may be substituted by a lump sum only under strict and limited conditions. Sectoral collective bargaining agreements could help better define the factors of a fair remuneration and the limited cases where a lump sum could be admitted. The ECS reminds that Member States may achieve the principle of an appropriate and proportionate remuneration by other mechanisms, such as the granting of unwaivable rights of remuneration.

**Article 19 – Transparency obligation:** Authors and performers are entitled to receive relevant information necessary to ascertain the revenues yielded by the exploitation of their works, which should comprise all revenues generated, all financial flows between exploiters as well as expenses occurred. The ECS underlines that Member States should consider the issue of sanction, should the transferees or licensees not comply with their obligation to provide the required information. In addition, the ECS welcomes the possible extension of the

transparency obligations to sublicensees when necessary, including to obtain information about the revenues generated by Internet platforms exploiting creative content.

**Article 20 – Contract adjustment mechanism:** The ECS is of the opinion that the contract adjustment mechanism is broader than a best-seller provision, where the remuneration can be readjusted in case of unforeseen commercial success of a work. Instead, authors/performers should be entitled to receive an additional, appropriate and fair remuneration, in any situation where the originally agreed-upon remuneration is disproportionately low compared with all the subsequent relevant revenues derived from the exploitation of the works or performances.

**Article 22 – Revocation right:** The Directive conditions the right for authors/performers to claim back their rights from their counterparty upon the lack of exploitation of rights they have acquired. To ensure a better and more efficient protection of authors and performers, Member States are advised to broaden the scope of the right of revocation so that it can operate in cases of partial exploitation that do not meet the customary standards of the sector concerned. However as the revocation might be a problematic and risky option for authors and performers, other possibilities, such as a right to revise the contract on a regular basis, may be provided by Member States.

## B. COMMENT

### I. General observations

#### 1. Objectives and extent of harmonisation

- 7 Articles 18-22<sup>2</sup> of the CDSM Directive provide harmonized protection for authors and performers when they have transferred or licensed their rights to a contractual counterpart. This is a first and important step in the EU copyright acquis to deal with the contractual protection of creators.<sup>3</sup>

<sup>2</sup> The third chapter of the CDSM Directive includes Articles 18 to 23, Article 23 dealing with the binding nature of the protection and the exclusion of computer program from its scope. For sake of simplicity, this comment includes Article 23 in its analysis, but refers to Articles 18-22, which concern the substantive protection granted to authors/performers.

<sup>3</sup> “Creators” or “artists” will be used here to refer to authors and performers, as individuals.

- 8 From the perspective of cultural economics, the proposed interventions are an attempt to regulate the market for creators. The new provisions aim to address “the weaker contractual position when [authors and performers] grant a licence or transfer their rights” (recital 72). There is a well-established body of empirical studies that shows an enormous disparity between the earnings of winners-take-all star authors and performers, as well as the persistent precariousness of the financial situation of the vast majority of creators and performers.<sup>4</sup> Such studies demonstrate that median creators’ earnings (not only in Europe) are often below the minimum income. Incomes typically are supplemented from non-creative jobs. In the view of the European Copyright Society (ECS), a key principle of copyright is that creators and performers should be able to share in the income generated through the economic exploitation of their works and performances. The ECS therefore welcomes the introduction of a harmonised and mandatory contractual framework, to ensure that European authors and performers are fairly and adequately compensated for their creative efforts.
- 9 Nevertheless, the ECS is perfectly aware that the regulation of contracts is no magic solution.<sup>5</sup> The market dynamics of the cultural industries are complex.<sup>6</sup> Copyright measures to secure adequate revenues to artists may need to be accompanied by social and economic measures tailored to the specific

circumstances of creative sectors and professions and by adequate social security status. The ECS would also recommend follow-up empirical research be commissioned by the European Union to assess the effects of copyright contract regulations brought in by the CDSM Directive.

- 10 All the rules contained in Articles 18-22 of the CDSM Directive grant an *ex post* protection, that is, they regulate contracts that have already been concluded, rather than seeking to control either the negotiation phase or the content of an exploitation contract (with the exception of the principle of fair remuneration and related rules discussed further in this opinion). The harmonisation brought by the CDSM Directive is incomplete. It focusses on the guarantee to receive appropriate and proportionate remuneration; on measures to ensure ways for the author/performer to monitor the exploitation of her work/performance; and on mechanisms that authors/performers can use to complain about or revoke an unfair contract.
- 11 It is clear from the background, but nevertheless important to emphasise, that Articles 18-22 do not provide for a maximal harmonisation, even in relation to the specific obligations, such as transparency, that are dealt with.<sup>7</sup> This means that Member States are entitled to maintain existing contractual protection or even introduce further protection, of authors and performers. Typical provisions recognised in Member States include, but are not limited to: a requirement of a written agreement; a principle of strict interpretation in favour of authors; a requirement that parties to a contract specify particular terms (e.g. the substantive and geographical scope of the rights transferred or licensed, the duration of such transfer/licence and the mode of remuneration); a prohibition on the transfer of rights in future works or in unknown modes of exploitation. Such provisions in national law are unaffected by the harmonised protection now required by the Articles 18 to 22 of the CDSM Directive.

4 C. Ker, S. Dusollier, M. Iglesias Portela and Y. Smits, *Contractual arrangements applicable to creators : Law and practice of selected Member States*, (European Parliament, 2014); IVIR, *Remuneration of authors and performers for the use of their works and the fixations of their performances*, (European Commission, 2015); CREATE, *UK Authors’ revenues and contracts* (2019); M. Kretschmer, A.A. Gavaldon, J. Miettinen, S. Singh, *UK Authors’ Earnings and Contracts: A survey of 50,000 writers* (Glasgow: CREATE Centre, 2019); Report for the French Ministry of Culture, *L’auteur et l’acte de création*, 22 January 2020.

5 Cf. J. Yuvaraj & R. Giblin, *Are Contracts Enough? An Empirical Study of Author Rights in Australian Publishing Agreements* (November 19, 2019). Melbourne University Law Review, Vol. 44, No. 1, 2020; U of Melbourne Legal Studies Research Paper No. 871. Available at SSRN: <https://ssrn.com/abstract=3541350>.

6 Cf. R. Caves, *Creative Industries: Contracts Between Art and Commerce*, (Harvard University Press, 2000); R. Towse, *A Textbook of Cultural Economics* (2<sup>nd</sup> ed.), (Cambridge University Press, 2019). In particular, the relationship between substantive rights and contracts remains theoretically and empirically under-researched: M. Kretschmer, E. Derclaye, M. Favale and R. Watt (2010), *The Relationship between Copyright and Contract Law: A Review commissioned by the UK Strategic Advisory Board for Intellectual Property Policy* (SABIP).

7 European Commission, *Impact Assessment*, Vol I, 191 (explaining that the proposed directive “would require MS to review these [existing] obligations in consultation with stakeholders to make sure that they comply with the minimum requirements set out by the legal instrument.” (emphasis added). The *Impact Assessment*, at 177, recognised the range of other author-protective regulation in the laws of Member States, but decided to focus the harmonization primarily on the issue of “information asymmetry”. Moreover, recital 76 affirms that “Member States should have the option, in compliance with Union law, to provide for further measures to ensure transparency for authors and performers.”

- 12 The Directive does not adopt a sectoral approach; nor does it regulate specific categories of contract, such as publishing contracts, audiovisual production contracts, which are the subject of tailored regulatory regimes in some Member States. However, several provisions allow the national legislator to consider sector specificities when they implement the provisions of the Directive.

## 2. A protection of authors and performers

- 13 The beneficiaries of the protection are authors and performers, who, according to recital 72, are considered as being in a weaker contractual position (than their contractual counterparts) when they license or transfer their rights. This premise is fundamental to the interpretation of Articles 18-22. The implementation of these Articles should directly benefit to authors and performers, and not be diluted merely for the profit of other economic actors.
- 14 As a matter of principle, the same level of protection applies to authors and performers; so, the implementation of Articles 18-22 should be based on the principle of an equal protection for authors and performers alike. That said, equal protection for authors and performers need not always imply identical implementation. Adaptation of the protection given to performers might be justified in some cases, without reducing their rights to a fair remuneration (under Article 18) or to remedy an unfair contract (under Article 20), by virtue of the particular situation of performers. Performers are sometimes better paid by remuneration rights than by royalties gained upon transferring their exclusive rights. They are often paid for a specific performance by lump sums and do not expect to be paid further, this remuneration being sometimes higher than what they could expect from a proportional share of the revenues. They might act in some circumstances under an employment contract, which, as we will see, may warrant a specific treatment. In addition, performers might receive stronger protection when collectively represented and collective agreements might provide adequate protection on a sectoral basis (e.g. musicians in ensembles or orchestras). When relevant in the present opinion, specific attention will be paid to performers.
- 15 Recital 72 also refers to authors and performers who transfer their rights “including through their own companies”. It is a regular practice for many artists, e.g. for social and/or tax reasons, to separate their legal personhood as individuals from their professional activity by acting through a specific legal person, having recourse to the legal forms national regimes offer them. When implementing

the provisions on contracts, Member States should take that fact into consideration and make clear - in their legislation or in the official memorandum - that the protection equally applies to authors and performers entering contracts through their own legal company or non-for-profit association.<sup>8</sup> The protections provided by Articles 18-22 therefore should not be regarded as inapplicable merely because the author or performer enters agreements through a legal entity. Each Member State will need to ensure that principles such as those of separate corporate personality do not impede the applicability or effectiveness of these measures.

## 3. Scope of application

### a) Computer programs

- 16 Article 23(2) appears to require Member States to preclude the application of Articles 18-22 of the CDSM Directive to authors of a computer program. This provision did not feature in the Commission’s Proposal, the European Parliament’s Amendments or the Council’s text. Instead, it seems to have been introduced during the secret Trialogue negotiations. The rationale for it remains unclear. Given that Articles 18 to 22 of this Directive establish a minimum level of protection, it might be that Article 23(2) was intended to leave flexibility to Member States, so that they can apply Articles 18-22 to the authors of computer programs or to some such authors.
- 17 The exclusion seems particularly problematic where a computer program is incorporated in a videogame. Following the *Nintendo* decision of the CJEU<sup>9</sup>, a hybrid regime applies to videogames:

“videogames (...) constitute complex matter comprising not only a computer program but also graphic and sound elements, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption. In so far as the parts of a videogame, in this case, the graphic and sound elements, are part of its originality, they are protected, together with the entire work, by copyright in the context of the system established by Directive 2001/29.”

- 18 Graphical and sound elements of a videogame are not considered in that decision to be computer

<sup>8</sup> Generally, copyright laws might require that the transfer of copyright is agreed upon by the author, being a physical person, which would render this precision useless.

<sup>9</sup> CJEU, 23 January 2014, *Nintendo*, C-355/12, EU:C:2014:25.

programs protected by Directive 2009/24. Therefore, the contractual protection scheme arising from the implementation of the Directive, applies to the videogames sector at least with respect to these works. However, a hybrid regime, as suggested by the CJEU in *Nintendo*, could create discrimination in contracts between a videogame company and its different creators, whereby programmers would be excluded from protective provisions (and the right to a fair remuneration) while graphic designers could claim to benefit therefrom. This seems in tension with the principle of equal treatment which requires that “comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified”.<sup>10</sup> The better view seems to be that the authors of computer programs incorporated in video games ought to be able to take advantage of the provisions of Article 18-22.

## b) Employment contracts

- 19 Chapter 3 is entitled “Fair remuneration in *exploitation* contracts of authors and performers” (emphasis added). Recital 72 indicates that Articles 18-22 do not apply “where the contractual counterpart acts as an end user and does not exploit the work or performance itself, which could, for instance, be the case in some employment contracts”. This statement aims at excluding from the regulations contractual relationships where the author or performer provides her creation or performance for the direct use and benefit of her contractual counterpart, rather than for *exploitation*. The reference to employment contracts in recital 72 points at the situation where employees transfer the copyright in works they create in the context of their employment. The relationship between an employer and an employee does not normally involve a “licence or transfer” of copyright or performers’ rights and when it does, it is not the primary object of the employment contract.
- 20 In implementing recital 72, Member States should not exclude employment contracts per se from the protective provisions.<sup>11</sup> It is important to emphasise, rather, that the Directive refers to the absence of exploitation of the works and performances by the contractual counterpart. There are many situations

in which creators or performers are employees but whose jobs is to create works or other creative outputs that will be exploited by their employer. For example, a director may be hired under an employment contract by a film producer; or, a dramatic writer might write a play for the next season under an employment contract. Many creators and performers actually mitigate their precarious social situation by working on the basis of short-term employment contracts with cultural institutions where the main object of their contract is to deliver one specific creative output to be exploited by the institution.<sup>12</sup> This could particularly occur for performers. In such circumstances it would be unfair not to protect creators in the same way as they are when they are acting independently. Consequently, Member States should pay particular attention when delineating the scope of application of Articles 18-22, not to exclude contracts with the “end-user” (as clumsily called by recital 72), including employment contracts, where the primary object of the contract is to acquire rights in a work or performance in order to exploit it. The key standard for application of Articles 18-22 should then be *whether the contractual counterpart exploits the exclusive rights* through making or selling copies, communicating the work or arranging its public performance, or licensing such use.

## c) Open access licences

- 21 The Directive also indirectly considers the case of open access and copyleft licensing. Recital 82, even though it does not specifically interpret the Articles 18-22, is of particular importance. It states that “nothing in this Directive should be interpreted as preventing holders of exclusive rights under Union copyright law from authorising the use of their works or other subject matter for free, including through non-exclusive licences for the benefit of any users”. When applied to Articles 18-22 of the Directive, this recital seeks to leave intact the freedom for authors to engage in open access licensing. Although such arrangements are not excluded as such from the operation of Article 18-22, the same result is achieved because the notions of an appropriate remuneration or the obligation of transparency need to be thought differently in the open access context. For instance, an absence of remuneration will be “appropriate” for a Creative Commons licence due to the general balance of such contracts and exploitation models. This is

10 CJEU, 5 March 2015, *Copydan Båndkopi*, C463/12, EU:C:2015:144, [31] and [32].

11 The peculiar situation in some Member States such as the Netherlands where the employer is deemed to be the copyright owner would complicate the question here. Arguably, the employment contract should then comply with the standards of copyright contract law, such as the right to fair remuneration for creative work.

12 This situation has even become the norm in some countries, such as Belgium, where a not-for-profit association acts as the employer in charge of the social and tax obligation of creators when they are “hired” for limited times or performances.



confirmed by Recital 74, which removes the need for information to be given to authors and performers (to assess the economic value of their right and thus to better determine a fair remuneration) where they have “granted a licence to the general public without remuneration”.

- 22 As a result, the protection of authors and performers should be limited to traditional bilateral exploitation contexts and should not extend to most open content situations, where the creator is not negotiating with a single business entity.<sup>13</sup>
- 23 However, the exemption of open access licences from Articles 18-22 should not lead exploiters of works and performances to impose upon creators and performers obligations to authorise the use of their creations under such free licences,<sup>14</sup> notably to circumvent the protective provisions of the Directive. National lawmakers should make this clear in the explanatory memorandum accompanying the implementation bills.

#### d) Exclusion of contracts concluded by CMO

- 24 Articles 19(6) and 20(2) indicate that contracts concluded through collective management organisations and independent management entities<sup>15</sup> are not subject to the same obligations as to

<sup>13</sup> This is already the case in German copyright law, where in cases “where the author grants an unremunerated non-exclusive right of use for every person” three author-protective rules do not apply: Section 31a (contracts concerning unknown types of use have to be in writing), Section 32a (author’s further participation), and Section 32c (Remuneration for types of use which subsequently become known).

<sup>14</sup> Producers or publishers should not be allowed to avoid the application of the protection of art.18-22, merely by imposing open access licensing to creators and performers as the recital 82 refers to “non exclusive licences for the benefit of any users”.

<sup>15</sup> As defined by the article 1 of Collective Management Directive 2014/26/EU, a “collective management organisation” refers to any organisation which is authorised to manage copyright or related rights on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which is owned or controlled by its members and/or organised on a not-for-profit basis. By contrast, an “independent management entity” manages copyright and related rights on behalf of more than one rightholder but is neither owned nor controlled, directly or indirectly, wholly or in part, by rightholders; and is organised on a for-profit basis

transparency and contract adjustment mechanisms. While the exclusion of the transparency mechanism seems appropriate given the fact that Directive 2014/26/EU contains its own transparency rules,<sup>16</sup> there is no equivalent in that Directive to the contract adjustment mechanism in Article 20. The ECS is concerned that this absence of equivalence should not be allowed to become a means to circumvent the protection provided by the Directive to authors and performers. This is particularly important when the contract with users of works or performances has been negotiated by an independent management entity, which is not subject to the same obligations towards rightholders whose rights it manages, as the collective management organisations, under the collective management Directive.

- 25 The ECS therefore suggests that this “exclusion” in Article 20(2) be understood in the light of article 20(1), which states that an individual claim for revision would apply, “in the absence of an applicable collective bargaining agreement providing for a *mechanism comparable* to that set out in this Article”. Therefore, Member States shall consider that any contract concluded through a collective management organization or independent management entity should likewise provide creators with a mechanism comparable to the adjustment mechanism provided by the Directive. This could be achieved either by collective negotiations reassessing the level of remuneration in response to the overall evolution of the modes of exploitation of the works/performances or on a more individual basis, for example, by allowing the creator to “opt out” if the legal entity representing her fails to renegotiate the terms of the contracts despite the imbalanced situation or whenever the terms negotiated by this entity do not match the reasonable expectations of readjustment of the remuneration.

#### 4. Digital exploitation

- 26 It is notable that the whole section on contractual protection is not tied to any consideration of the digital environment. This is in stark contrast with the other parts of the Directive that regulate, in one way or another, issues relevant to the digital market (see also the title of the Directive). Articles 18-22 apply to all modes of exploitation, analogue or digital, which underlines the aim of the European legislator to improve the protection of authors. However, the ECS regrets that some issues particularly related to digital exploitation were not given closer consideration. More specifically, consideration could have been given to the particular economic context of digital modes of exploitations and their impact on a fair

<sup>16</sup> Directive 2014/26/EU, Art 18.

distribution of revenues between all actors involved, whether distribution platforms, copyright owners or creators/performers. For example, the exploitation of an e-book differs from the sale of tangible books, in terms of intermediaries involved (including their economic power), production and distribution costs, consumer distribution models (that could include subscription-based or advertisement-sustained models). In order to ensure a better protection for creators in this evolving environment, the changed economic context needs to be reflected in modified contractual provisions, including tailored modes of calculation of revenues to which authors and performers are entitled.

- 27 There is still room for Member States to respond to the needs of authors and performers when their rights are transferred or licensed, then exercised, for digital modes of exploitation. In particular, we suggest that authors and performers should benefit from an appropriate remuneration for digital exploitations, in consideration of their economic value and context. The mere replication of the calculation of remuneration from analogue exploitation to digital modes should be avoided. For instance, providing the same percentage of revenues yielded by sales of tangible books as compared to e-books might be unfair. Specific models of digital distribution, e.g. subscription-based music or advertisement-supported streaming services, should also be taken into account in the calculation of a fair remuneration. It is suggested that national copyright laws or collective agreements should provide some guidance in this respect.
- 28 National laws could in addition introduce (if such provisions do not currently exist) an obligation to revise a contract, in particular the originally agreed remuneration, in case of new and unexpected methods of digital exploitation or known digital exploitations that gain in importance during the life of the contract. Other digital peculiarities will be addressed when analysing each article separately.

## 5. Collective agreements and representation

- 29 The Directive leaves wide room for collective interventions and negotiations as far as contractual protection of creators is concerned. The recourse to collective agreements, model contracts or the intervention of collective management organisations, is already largely practised in some Member States (e.g. France or Germany), where the lawmaker sometimes makes mandatory the arrangements largely agreed upon by the collective representatives for the sector in question. Despite the possible encroachment upon individual contractual

freedom, such collective schemes have proved useful in representing the interests of individual authors or performers and strengthening their position in contract negotiation or enforcement. That said, the use of such collective intervention should depend on the representativeness of the actors involved. Such collective arrangements would also need to comply with the obligations of transparency and accountability applicable to collective management organisations and should not have anti-competitive effects.

- 30 Such collective frameworks could be found in collective agreements, model agreements, best practices or remuneration rates decided by all stakeholders, memorandum of understanding or codes of practices. Member States should seek to ensure the representativeness of the collective bodies called upon to negotiate such agreements, to initiate and supervise their negotiation and possibly to make those agreements mandatory for a sector if it has proven to be fair, representative and widely adopted in practice.
- 31 When advising on the implementation of each Article in the Directive, this Comment will identify situations where recourse to such collective is recommended.

## 6. Application in time

- 32 One difficult issue is the application in time of Articles 18-22 and mostly the question as to whether they apply to existing contracts.
- 33 According to its Article 26, the Directive applies from 7 June 2021 to works and other subject matter protected by national law. In principle, therefore, Articles 18-22 might be applied to licences and transfers that occurred before that date. Article 27 provides that agreements for the licence or transfer of rights of authors and performers “shall be subject to the transparency obligation set out in Article 19 as from 7 June 2022”. Recital 77 explains that this is necessary “to enable the adaptation of existing reporting practices to the transparency obligation”. With this provision, the legislator confirms that the contract provisions can and should be applied also to existing agreements.
- 34 However, under Article 26(2) the Directive should not prejudice “any acts concluded and rights acquired before 7 June 2021”.<sup>17</sup> Member States

<sup>17</sup> The provision in Article 26(2) replicates Article 9(2) of the Information Society Directive, 2001/29/EC. The history of that provision is not irrelevant. The original proposal had contained a requirement that the Directive was to be applied

might wrongly consider that Article 26(2) requires that all existing contracts be exempted from Arts 18, 20, 21 and 22 (while Article 27 clarifies that only the transparency mechanism applies to existing contracts, as of 7 June 2022). The ECS is concerned that such an interpretation would undermine the objective of the whole protection scheme, i.e. enhanced protection for authors and performers in their contractual relations with exploiters. In reality, many exploitation contracts are concluded “for the duration of copyright”.<sup>18</sup> If Article 26(2) was interpreted as precluding the application of Articles 18-22 to contracts concluded before 7 June 2021, this would lead to the continued existence of unfair and disproportionate contractual terms for decades to come.

35 The ECS submits that such an interpretation is incorrect. The CJEU has already offered guidance on how Member States are to give effect to transitional provisions, most importantly in Case C-168/09, *Flos v Semeraro*, EU:C:2011:29. We draw from that judgment three key points of relevance here:

- i) Member States must ensure that the law comes into effect:<sup>19</sup> as a result, a blanket exemption in relation to all existing contracts would be inappropriate;<sup>20</sup>

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to existing contractual arrangements at the very latest after 5 years. See COM(1997) 628 final (and Amended proposal, COM(1999) 250 final, Arts 9(3) and (4). In the Council proceedings it was decided to delete this provision because the Directive was not regarded as the appropriate place to harmonize matters relating to contract (Commission to European Parliament, SEC/2000/1734 final). It would be possible to infer from this that the same provision in the CDSM Directive equally leaves the determination of the transitional law to Member States, apart from that there just be respect for “acquired rights.” However, as we show, various inferences can also be drawn from the new Directive that restrict any such freedom.

18 In contrast, the Unfair Terms Directive 93/13 did not apply to existing contracts, but such consumer contracts are usually of a short duration. Conversely, the Directive (EU) 2019/770 on contracts for the supply of digital content and digital services, applies to the supply of digital content and services after the date of its entry into force, and even if the contract has been concluded before that date.

19 *Flos*, [51], explained that amending legislation applies, except where otherwise provided, to the future consequences of situations which arose under the law as it stood before amendment”; [53] (“the protection of legitimate expectations cannot be extended to the point of generally preventing new rules from applying to the future consequences of situations which arose under the earlier rules.”)

20 See also Case C-457/11, *VG Wort*, EU:C:2013:426, [28]-[29],

- ii) the transition must not defer for a substantial period the acquisition of the rights;<sup>21</sup>
- iii) the transition must balance the interests of the contracting party with those of the person on whom the Directive requires rights be conferred (here, authors and performers) and be proportionate to the contracting parties acquired rights.<sup>22</sup>

36 In applying these principles, separate consideration needs to be paid to each obligation.

First, the introduction of **alternative dispute resolution** in accordance with Article 21 has no effect on acquired rights and interests. Considering that this mechanism is intended to help give effect to the transparency mechanism, it must apply to existing contracts like the transparency mechanism, as from 7 June 2021.

Second, the **contract adjustment mechanism** in Article 20, as a mechanism to enforce the transparency obligation<sup>23</sup>, that clearly applies to existing contracts, needs also to be available in relation to existing contracts. If a transitional period is regarded as appropriate, it must not extend beyond 7 June 2022 (when the transparency obligation comes into operation). That said, the principle in Article 26(2) means that a claim to adjustment cannot be made that would require the payment of a share of remuneration that accrued to the contractual counterpart before the coming into operation of the Directive.

Third, with respect to the **revocation mechanism**, this more directly implicates “acquired rights.” After all, it empowers “the author or performer [to] revoke in whole or in part the licence or the transfer of rights,” so clearly applies where rights have already been transferred. However, as already noted, implementation must reconcile such rights with the principle that the Directive applies to the future consequences of existing situations. This balance is given effect to under the conditions intrinsic to the operation of Article 22. This safeguards the real economic interests of holders of any acquired rights: the mechanism is only available after “a reasonable time following the conclusion of the licence or the transfer of the rights” and where there is a “lack of

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interpreting Art 10(2) as only relating to acts of exploitation completed before the date of transposition.

21 [55] “the measure does not have the effect of deferring for a substantial period the application of the new rules on copyright protection”

22 [56]-[57].

23 Explanatory Memorandum, [8].

exploitation.” Given this internal balancing built into Article 22, there is no reason why it should be subject to any transitional measure to protect “acquired rights.” It should therefore be made applicable by Member States to existing contracts and with effect from the implementation date. Contracting parties have had plenty of time since the publication of the Directive on 17 April 2019 to rectify failure to exploit the work or other rights.

Finally, with regard to the **right to remuneration** of Article 18, there is no reason why it should not apply to existing contracts.<sup>24</sup> As with the revocation rights in Article 22, Article 18 itself allows for recognising the interests of contractual counterparties since the right is one to “appropriate and proportionate remuneration.” Article 18(2) specifies that in their implementation Member States shall take into account “the principle of contractual freedom and a fair balance of rights and interests.” Remuneration – even proportionate – for exploitation under existing contracts from before 7 June 2021 should not be available as these acts may be said to have been definitively concluded. In these circumstances, further transitional provisions are unnecessary to achieve a fair balance. Moreover, the national legislator could leave open room for collective agreements to define principles for appropriate remuneration that could lead to the revision of existing contracts by the parties abiding to such collective frames.

## 7. Binding nature of the contractual protection and applicable law

37 Article 23(1) provides that Member States shall ensure that any contractual provision that prevents compliance with Articles 19, 20 and 21 shall be unenforceable in relation to authors and performers. Thus, the principle of appropriate and proportionate remuneration (Article 18) and the right of revocation (Article 22) appear to be subject to party autonomy. However, the right to an appropriate and proportionate remuneration is stated by Article 18 as a principle that Member States can achieve by imposing an obligation on contractual licensing/transferring of the rights or by other mechanisms (see *infra*). If the right to a fair remuneration is implemented by way of contract law, this should by definition be a provision that cannot be overridden by contract, or else it will

have no effect, and Member States will not comply with Article 18. As to the right of revocation, Article 22 already recognises the possibility that Member States may limit its being overridden by contract, hence implying that such override is permitted. But Member States can further decide that the right of revocation is incapable of being overridden by contract, as the Directive does not create maximal harmonisation in that regard.

38 It should be evident, also, that the mere existence of an exploitation contract cannot of itself be viewed as excluding the operation of those rights.

39 This binding nature of Articles 19, 20 and 21 also implies that the contractual parties cannot decide for an applicable law that would bypass the application of those mandatory provisions. To that effect, Recital 81 refers to the application of Article 3(4) of Rome I Regulation 593/2008 on the law applicable to contractual obligations: where all elements relevant to a situation are located in one or more Member States, the provisions on transparency, contract adjustment and alternative dispute resolution should apply. Such relevant elements for a contract transferring or licensing copyright or performer’s right consist in the place of exploitation of the work or performance, the place of establishment of the transferee or licensee, even perhaps the residence of the author and performer, and the place where the creation has taken place.

40 Should any of such elements be located in the EU, Member States need to state clearly that provisions on a right of fair remuneration, transparency, contract adjustment, alternative dispute resolution and revocation right cannot be set aside by the application of a foreign law.

41 For contracts with elements outside of the EU, especially with parties from third states, Member States should consider applying the implementing provisions as internationally mandatory provisions based on Article 9 of the Rome I Regulation or as public policy based on Article 21 of the Rome I Regulation.<sup>25</sup> These instruments could be used by Member States’ courts even if not mentioned explicitly in Member States’ legislation implementing the Directive or in the official memorandum accompanying that legislation.

24 That said, it might be noted that the language of Article 18 itself relates to where authors and performers “license or transfer” whereas Article 19, 20 and 22 more clearly impose future rules applicable to past situations (where authors or performers “licensed or transferred their rights” or have “entered into a contract”).

25 Compare with section 32b German Copyright Act.



## II. Analysis of articles

### 1. Article 18 - A principle of an appropriate and proportionate remuneration

42 Article 18 provides that “Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration”.

43 This principle of an appropriate and proportionate remuneration applies to contracts granting a licence or transferring any economic right of an author or performer.<sup>26</sup>

44 The terms “appropriate” and “proportionate” are two distinct elements that should receive a separate interpretation,<sup>27</sup> even though they could inform each other. “Appropriate” refers to some fairness and could be interpreted considering objective and usual practices in cultural sectors. “Proportionate” is used in the English version of the Directive. In other languages versions, it oscillates between “proportionate”, meaning a reasonable amount (and being close to “appropriate”), or “proportional”, referring to a proportion or percentage of the revenues.<sup>28</sup>

45 This linguistic variation presents a challenge for national implementation and EU harmonisation. To ensure that the requirements that the remuneration be both “appropriate” and “proportionate” are not conflated, the ECS suggests that it is best to understand the term “proportionate” as reflecting the principle that the remuneration of the author

and performer should increase with any increase in the returns to the licensee or transferee, that is be “proportional.”

46 According to Recital 73, the notion of a proportionate remuneration is linked to the **actual or potential economic value** of the licensed or transferred rights. The author’s or performer’s contribution to the overall work and other circumstances, such as market practices or the actual exploitation of the work need to be taken into account. In defining the contribution of an author or performer, a qualitative and quantitative assessment could be considered. A qualitative appraisal of a contribution would consider its relative importance e.g. by reference to the conventional hierarchy between roles in an orchestra, or between “lead” actors and others. A quantitative appraisal would consider e.g. the amount of material contributed, the duration of a part or of a musical performance in relation to the whole (work or performance). There is certainly a role for national lawmakers or for collective bodies representing authors and performers to lay down factors to help authors and performers to assess the economic value of their works and performance in each cultural or economic sector, namely by pointing out the discrete revenues, including advertisements on webpages where creative content is exploited, that economic actors could generate from exploitations.

47 The rule of the remuneration is its **proportionality to such economic value**. Yet, recital 73 of the Directive indicates that it can accommodate an **exception for lump sum** payments, which seems reasonable considering the many different models and contexts where works and performances are exploited. The Directive does not provide any criteria by which to judge when such a derogation is permissible, but allows Member States to define sectorial-specific cases where a lump sum could be consistent with the requirements of Article 18. Such derogations should be applied with caution by Member States when implementing the provision in order to prevent the principle of a proportional remuneration becoming empty of any substance,<sup>29</sup> and should be duly justified by the particularities and well-established practices of the sector concerned. Member States should ensure that the choice of a lump sum does not operate to the detriment of the creators when compared with the income they would have received as a percentage of the revenues (according to the uses of the sector).

48 In identifying the situation where a lump sum is acceptable, the ECS recommends Member States to ensure that this exception is not used to justify

26 Recital 72 implies that the obligation applies at least to the extent that it is a right harmonised under EU law. However, it is permissible for Member States to apply the protection to all rights of authors and performers provided by their national law, and it seems to the ECS that it would be desirable that they do so. To differentiate between harmonized and unharmonized rights would make national law unnecessarily and unjustifiably complex.

27 The use of the word « and » confirms this interpretation.

28 E.g. in French, “appropriée et proportionnelle”; in Italian “adeguata e proporzionata”; in Spanish, “adecuada y proporcionada”; in Portuguese, “adequada e proporcionada”; in German, “angemessene und verhältnismäßige”; in Dutch, “passende en evenredige”; in Danish, “passende og forholdsmæssigt”; in Swedish, “lämplig och proportionell”; and in Polish, “odpowiedniego i proporcjonalnego”.

29 Recital 73 is clear: “A lump sum payment ... should not be the rule.”

“buy-out contracts,” where all rights of an author or performer are acquired for any possible use against a one-off payment. This would not amount to an “appropriate” remuneration.

49 The force of the principle of a fair remuneration embraced in Article 18(1) is qualified by the second sentence of the article that allows Member States “to use different mechanisms and take into account the **principle of contractual freedom** and a fair balance of rights and interests”. The insistence on contractual freedom and a fair “balancing” of rights and interests of all parties involved might be thought to undercut the objective of protecting the weaker parties to copyright contracts, i.e. the individual authors and performers. However, it should not be used as a justification to eliminate the right of creators and performers to claim such remuneration. If imposed by national law as a contractual obligation on transferees and licensees of copyright and performers’ rights, it cannot be set aside, except in situations where the law admits a lump sum or a remuneration agreed upon by a collective agreement. Courts should also be able to correct a possibly unfair remuneration in a contract even if the parties pretend it is fair.

50 According to Article 18 (2) and recital 73, Member States are said to be free to determine the proper methods and mechanisms by which to implement the principle of fair remuneration. In order to identify the circumstances in which remuneration can be treated as adequate and proportional, Member States might appeal to **collective bargaining** between representatives of the authors and performers and representative associations of exploiters of creative content. Such collective agreements have been deployed with satisfactory results for some sectors in France or Germany, where authors’ associations or collective management organisations have succeeded in establishing framework contracts with defined remuneration schemes for particular sectors<sup>30</sup>. Sectoral agreements can provide framework or model schemes and factors determining revenues for each type of exploitation. In addition to improving protection of authors or performers, who would not be left alone in negotiating that part of their contract, such measures would also reduce transaction costs for their contractual counterparts and ensure equal conditions across a cultural sector. The lawmaker could encourage such collective agreements and possibly make those collective agreements mandatory for a whole sector (at least, when of the processes have been fair and the organisations are truly representative).

30 See the German article 36 UrhG that refers to collective negotiations to established “joint remuneration agreements” determining an equitable remuneration for authors.

In particular, in light of the Directive’s goal to guarantee to authors and performers appropriate and proportionate remuneration and the reference to collective bargaining in Article 20(1), the European Commission and the national competition authorities should generally permit collective bargaining and the ensuing agreements, since they contribute to general welfare.

51 Member States are also free to use non-contractual mechanisms to implement the principle of a fair remuneration. One such mechanism that Member States are free to maintain or introduce in their laws could consist in an **unwaivable right of remuneration** that authors or performers cannot transfer (except upon death or for administrative purposes to a CMO) and that could be managed and collected by CMOs. The EU recognised such a right in relation to rental of phonograms and films in Article 4 of Council Directive 92/100/EEC of 19 November 1992 (codified as Article 5 of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006). Many Member States, including Belgium, Spain, Italy, Estonia, Germany, recognise such rights of remuneration that authors and performers (generally through their collective management organisations) can directly claim from economic actors exploiting their works (e.g. for cable retransmission, or for some secondary exploitations of an audiovisual work), even when the latter have cleared the rights from the producers to which authors and performers have transferred their rights. Some commentators have called for the introduction of such an unwaivable remuneration right for audiovisual authors.<sup>31</sup> It could also be an efficient mode of remuneration of performers. By applying such a solution, Member States separate the licensing of exclusive rights between economic operators, enabling them to engage in exploitation of creative content, and the remuneration of authors and performers, whose efficiency might be enhanced if properly managed by CMOs.<sup>32</sup>

31 R. Xalabarder, The equitable remuneration of audiovisual authors: a proposal of unwaivable remuneration rights under collective management, *R.I.D.A.*, 2018, n°256; SAA, *White Paper – Audiovisual Authors’ Rights and Remuneration in Europe*, 2015, available at: [http://www.saa-authors.eu/dbfiles/mfile/6100/6137/SAA\\_White\\_Paper\\_2015.pdf](http://www.saa-authors.eu/dbfiles/mfile/6100/6137/SAA_White_Paper_2015.pdf).

32 That would require a high level of efficiency and transparency of CMOs, in compliance with the collective Management Directive, to mitigate the possible cost of collective management.

## 2. Article 19 - Transparency obligation

52 Article 19 aims at securing the right to a fair remuneration by providing authors and performers with all the information needed to ascertain the revenues generated by the exploitation of their works and performances.<sup>33</sup> To that end, they should receive on a regular basis, at least once a year, “up to date, relevant and comprehensive information” about such exploitation from the parties to whom they have transferred or licensed their rights. This obligation is imposed on the licensees or transferees of the right, and does not require a prior request.<sup>34</sup>

53 The information to be supplied to authors/performers should identify all the modes of exploitation of the work/performance, all revenues generated and remuneration due. When implementing that provision, Member States could further **specify the type of information** that should be communicated to authors, performers or their representatives. As explained in recital 77, collective agreements or model documents could be the best way to determine the relevant information.<sup>35</sup>

54 Recital 75 provides that the information should be “comprehensive in a way that it covers all sources of revenues relevant to the case, including, where applicable, merchandising revenues”. Therefore, the information should encompass all financial flows between economic actors exploiting such works. Apart from obvious flows such as sales or licensing fees, less obvious financial returns such as advertisement revenues, rebates, promotional advantages, that could be a form of disguised revenues, should also be notified to authors/performers. Expenses should also be detailed as these play an important part in calculating the revenues from which the author’s or performer’s share will be paid. Where works are bundled and exploited along with other works, details of total revenues and the mechanism used to calculate shares attributable to specific works should be specified. The right does not appear to extend to a right to see the evidential basis for the accounts (e.g. to inspect), though some national laws contain

such provisions<sup>36</sup>. Member States could consider buttressing their implementation of Article 19 with a provision of this sort.

55 The Directive does not specify a remedy or penalty for this failure to comply with the obligation embodied in Article 19. The Commission clearly envisaged that the ADR scheme and contract adjustment mechanisms would play some role here, so that, for example, authors and performers could request before courts or in the ADR scheme that the relevant information be provided to them as a principal claim or as a claim accessory to their demand for an appropriate remuneration. Member States should consider whether and if so, how far they want to go further in establishing sanctions for failure to comply with the transparency obligation. One possibility would be to treat the obligation as automatically implied into the contract and specify that where a failure to provide the required information is significant and regular, it could amount to a breach of contract and become a reason for the author or performer to pursue the revocation of the contract. A Member State may also provide that collective representatives are able to intervene and bring legal proceedings demanding that economic operators comply with their transparency obligation. Another alternative might be a statutory penalty for failure to comply.

56 The obligation to provide the specified information is imposed upon any transferee or licensee with whom the author or performer has concluded a contract. However, the Directive entitles the author or performer to request **any sub-licensees** to provide additional information when the person to whom she has transferred or licensed the right does not hold all the necessary information. This extension of the obligation beyond the contractual realm of the first transfer/licence is remarkable and could be considered as a genuine protection of authors/performers. Member States might wish to specify that such sublicensees include internet platforms (e.g. e-books sellers or music streaming services) that exploit masses of copyright-protected works and whose economic models might sometimes obfuscate the revenues they generate. Getting access to relevant information on the sales, distributions and streams of works and performances is crucial for publishers and producers to be able to give to authors and performers a proper view of the revenues generated on those platforms. In their implementation of Article 19, national lawmakers will need to provide effective mechanisms for ensuring that creators can receive such information

33 Recital 75 : “sharing of adequate and accurate information by their contractual counterparts or their successors in title is important for the transparency and balance in the system governing the remuneration of authors and performers .”

34 Impact Assessment, Vol 1, 178. At n 551, the IA says a request-based mechanism would not be effective.

35 Recital 77: “Collective bargaining should be considered as an option for the relevant stakeholders to reach an agreement regarding transparency”.

36 See Article 57(2) of the Danish Copyright Act or the Polish law that also gives a right of access “as necessary, to the documentation being essential to determine such remuneration.”

from third parties. Member States may decide to entrust collective bodies or sectoral collective agreements to determine the modalities and scope of such requests to third parties.

- 57 According to Article 19(3), while the transparency obligation clearly should not become disproportionately burdensome for the contractual counterpart, the obligation must remain effective and ensure a high level of transparency in every sector. The Directive offers Member States two avenues to reconcile these goals.
- 58 First, to avoid the administrative burden becoming disproportionate in the light of the revenues generated by the exploitation of the work or performance, Member States may limit the types and level of information that a contractual counterpart is required to provide. Such limitations are available only for “duly justified cases”. Thus a Member State might provide that where annual payments due to an author/performer fall below a certain level, there is no obligation to provide more detail than the number of copies sold.
- 59 Second, under Article 19(4), Member States may decide to exclude the obligation when the contribution of the author or performer is “not significant” having regard to the overall work or performance. It seems sensible that transparency could be reduced for contributors of non-significant portions of a copyright-protected work or where the work only yields minimal revenues. However, in deciding where these thresholds lie, Member States need to consider sectoral differences and are obliged to consult all relevant stakeholders.<sup>37</sup> Member States will want to consider whether this is best achieved through **collective agreements** entered on a sectoral basis.

### 3. Article 20 – Contract adjustment mechanism

- 60 Article 20 imposes a mechanism that already exists in some Member States, though sometimes only for publishing contracts, and entitles authors and performers to claim additional, appropriate and fair remuneration when the remuneration originally agreed upon turns out to be disproportionately low compared to the revenues that have been

derived from the actual exploitation of the work or performance. The right is exercisable against “the party with whom they entered into a contract for the exploitation of their rights, or from the successors in title of such party”. It is not capable of contractual exclusion according to Article 23(1). Such a right could be actioned by authors’ and performers’ representatives.

- 61 This adjustment mechanism is often called the best-seller clause or success clause,<sup>38</sup> because one circumstance in which it would apply is where a work turns out to be more successful than initially expected: the contract adjustment mechanism allows for correction of the resulting gap between the income derived from a work that turns out to be successful and the remuneration, generally in the form of a lump sum, that was originally agreed for its creator. However, the mechanism has a broader **scope of application** than the case of an unexpected success of a work. The formulation of Article 20 is more comprehensive and covers any situation in which the agreed remuneration ends up being inadequate. For instance, it would apply in a situation where a creator underestimated the economic importance of a particular mode of exploitation. If the percentage of revenues allocated to authors and performers was at the time of the contract fixed at a very low rate, but the particular mode of exploitation turns out to be significant, it might be appropriate to alter the rate. As an example, in many countries, the remuneration of performers for cable distribution was collectively fixed at a time when this mode of retransmission of broadcasts was rather insignificant. Today this mode of exploitation has gained in importance and as a result the original remuneration is disproportionately low compared to the economic value of such exploitation. The Article 20 does not require that the success of exploitation was not anticipated by the parties to the contract. In other words, no condition of unforeseeability should be required.

- 62 Member States should thus take care not to implement Article 20 as a best-seller clause. The mechanism should be capable of being engaged in any situation where the remuneration of the creator is disproportionately low compared with all the subsequent relevant revenues derived from the exploitation of the works or performances. Member States that operate similar mechanisms but with stricter thresholds, such as “serious” or “gross” disproportion must remove such conditions. In the light of recital 78, it might be acceptable to add the requirement that the remuneration has “clearly” become disproportionately low.

<sup>37</sup> Recital 77: “When implementing the transparency obligation provided for in this Directive, Member States should take into account the specificities of different content sectors, such as those of the music sector, the audiovisual sector and the publishing sector, and all relevant stakeholders should be involved when deciding on such sector-specific obligations.”

<sup>38</sup> Impact assessment, Vol 1, 180, n 559 (noting the term can be misleading); Impact assessment, Vol 3, annex 14d, 220 (referring to a bestseller clause).



- 63 Once the threshold is met, the mechanism must allow for the creator to receive an “additional, appropriate and fair” remuneration. Although these terms are notably different from those in Article 18, it is suggested that the effect of the “additional” remuneration should be that the creator receives an “appropriate and proportionate” remuneration.
- 64 Beyond delineating the scope of application of the contract adjustment mechanism provided by Article 20, the **Member States have room for manoeuvre** in deciding several points.
- 65 In assessing whether remuneration is “disproportionately low”, Article 20 refers to “all the subsequent relevant revenues derived from the exploitation of the works or performances.” Recital 78 only provides that all revenues, including merchandising ones, should be taken into account. Consequently, Member States could improve the protection afforded by this Article by specifying the “relevant” revenues that need to be considered. Member States can also identify what circumstances are relevant to the assessment of “disproportionality”, such as the contribution of the author or performer to the whole, or the practices in each sector. In accordance with the wording of Article 20 (“in the absence of an applicable collective bargaining agreement...”) and with Recital 78, sectoral collective agreements could again play a useful role in establishing the criteria by which the disproportionality of the agreed-upon remuneration is to be judged.

#### 4. Article 21 – Alternative dispute resolution mechanism

- 66 Member States shall provide that disputes concerning the transparency obligation under Article 19 and the contract adjustment mechanism under Article 20 may be submitted to a voluntary, alternative dispute resolution procedure. Member States shall ensure that representative organisations of authors and performers may initiate such procedures at the specific request of one or more authors or performers.
- 67 This provision aims at helping authors and performers to enforce their rights without being subjected to the high cost and burden of judicial proceedings. Such a mechanism could to some extent attenuate the risk of black-listing that complaining authors have sometimes suffered as retaliation when they undertake legal action against their publisher or producer, as documented in some studies.<sup>39</sup>

39 C. Ker, S. Dusollier, M. Iglesias Portela and Y. Smits, *Contractual arrangements applicable to creators: Law and practice*

- 68 Here also, the Member States are free to decide about the modalities of organization of such alternative dispute resolution schemes. They may also decide not to implement this Article if efficient and reliable mechanisms are already in place and accessible to authors and performers. As Article 20 makes clear, such systems should allow for representatives of authors and performers<sup>40</sup> to intervene on their behalf.

#### 5. Article 22 – Right of revocation

- 69 Article 22 of the Directive allows authors or performers to terminate a licence or transfer in case of lack of exploitation. It provides that “where an author or a performer has licensed or transferred his or her rights in a work or other protected subject matter on an exclusive basis, the author or performer may revoke in whole or in part the licence or the transfer of rights where there is a lack of exploitation of that work or other protected subject matter”.
- 70 Despite the contradiction with the binding nature of the contract, revoking a copyright contract might prove necessary if the exploiter fails to deliver the essential object of the agreement: the actual exploitation of the work for which she has obtained the rights. The right to revocation provides a strong weapon to authors and performers, but a weapon that it might be dangerous for a creator to trigger. Therefore, Member States should implement it with suitable safeguards to protect the interests of all parties to the contract and thus to make it an efficient and fair tool to deploy as a last resort.

- 71 The **freedom of manoeuvre left to Member States** in national implementation is broad. Once again, significant assistance in implementation and application of the right might be gained through collective bargaining agreements concluded on a sector-by-sector basis.

Firstly, in conformity with Article 22(2), specific provisions may be adopted for specific sectors, different types of works and performances, and for works composed of multiple contributions. In relation to the latter, Member States may decide to exclude the availability of the right of revocation if such works or other subject matter usually contain contributions of a plurality of authors or performers.<sup>41</sup>

*of selected Member States*, (European Parliament, 2014), at 23.

40 Representatives could namely be CMOs or agents.

41 Art. 22(2).

Second, Member States may also provide that the revocation only applies within a certain time frame, if such restriction is justified by the specificities of the sector or types of works or performances concerned. It could be the case if the exploitation of some categories of works is not on-going but is usually carried out for a short period of time.

Finally, Member States can offer the choice to authors and performers to terminate the exclusivity of the contract instead of revoking it completely. A revocation of exclusivity could multiply the choices of the author to see her work exploited and incentivize the first publisher or producer to do better.<sup>42</sup>

- 72 Member States are required to determine a period of reasonable time after the conclusion of the contract and the modalities for the exercise of the claim of revocation. This includes the requirement for a prior notification that sets an appropriate deadline to undertake or resume the exploitation. The reasonable period of time could be fixed by the law, by the parties themselves in their contracts, by collective agreements or, by default by sectorial professional practices (that could be codified).
- 73 The “**lack of exploitation**” of the work or subject-matter that triggers the possible application of the revocation right is not defined further in the Directive. Member States could determine, in concertation with each sector, what would be a satisfactory level of reasonable exploitation (e.g. the threshold of published copies, the lack of a reprint despite some demand, the lack of merchandising, the refusal to engage in some modes of exploitation).
- 74 The Directive only provides the right to revoke the contract for lack of exploitation of the work or subject-matter.<sup>43</sup> This does not prevent national lawmakers from going a step further and making the right available *when the exploitation is minimal or does not meet the customary standards of the sector*. In such a case, the national laws, directly or by reference to sectorial collective agreements or codes of practice, need to establish the criteria to assess the inadequacy of the exploitation. Some consideration of digital context would be particularly relevant. Authors of

literary works could consider that the publisher to whom they have transferred their copyright for all types of exploitation, does not comply with her obligation if she declines to offer the works in an e-book format. In a similar way, where some licensed or transferred rights (e.g. the translation rights) are not exploited, this also justifies the revocation of that part of the transfer.<sup>44</sup> France entitles authors to take back their rights in such a case, either totally or only for digital exploitation.<sup>45</sup> Such partial revocation, applicable only to modes of exploitation that the transferee or licensee has not developed, could inspire other Member States. They would need then to determine what would amount to sufficient exploitation in the channels concerned, in different formats and platforms.<sup>46</sup>

- 75 As discussed above, recital 72 gives the possibility to exclude some works created by employees from the scope of application of Articles 18-22, including this right of revocation. As said earlier and for better protection of creators and performers, any such exclusion should not apply where the primary object of the contract is to acquire rights in a work or performance in order to exploit it.
- 76 In contrast to the provisions on transparency and contract adjustment,<sup>47</sup> the right of revocation can be excluded by contract. To reduce the risk of ineffectiveness of the right of revocation, the Directive allows Member States to make such a contractual derogation dependent on the existence of a collective bargaining agreement.<sup>48</sup> The ECS recommends that Member States limit derogations to such circumstances.
- 77 **Recourse to sectorial collective negotiations and agreements** will be essential for all the practical application of the revocation right and therefore should be encouraged.

42 The Section 40a of the German copyright law gives the right to authors who have granted an exclusive right of use against a flat-rate remuneration to exploit the work in another manner after 10 years.

43 Although the term “lack” in English is not unambiguous, the other languages suggest that the Directive only requires the right be available where there is no exploitation at all, ie a “complete lack” of exploitation: French “non-exploitation”; in Spanish “no se está explotando”; in Italian “mancato sfruttamento”.

44 In a way, that envisages copyright as a bundle of distinct rights, with revocation still available in relation to each. On this, see S. Dusollier, Intellectual property and the bundle-of-rights metaphor, *Kritika – Essays in Intellectual Property*, Vol.3, 2020, p.146-179, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3544131](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544131).

45 Cf. Art. L.132-17-2 of the French Code de la Propriété Intellectuelle.

46 French copyright law refers to publishing codes of practice to determine on which conditions a digital exploitation of book is deemed sufficient to bar the author from taking back her right.

47 Art. 23(1)

48 Art. 22(5).

## 6. Possible complementary measures

- 78 As mentioned in the introduction, Articles 18-22 only provide for minimum harmonization and do not prevent Member States from providing better protection for authors and performers in relation to transfers or licences. *Ex ante* protection, such as mandatory provisions relating to the creation of valid licences or assignments, could be considered by Member States, and there is some evidence that these provide creators with valuable protection. As far as *ex post* protection is concerned, two further options could be considered by Member States.
- 79 Aside of the right to revocation whose implementation is mandatory, Member States could consider providing authors and performers with a more efficient mechanism for rebalancing a contract that has become unsatisfactory. A **right to regular revision of contract**, as it already exists in countries such as Sweden, could be introduced. Such a right would be a less radical option for authors and performers than revocation. Moreover, rather than focussing on more extreme situations, such as disproportionately low remuneration or non-exploitation, such a right could address issues such as adaptation of arrangements to reflect changes in business models and exploitation modes.<sup>49</sup> Such a “revision right” would reduce the risk for creators of being black-listed in the cultural sector in which they operate for exercising the right of revocation, and well as resolve the difficulties associated with the possible lack of alternative producers or publishers who might be willing to exploit the work/performance (after the revocation of rights in it). Moreover, in comparison to the revocation right, a “revision right” could benefit publishers or producers by reducing the risk of termination of the contract, and thus maintaining the incentive for the publisher to invest in exploitation.<sup>50</sup> A “revision

right” could also accommodate the difficulties faced by parties negotiating contractual terms in the digital context where modes of exploitation, costs and revenues derived from different uses might radically change.

- 80 Instead of a right to revise the contract, an alternative could be to impose a limited duration of contracts of copyright transfer or licence with an option of renewal (accompanied by a possible renegotiation), open to both the author/performer and the transferee or licensee. Such option was rejected by authors when discussed in some States, such as the Netherlands, for fear of receiving royalties only for a limited-in-time exploitation and of copyright losing its value at the expiration of the first contract. If the duration is too short, it could also drastically reduce the incentive for publishers and producers to invest in the exploitation of the works/performances.
- 81 Nevertheless, a limited duration of transfer or licence could be an option to explore where exploitations is expected to be of a short duration, to avoid buy-outs contracts where all rights in a work or performance are acquired for one or a few foreseen uses, often ultimately in a disproportionate manner. Member States could equally require that the scope of the contract ought to be limited to the field of intended exploitation, so that any new or unforeseen modes of exploitation would require a new negotiation between the transferee/licensee and the authors and performers.

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49 Cf. Art. L.132-17-7 of the French Code de la Propriété Intellectuelle that imposes that the publishing contract includes a provision on the revision of the economic conditions of the transfer rights of exploitation of a book in a digital format.

50 Economic studies are divided as to the beneficial effect of the right of termination of copyright transfers, see M. Karas & R. Kirstein, “More rights, less income ? An economic analysis of the new copyright law in Germany”, *Journal of Institutional and Theoretical Economics (JITE)*, vol. 175(3), pages 420-458, available at <https://ideas.repec.org/a/mlr/jinste/urndoi10.1628-jite-2019-0029.html> (concluding that a reversion right would lead to lower earnings). Other studies point at the beneficial effect of a termination/reversion right for authors after some time, see P. Heald, *The Impact of Implementing a 25-Year Reversion/Termination Right in Canada* (2020). *Journal of Law, Technology, & Policy*, Available at SSRN: <https://ssrn.com/abstract=354870>.

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# 3D Digitisation of Cultural Heritage

## Copyright Implications of the Methods, Purposes and Collaboration

by Pinar Oruç\*

**Abstract:** 3D technology is increasingly used in the digitisation of cultural heritage and while parties engaging in such projects need copyright as an incentive, the copyright status of such 3D models are unclear. It is usually assumed they would not be protected, as the scans of existing objects are less likely to be original compared to the 3D models created from scratch. However, it is often overlooked that these projects vary greatly in terms of the chosen method (whether it is laser scanning or photogrammetry), the project's purpose (if it is for identi-

cal copying or if there is any restoration or creative contribution involved) and the collaboration of different people (ranging from employees to volunteers). This article will discuss the copyright implications of the chosen method, purposes and the level of collaboration, in order to show that each of these factors impact the category, originality and the authorship of the resulting work. It will be argued that it is possible, and in some instances very likely, for 3D projects to lead to protectable outcomes under the EU copyright law.

**Keywords:** copyright law; cultural heritage; laser scanning; photogrammetry; three dimensional; 3D; originality

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### A. Introduction

1 Cultural heritage faces many challenges such as armed conflicts, targeted destruction, natural disasters and natural aging. To reduce the risk of such artefacts disappearing and to increase access, custodians of cultural heritage regularly engage in making reproductions of the movable heritage held in collections and the immovable heritage held on-site. It is not a new practice to make reproductions of fragile art works or to invest in cast courts for allowing visitors to experience works in distant areas. Considering these past practices of reproduction, embracing the 3D technology and implementing digitisation strategies seem like the next logical step. However, these 3D projects also come with the question of how to control their outcomes, therefore intellectual property law becomes directly relevant for incentivising such costly undertakings and for controlling the commercial exploitation of the results.

2 There is already a vast amount of scholarly literature on the relationship between 3D printing and intellectual property law: some aspects of the 3D printing can be protected by patent law if they are registered and 3D printing can also infringingly replicate patented inventions.<sup>1</sup> There could be potential trademark infringements, if the 3D printed object incorporates existing 2D marks or replicates another 3D shape mark.<sup>2</sup> There is also the overlap

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1 Simon Bradshaw, Adrian Bowyer and Patrick Haufe, 'The Intellectual Property Implications of Low-Cost 3D Printing' (2010) 7 SCRIPTed 1, 26; Rosa Maria Ballardini, Marcus Norrgård and Timo Minssen, 'Enforcing Patents in the Era of 3D Printing' (2015) 10(11) JIPLP 850; Lucas S Osborn, *3D Printing and Intellectual Property* (Cambridge University Press 2019) 60-81.

2 Angela Daly, *Socio-Legal Aspects of the 3D Printing Revolution*

between copyright and design law, for the shape of the artefacts and anything that exceeds surface decoration.<sup>3</sup> But copyright is the most suitable for cultural heritage as it has been facing challenges of increasing digitisation already<sup>4</sup> and it is also the most relevant one for the type of objects that are 3D digitised. In the existing discussion on the copyright status of the 3D models, it is often assumed that digitising existing objects, especially cultural heritage, equates to slavish copying and creates only non-original works. On the other side, parties engaging in digitisation need the incentive, so they argue that the outcome should be protected.

- 3 This article will focus on to what extent 3D scanning of cultural heritage leads to new works protectable under the EU copyright law. By assessing the copyright implications of varying methods, purposes and human involvement in these projects, the article will show that copyright can arise often in the 3D scanning of cultural heritage. Part B will focus on the two most common methods used for cultural heritage (laser scanning and photogrammetry) and explain what it means for the subject matter and originality of the outcome. Part C will discuss the three most common purposes for such projects (making identical copies, restoration and creative uses) and explain what it means for the originality of the outcome. Part D will assess the involvement of the employees, contractors and volunteers and explain what their contribution means for the originality and ownership of the outcome.
- 4 Two caveats should be added here. While the existing copyright literature on 3D scanning addresses all three scenarios of (a) creating a new 3D object by using software, (b) locating and modifying files found online, and (c) scanning existing objects,<sup>5</sup> the first two will not be addressed in this article. Secondly, it will only focus on the scanning of the cultural heritage that is no longer subject to

copyright, and therefore not assess the potential copyright infringement caused by reproducing without permission.

## B. Copyright implications of the chosen method

- 5 It is necessary to start the discussion with the methods of 3D scanning, which are laser scanning and photogrammetry.<sup>6</sup> After providing a brief introduction to the technical side of these methods, the copyright implications will be assessed.
- 6 In the simplest terms, laser scanning works by sending laser light to the surface without any contact while photogrammetry works by calculating the measurements between specific points in the collected data. When comparing these methods, we see that laser scanning allows for higher accuracy, especially for large spaces.<sup>7</sup> But it also requires expensive equipment and does not create good results for edges or reflective surfaces.<sup>8</sup> On the other side, photogrammetry is preferred for smaller spaces with more realistic textures and its accuracy depends less on the equipment and more on the software.<sup>9</sup> Its quality is affected more from outside conditions, such as changing light levels and surrounding vegetation.<sup>10</sup> The choice between the two depends on the size of the object and the desired detail level.<sup>11</sup>

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(Palgrave Macmillan 2016) 36-37; Osborn, *3D Printing* (n 1); Dinusha Mendis, Mark Lemley and Matthew Rimmer (eds), *3D Printing and Beyond: Intellectual Property and Regulation* (Edward Elgar 2019).

- 3 Dinusha Mendis, “‘The Clone Wars’ - Episode 1: The Rise of 3D Printing and Its Implications for Intellectual Property Law - Learning Lessons from the Past?” (2013) 35 EIPR 155.
- 4 Osborn, *3D Printing* (n 1) 143; David Gillespie, ‘Copyright and Its Implications for 3D Created Datasets for Cultural Heritage Institutions’ (2015) 1(2) *International Journal of Culture and History* 135.
- 5 Dinusha Mendis, ‘Back to the Future’? From Engravings to 3D Printing – Implications for UK Copyright Law’ in Dinusha Mendis, Mark Lemley and Matthew Rimmer (eds) (n 2) 57.

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6 Although methods such as hand measurement (for small objects) or global navigation satellite system (for topographies) are also used for heritage, these two are the most common ones for mass data collection. Historic England, ‘3D Laser Scanning for Heritage: Advice and Guidance on the Use of Laser Scanning in Archaeology and Architecture’ (2018) 2.

- 7 Annabelle Davis and others, ‘Pilbara Rock Art: Laser Scanning, Photogrammetry and 3D Photographic Reconstruction as Heritage Management Tools’ (2017) 5 *Herit Sci* 25.
- 8 Historic England, ‘3D Laser Scanning’ (n 6).
- 9 Lanmar Services, ‘Laser Scanning vs. Photogrammetry’ <<http://lanmarservices.com/2014/11/07/laser-scanning-vs-photogrammetry/>> accessed 2 April 2020.
- 10 Davis and others (n 7).
- 11 For example, web-uses require a photo-realistic representation simplified enough to be viewed easily, while objects for scholarly research needs to be precise to the millimetre. Grazia Tucci, Daniela Cini and Alessia Nobile, ‘Effective 3D Digitization of Archaeological Artifacts for Interactive Virtual Museum’ [2011] *International Archives of*

It is also possible to use these methods together, therefore addressing each other's shortcomings.

## I. Laser Scanning

Most of the laser scanning projects operate on one of the three different principles: triangulation, pulse and phase.<sup>12</sup> Triangulation scanners work by detecting the position of a spot or stripe of laser light and has forms such as (i) static scanners for small objects placed on turntables, (ii) scanners attached to articulating arms, (iii) tripod-mounted scanners, (iv) handheld scanners for close range work, and (v) handheld and backpack-mounted scanners for mobile field use over extensive areas.<sup>13</sup> Pulse scanners work by emitting a pulse of laser light and calculating the time it takes to return (speed of light) and their ability to rotate means greater coverage of the area its placed in, compared to triangulation method.<sup>14</sup> Phase-comparison scanners rely on the phase differences between the emitted and returning signals and are useful for capturing higher accuracy scans of intricate cultural heritage.<sup>15</sup>

- 7 The laser scanning procedure usually starts with the surveying, which involves calculating how many scans and angles will be needed for that object and setting up the positioning.<sup>16</sup> In one of the laser scanning projects, half of the data acquisition time is reported to be spent on the placement of the object.<sup>17</sup>
- 8 Once the data is acquired, the next stage is "processing", where raw data is further analysed. This stage includes the cloud alignment (aligning the points in the scans) and mesh fusion, and the

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*the Photogrammetry, Remote Sensing and Spatial Information Sciences* 414.

- 12 Historic England, '3D Laser Scanning' (n 6) 7-8.
- 13 *ibid.*
- 14 *ibid* 10; Fabio Remondino, 'Heritage Recording and 3D Modeling with Photogrammetry and 3D Scanning' (2011) 3 *Remote Sens.* 1104; Massimiliano Pieraccini, Gabriele Guidi and Carlo Atzeni, '3D Digitizing of Cultural Heritage' (2001) 2 *Journal of Cultural Heritage* 63.
- 15 Historic England, '3D Laser Scanning' (n 6) 13; Naci Yastikli, 'Documentation of Cultural Heritage Using Digital Photogrammetry and Laser Scanning' (2007) 8 *Journal of Cultural Heritage* 423.
- 16 Tucci, Cini and Nobile (n 11) 415; Historic England, '3D Laser Scanning' (n 6) 26-27.
- 17 Tucci, Cini and Nobile (n 11) 416.

editing of polygonal mesh and texture – which would involve input such as removing the support the object was leaning on, correcting errors and holes in the surface, removing reflections, noise reduction and adding a more realistic texture.<sup>18</sup> While some of these activities are automated, others require a human expert who can correctly identify and attribute features to the scans.<sup>19</sup> It is then followed by simplification of the model for easier sharing and exporting it in the desired storage format.<sup>20</sup> It is common to keep most of the data so that it can be re-evaluated later with more developed technologies, to make these efforts more "future-proof".<sup>21</sup>

## II. Photogrammetry

- 9 Photogrammetry has been described in the past as the "art, science and technology of obtaining reliable information about physical objects and the environment through the process of recording, measuring, and interpreting photographic images and patterns of electromagnetic radiant energy and other phenomena".<sup>22</sup> Photogrammetry starts with field work (surveying and pictures) and is then completed by processing, which involves camera calibration, orientation, point clouds determination by image matching or point clouds registration by using laser scanning, followed by meshing and texturing to create a 3D model.<sup>23</sup>
- 10 For large objects, there are many decisions to be made regarding the use of manned or unmanned aircrafts, how to capture elevations and problem areas in the photogrammetry of buildings and structures, using tripods and deciding on the right surface and light conditions for recording excavation areas.<sup>24</sup> For smaller objects, there are decisions to be

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- 18 *ibid* 417; Historic England, '3D Laser Scanning' (n 6) 23-29.

- 19 Historic England, '3D Laser Scanning' (n 6) 40.
- 20 Tucci, Cini and Nobile (n 11) 417.
- 21 Historic England, '3D Laser Scanning' (n 6) 41.
- 22 José Luis Lerma and others, 'From Digital Photography to Photogrammetry for Cultural Heritage Documentation and Dissemination' (2013) 6 *DISEGNARECON* 1, quoting from Chester C Slama, Soren W Henriksen, Charles Theurer, *Manual of Photogrammetry* (1980) 4th. Edition, American Society of Photogrammetry.
- 23 *ibid.*
- 24 Historic England, 'Photogrammetric Applications for Cultural Heritage: Guidance for Good Practice' (2017), 53-73.

made about camera lenses, lighting and turntables.<sup>25</sup> Photogrammetric procedures have more difficulty in creating high quality and reliable models of large scale objects due to the lighting conditions, image block configuration and the camera resolution, but the developments in the software seems to be effective in making photogrammetry a viable alternative.<sup>26</sup> The development of software for assisting photogrammetry leads to increased automation and higher performance.<sup>27</sup> Because the majority of the accuracy depends on the post-processing, a single good camera can be sufficient for many projects.<sup>28</sup>

- 11 This method is especially useful for heritage that is in danger or lost heritage. For example, the Bamiyan Buddhas, destroyed by the Taliban in 2001, were recreated this way. One of the projects relied on three sources: while the internet and tourist images were only useful to an extent, the 3D model was mainly based on metric images acquired in 1970, which provided more precise information about the measurements.<sup>29</sup> A light projection of 3D Bamiyan Buddhas was later used in 2015, with more than 150 people in attendance celebrating their revival.<sup>30</sup> In terms of community involvement, the parties providing the photography should understand the importance of providing photographs that are uncropped and free of any special effects.<sup>31</sup> Tourists usually take similar photographs, so the collection of those raw images might not give the full scale and all angles of the lost heritage.<sup>32</sup>

Nevertheless, examples like this mean that photogrammetry has an edge over laser scanning for allowing retrospective copies of lost cultural heritage.

### III. Copyright analysis

- 12 In order to determine the copyright status of the 3D models created at the end of laser scanning and/or photogrammetry, four questions need to be asked.
- 13 The first question is whether the files are just copies of the existing works or if they can be treated as individual works on their own. It would be particularly problematic for functional objects, since the scope of cultural heritage is never explicitly limited to purely aesthetic objects. If the 3D models are viewed merely as the medium where the underlying work is recorded,<sup>33</sup> then the copies of functional objects could not be protected.
- 14 While some jurisdictions specifically exclude utilitarian objects from copyright protection,<sup>34</sup> these copies are more likely to be protected as derivative works within the EU. As long as they satisfy the originality standard, scans of existing objects – even the utilitarian ones – can still be potentially protected.<sup>35</sup> In the EU, the originality standard is that the work has to be the “author’s own intellectual creation”, and this can only be present when the author can make “free and creative choices” that are

25 ibid 73-76.

26 Thomas Kersten, Klaus Mechelke and Lena Maziull, ‘3D Model of Al Zubarah Fortress In Qatar - Terrestrial Laser Scanning Vs. Dense Image Matching’ [2015] Int. Arch. Photogramm. Remote Sens. Spatial Inf. Sci. Volume XL-5/ W4 .

27 Lerma and others (n 22).

28 Historic England, ‘Photogrammetric Applications’ (n 24) 19.

29 Armin Grün, Fabio Remondino and Li Zhang, ‘Photogrammetric Reconstruction of the Great Buddha Of Bamiyan, Afghanistan’ (2004) 19 The Photogrammetric Record 177, 182.

30 Edward Delman, ‘Afghanistan’s Buddhas Rise Again’ (*The Atlantic*, 2015) <<https://www.theatlantic.com/international/archive/2015/06/3d-buddhas-afghanistan/395576>> accessed 21 February 2020.

31 Historic England, ‘Photogrammetric Applications’ (n 24) 79.

32 ibid.

33 ‘a machine instruction file is a material object (namely the tangible computer memory) in which the sculptural work is fixed (i.e. stored), and from which the work can be perceived (i.e., seen) with the aid of a machine (i.e., a 3D printer)’. Osborn, *3D Printing* (n 1) 146; Lucas S Osborn, ‘Of PhDs, Pirates, and the Public: Three-Dimensional Printing Technology and the Arts’ [2014] Tex. A&M L. Rev. 811, 833; Mikko Antikainen and Daniël Jongsma, ‘The Art of CAD: Copyrightability of Digital Design Files’ in Rosa Maria Ballardini, Marcus Norrgård and Jouni Partanen (eds), *3D Printing, Intellectual Property and Innovation: Insights from Law and Technology* (Wolters Kluwer 2017) 264; Plamen Dinev, ‘Revisiting the Copyright Status of 3D Printing Design Files’ (2020) 42(2) EIPR 94, 99.

34 For US analysis, see: 17 US Copyright Act, §101; Kyle Dolinsky, ‘CAD’s Cradle: Untangling Copyrightability, Derivative Works, and Fair Use in 3D Printing’ (2014) 71 Wash. & Lee L. Rev. 591; Daly (n 2) 24-25.

35 Marcus Norrgård, Rosa Maria Ballardini and Miia-Mari Kasi, ‘Intellectual Property Rights in the Era of 3D Printing’ in Ballardini, Norrgård and Partanen (n 33) 66-67; Dolinsky (n 34); Burton Ong, ‘Originality from Copying: Fitting Recreative Works into the Copyright Universe’ (2010) 2 IPQ 165.



not dictated by their technical function.<sup>36</sup> The room for originality in these methods will be discussed below separately.

- 15 The second question is how to define these files. There are multiple formats involved, although the literature often focuses on the computer aided design (CAD) files.<sup>37</sup> CAD files can be created from scratch or by using pre-existing shapes and they can carry a variety of information such as names of parts or user comments.<sup>38</sup> They are then converted into surface-mesh files (usually as STL) which is the most downloaded format and therefore the most valuable, but they are not printable by themselves.<sup>39</sup> In order to be printed, these files have to be converted to machine-instruction files (usually G-Code), where the surface is sliced into many printable layers and the printer is instructed to move and build the item accordingly. At the end of this process, parties can choose to share the files or print the outcome as many times as they wish.
- 16 For outcomes of laser scanning and photogrammetry, the scans of existing objects can directly be turned into surface-mesh files with the help of software, but they would have to be transferred back to CAD format for further corrections and manipulation.<sup>40</sup> It should be noted that both methods above mention the “processing” stage, meaning that it is likely that

the files change formats multiple times and there could potentially be original contributions during these changes.

- 17 The third question is how to categorise the files under the copyright’s subject matter, for which there are diverging views in the literature. Based on the definition of computer programs,<sup>41</sup> it could be argued that the CAD files have enough room for user input in them to be treated as “mini-programs” or “preparatory design”.<sup>42</sup> Alternatively, they could be seen as literary work, similar to instructions given to create something new, such as a knitting pattern or circuit diagram, based on the cases from the UK.<sup>43</sup> As another alternative, some scholars argue for seeing CAD files as artistic works (in addition to literary works), based on the fact that they could be scans of existing artistic works,<sup>44</sup> or the fact that they carry instructions to create a new artistic work.<sup>45</sup> It could also be possible to argue that these works are protectable as databases, provided that they are “authors own intellectual creation”,<sup>46</sup> which is not always the case.<sup>47</sup>

36 Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECDR 16; Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Ors* [2012] ECDR 6 89; Case C-393/09 *BSA v Ministerstvo kultury* [2011] ECDR 3; Cases C-403/08 and C-429/08 *FAPL v QC Leisure and Karen Murphy v Media Protection Services* [2011]. It is also harmonised for some types of works through EU Directives: Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Software Directive) Art 1(3) for computer programs, Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (Database Directive) Art 3(1) for databases and 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 (Term Directive) Art 6 for photographs.

37 Osborn points out that the literature mainly focuses on CAD files while ignoring other files in the process. Osborn, *3D Printing* (n 1) 29.

38 *ibid* 28; Antikainen and Jongsma (n 33) 258; Osborn, ‘Of PhDs, Pirates, and the Public’ (n 33) 28.

39 Osborn, *3D Printing* (n 1) 31.

40 *ibid* 29.

41 Computer programs are defined as “programs in any form, including those which are incorporated into hardware... also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage”. Software Directive, Recital 7.

42 Dinusha Mendis, ‘In Pursuit of Clarity: The Conundrum of CAD Software and Copyright – Seeking Direction Through Case Law’ (2018) 40(11) EIPR 694; Dinusha Mendis, ‘Clone Wars Episode II - The Next Generation: The Copyright Implications Related to 3D Printing and Computer-Aided Design (CAD) Files’ (2014) 6 Law, Innovation and Technology 265; Bradshaw, Bowyer and Haufe (n 1); Dolinsky (n 34); Osborn, *3D Printing* (n 1); Iona Silverman, ‘Optimising Protection: IP Rights in 3D Printing’ (2016) 38(1) EIPR 5.

43 See further *Abraham Moon & Sons v Thornber* [2012] EWPCC 37, [2013] FSR 17; *Anacon Corporation v Environmental Research Technology* [1994] FSR 659 (Ch D); *Brigid Folley v Elliot* [1982] RPC 433 9EWHC Ch; Mendis, ‘In Pursuit of Clarity’ (n 42).

44 Antikainen and Jongsma (n 33) 258; Mendis, ‘Back to the Future?’ (n 5); Daly (n 2); Haritha Dasari, ‘Assessing Copyright Protection and Infringement Issues Involved with 3D Printing and Scanning’ (2013) 41 AIPLA QJ 279.

45 Mendis, ‘In Pursuit of Clarity’ (n 42).

46 Database Directive, Art 3(1)

47 Antikainen and Jongsma (n 33) 272; Osborn, *3D Printing* (n 1) 168.

- 18 The category of the work matters more for countries with a closed-list of protected subject matter, such as the UK; while civil law countries keep an open-list approach,<sup>48</sup> and use the originality standard to determine what is protected. This open-list approach requires assessing whether previously unconsidered things, such as smell of perfumes or taste of cheese, could receive copyright protection. The category might also matter for originality in the UK; because the originality standard for computer programs, databases and photographs are harmonised with the EU Directives, but not harmonised for other types of works. For other countries, determining the correct category seems to be a relatively small problem compared to determining the originality of the scans.
- 19 The fourth and most important question is whether these methods have enough room for originality. The general understanding is that 3D models created from scratch are more likely to be original, while the scans of existing objects rarely have enough room for originality.<sup>49</sup> While there are no cases for the 3D scanning of cultural heritage yet, *Bridgeman v Corel* can be helpful in explaining this viewpoint. This case showed that photographs of two-dimensional public domain paintings lacked sufficient originality to be protected as new works.<sup>50</sup> It was held that they could not be protected because the result was not original enough, which was in line with developments in the US at the time.<sup>51</sup> The outcome of this case and its discouraging impact on heritage institutions were widely discussed.<sup>52</sup> It should be mentioned here that even the recreation of seemingly two-dimensional works is not always straightforward. One interesting example is the digitisation of 2D paintings in 2013, when a researcher used a 3D scanner to detect the details of the usage of brushes and the amount of paint and then recreated these images by 3D printing.<sup>53</sup>
- 20 Going back to the methods above, it should also be noted that there is no single determining point during the 3D digitisation for the originality threshold, the creative decisions could be in the planning, the scanning or the processing, as long as they affect the final outcome.<sup>54</sup>
- 21 In arguing for originality in laser scanning, it was mentioned above that they come in many different types, with differing levels of human control.<sup>55</sup> As such, the level of free and creative choices could be different between the scanning of an object placed on a turntable and the scanning performed by hand-held or backpack-mounted scanners. Depending on the size of the scanned location, the use of phase and/or pulse scanners and drones add another layer in the scanning stage, where original decisions might be made.<sup>56</sup> Even if there is only one possible angle (such as an archaeological excavation with a limited view), choosing the correct method and device to capture the scan might equate to
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- 48 See for a detailed comparison: J.A.L. Sterling, *Sterling on World Copyright Law* (5<sup>th</sup> edn, Sweet & Maxwell 2018) Chapter 6.
- 49 Antikainen and Jongsma (n 33) 269; Osborn, *3D Printing* (n 1) 168; John Hornick, '3D Printing and IP Rights: The Elephant in the Room' (2015) 55 Santa Clara L. Rev. 801, 812.
- 50 *Bridgeman Art Library v Corel Corp.*, 36 F Supp 2d 191 (SDNY 1999).
- 51 'distinguishable variation' in *Gerlach-Barklow v Morris & Bendien* 23 F 2d 159 (SDNY 1927); 'something more than merely trivial, something recognizably his own' in *Alfred Bell v Catalda Fine Arts* 191 F 2d 99 (2d Cir 1951); 'substantial as opposed to trivial variation ... an element of creativity' in *L Batlin & Son v Snyder* 536 F 2d 486 (2d Cir 1976); as quoted in Robert C Matz, 'Bridgeman Art Library, Ltd. v. Corel Corp.' (2000) 15 Berkeley Tech LJ 3. See also *Meshworks, Inc. v. Toyota Motor Sales USA, Inc.*, 528 F.3d 1258 (10th Cir. 2008); *Osment Models, Inc. v. Mike's Train House, Inc.*, No. 2:09-CV-04189-NKL, 2010 WL 5423740; cf. *Alva Studios, Inc. v. Winninger*, 177 F. Supp. 265 (SDNY 1959) and *Lucky Break Wishbone Corp. v. Sears Roebuck & Co.*, 373 F. App'x 752, 755 (9th Cir. 2010) for the US approach to copies of existing objects.
- 52 For *Bridgeman* case: Matz (n 51); Terry S Kogan, 'Photographic Reproductions, Copyright and the Slavish Copy' (2012) 35 Colum. J.L. & Arts 445; Mary Campbell Wojcik, 'The Antithesis of Originality: Bridgeman, Image Licensors, and the Public Domain' [2008] Hastings Comm. & Ent. L.J. 257; Robin J Allan, 'After Bridgeman: Copyright, Museums, and Public Domain Works of Art' (2007) 155 U. Pa. L. Rev. 961. For similar cases see also Sterling (n 48) 288.
- 53 '3D Printer Creates Identical Reproductions of Fine Art Paintings' (designboom, 2013) <[www.designboom.com/art/oce-3d-printer-creates-identical-reproductions-of-fine-art-paintings-09-30-2013/](http://www.designboom.com/art/oce-3d-printer-creates-identical-reproductions-of-fine-art-paintings-09-30-2013/)> accessed 20 February 2020.
- 54 Michael Weinberg, '3D Scanning: A World without Copyright' (2016) 7.
- 55 For different levels of human involvement in works and its implications for copyright, Thomas Margoni, 'The Digitisation of Cultural Heritage: Originality, Derivative Works and (Non) Original Photographs' (2014); Dasari (n 44) 298-305.
- 56 Laser scanning by using drones can be compared to the example of taking aerial photographs of Paris mentioned in Margoni (n 55) 34. Due to technological developments, whoever is controlling the laser scanning drone nowadays would have more control than a person setting up a camera to take photographs in regular intervals in this example.

having enough room for free and creative choices. Secondly, positioning of the objects play a big role in the desired outcome and it was mentioned above that deciding on the right position can take up as much as half of the data acquisition. Based on the decision in *Painer*, it is clear that the lighting and positioning of the object can impact the originality of the outcome.<sup>57</sup> It should especially be noted that this case also mentions situations after the image is captured for adding a “personal touch”.<sup>58</sup> While some argue that lighting, colour and shadows disappear during the processing stage, especially if they are aiming for accuracy,<sup>59</sup> there could be further choices in the processing such as removing errors or adding realistic textures.

- 22 *In arguing for originality in photogrammetry*, there are the capturing and processing stages. If the photographs are new and created as part of the project, then the arguments about the choosing the right device and positioning also apply here. If the images were not specifically created for the project, but were processed with the help of photogrammetry, then we would need to assess the processing stage.
- 23 One of the issues would be whether this method only involves facts. Since photogrammetry uses existing images to learn the measurements and positioning of objects, those things alone would not be copyrightable.<sup>60</sup> However, the processing might mean that the right information needs to be chosen, interpreted and brought together, which might show sufficient originality. If the end result is going to be treated as a database, then the materials need to be individually accessible.<sup>61</sup> While the data is arranged in a systematic way in photogrammetry,

are the outcomes of photogrammetry individually accessible? The closest example would be the geographic locations on a map, in which the CJEU confirmed that it would be.<sup>62</sup> However, it would be less likely to be original, if photogrammetry just relies on all existing images and if there is not much room for creative choices in the selection or arrangement.<sup>63</sup> There is also the sui generis database right for protecting the substantial investment in obtaining, verifying or presenting the contents of the database.<sup>64</sup> Where (i) data obtaining and verifying is limited (photogrammetry relying on existing photographs), or (ii) added information disappears in the conversion to 3D printable formats,<sup>65</sup> it is unlikely for the result to receive a database right. Another concern regarding the originality of photogrammetry method is the heavy reliance on the software. If there is no human involvement and the data collected is merely fed to the photogrammetry software, at which stage would there be free and creative choices? It should be noted that while software is useful for increasing automation, it is still not fully automated, and a human’s involvement is still needed to ensure that the correct data is collected and the processing stage goes smoothly.

- 24 To sum up, varying methods mean varying original contributions for copyright purposes. Both laser scanning and photogrammetry are common methods with multiple changes taking place at every stage. Selecting the right method, device, angle, positioning at the capturing stage and then selecting the right processes, measurements and interpretations in the processing stage show enough room for free and creative choices. It is a separate question if these digitisers actually want to create a new work, which will be discussed in the next part.

57 See *Painer* (n 36), *Antiquesportfolio.com v Rodney Fitch & Co* [2001] FSR 345, [2001] ECDR 52 (EWHC Ch); *Margoni* (n 55) 19; *Mendis*, ‘Clone Wars Episode II - The Next Generation’ (n 42) 277-278.

58 “In the preparation phase, the photographer can choose the background, the subject’s pose and the lighting. When taking a portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software.”: *Painer* (n 36) [91].

59 Osborn, ‘Of PhDs, Pirates, and the Public’ (n 33) 831.

60 Weinberg (n 54) 14.

61 A database is defined as “a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means”: Database Directive, Art 1(2).

62 “...Article 1(2) of Directive 96/9 must be interpreted as meaning that geographical information extracted from a topographic map by a third party so that that information may be used to produce and market another map retains, following its extraction, sufficient informative value to be classified as ‘independent materials’ of a ‘database’ within the meaning of that provision.” Case C-490/14 *Freistaat Bayern v Verlag Esterbauer* EU:C: 2015:735 [29]; See also Lionel Bently and Brad Sherman, *Intellectual Property Law* (5th edn, Oxford University Press 2018) 67.

63 Antikainen and Jongsma (n 33) 272.

64 Database Directive Art 7, Case C-444/02 *Fixtures Marketing Ltd v Organismos prognostikon agonon podosfairou AE (OPAP)* [2004] ECR I-10549 [2005] 1 CMLR. 16.

65 Antikainen and Jongsma (n 33) 273.

## C. Copyright implications of the project's purpose

25 It is worth mentioning here again that creative decisions could take place at any stage of the project. It means that depending on the purpose, there could be different types of contribution taking place at the capturing and processing of both of the methods described above. This section will roughly divide it into three purposes: identical copies, restoration, and creative purposes. Any subsequent purposes (such as research, education, virtual repatriation) would usually be achieved by creating identical copies. It should be repeated here again that while these activities would count as reproduction and adaptation and could infringe the copyright in the scanned object, this article only addresses the scenarios where the scanned originals are already in the public domain.

### I. Identical copies

26 The benefits of digitisation in creating preservation copies is widely recognised.<sup>66</sup> As mentioned in the Introduction, cast courts of identical copies allow people to experience cultural heritage in remote areas.<sup>67</sup> With the technological developments, 3D printed versions are no longer inferior to the original and can be preferred for allowing a more personal, hands-on approach with the copies,<sup>68</sup> while saving the originals from further contact. As mentioned earlier, the case law for identical copies of public domain works (*Bridgeman v Corel*) seems discouraging. As discussed in Part B, there is great

skill involved in making accurate copies. While showing that skill alone is not enough for originality, if there are free and creative choices to be made to create a “good copy”,<sup>69</sup> then these works can still be original.

27 On the other hand, not all choices will matter when aiming for accuracy. For example, the decisions made during the printing, such as aiming for the right colour<sup>70</sup> or the right material,<sup>71</sup> will not matter in determining the originality of the 3D model itself. Similarly, when the CAD file is converted into an STL file, they lose features such as lighting and shadows (as they are not needed for the printing),<sup>72</sup> which means that the original decisions regarding those aspects also disappear. So, achieving sufficient originality is not impossible for identical copies, but it requires an incredibly careful expert consideration of the decisions made at every stage.

### II. Restoration

28 When the aim is not creating the object as it is now but to restore it to its former glory, there could be restoration decisions for removing weather damage or cracks, smoothing of the edges, purposefully separating a single work into different parts and changing the scale; all of which could lead to sufficiently different scans. On multiple occasions, the contributions in restorations were treated as

66 European Commission, Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation' ((EC) 2006/585) [2006] OJ L236/28; Declaration of cooperation on advancing digitisation of cultural heritage (2019).

67 “Just as the Romans once used casting to obtain copies of Classical Greek statuary, the British, and then the Americans, used this technique in the nineteenth century to develop collections of copies of sculptural works in Italy. These copies were publically displayed, even in major museums, and used in teaching history of art, and applied art courses, at universities”: Charles Cronin, ‘Possession Is 99% of the Law: 3D Printing, Public Domain Cultural Artifacts and Copyright’ (2016) 17 Minn. J.L. Sci. & Tech 709, 712.

68 Osborn, ‘Of PhDs, Pirates, and the Public’ (n 33) 820-821; Sonia K Katyal, ‘Technoheritage’ (2017) 105(4) California Law Review 1111, 1129; Matthew Rimmer, ‘3D Printing Jurassic Park: Copyright Law, Cultural Institutions, and Makerspaces’ [2016] Pandora’s Box 1, 9.

69 “In cases where there is no complete record of the antecedent work intact... such as when an impurity-obscured painting is restored to its former glory or when a scholar tries to accurately recreate an obscure ancient work for which no complete records have survived the passage of time, the conclusions reached and decisions made by the recreative author may well be different from those of another person engaged in the same task”: Ong (n 35) 184.

70 “the varying color temperatures of natural lighting differentiate the appearance of the originals and digital reproductions from hour to hour”: Shoji Yamada, ‘Who Moved My Masterpiece? Digital Reproduction, Replacement, and the Vanishing Cultural Heritage of Kyoto’ (2017) 24 International Journal of Cultural Property 295, 302.

71 “Some parts may be durable, but other materials will be predictably short-lived. These less durable materials would be best used as models or precursors to final objects. There are some very robust materials used for aerospace or deep-sea applications”: Melvin J Wachowiak and Basiliki Vicky Karas, ‘3D Scanning and Replication for Museum and Cultural Heritage Applications’ (2009) 48 Journal of the American Institute for Conservation 141, 147.

72 Antikainen and Jongsma (n 33) 260.



original throughout the EU countries.<sup>73</sup> While also requiring a careful analysis of the contribution of the restorer, this purpose is more likely to lead to an original work, compared to identical copies.

- 29 Restoration could also be interpreted as restoring an unprintable 3D model: it was previously mentioned that format changes can mean the disappearance of original decisions. But changing formats could also allow for making an original contribution: for example, the files should be checked for mistakes during format changes, because any gap in the surface-mesh file might lead to a failed printing-job.<sup>74</sup> But if the subsequent restorations made to the file is the only way of achieving those results, then it would not be an original work as there were no choices involved.

### III. Creative Purposes

- 30 3D models can allow presenting works in new range of possibilities such as interactive exhibitions.<sup>75</sup> Scholars refer to expressive scans where the outcome significantly differs from the original objects and therefore display sufficient originality.<sup>76</sup> Further alterations to identical copies can also lead to new works. Anyone with access to existing 3D models can make personal changes, so that they can interact with heritage in a deeper way. For example, there are various 3D models of the Nefertiti bust turned into different objects such plant pots and accessories that can be found online<sup>77</sup>, which are based on an

identical copy of the bust.<sup>78</sup> Modifying and printing these objects and using them in daily life could bring a deeper understanding than seeing the original bust held in a glass case in the Neues Museum. Overall, the works created for creative purposes are more likely to be original and deserving of copyright protection, compared to identical copies.

- 31 To sum up, the purpose of 3D scanning and printing carries a great importance in affecting their copyright status. As the original contributions could occur at any stage, every work should be assessed separately. Even when the aim is to create an identical copy, it is possible to make free and creative choices to achieve such accuracy. Projects with purposes such as restoration and creative uses are even more likely to produce original results.

### D. Copyright implications of the human involvement

- 32 It is also important to remember that such 3D digitisation is usually performed by multiple parties providing their skills and assistance at different stages. It matters for originality because it means any of these parties can display “free and creative choices” that result in something original. Secondly it also determines who stamped the work with their personal touch,<sup>79</sup> in order to become the author(s).<sup>80</sup> The rules for authorship could be particularly important for the desirability such projects.

- 33 Both methods of laser scanning and photogrammetry will require human involvement in order to avoid errors. For example, when the points in the multiple scans are being aligned, even with laser scanners with built-in compasses, it is necessary to check for metal objects that could affect the compass.<sup>81</sup> But the involvement for overcoming technical hurdles might be less original compared to the involvement to determine the methods or shape of the 3D model.

- 34 It could be challenging to distinguish the authors. One of the benefits of laser scanning is argued to be automated to an extent where “the outcome will be homogenous even when different operators work

73 Andreas Rahmatian, ‘Copyright protection for the restoration, reconstruction and digitization of public domain works’ in Estelle Derclaye (ed), *Copyright and Cultural Heritage: Preservation and Access to the Works in a Digital World* (Edward Elgar 2010) 51-77; Paul Torremans, ‘Legal issues pertaining to the restoration and reconstitution of manuscripts, sheet music, paintings and films for marketing purposes’ in Paul Torremans (ed), *Copyright Law. A Handbook of Contemporary Research* (Edward Elgar 2007) 28-48. See also *Eisenman v Qimron*, C.A. 2790/93, 2811/93, 54(3) P.D. 817.

74 Osborn explains that this part sometimes requires the involvement of a person with the necessary skills and knowledge, but this human dependency might decrease in the future with better technology. Osborn, *3D Printing* (n 1) 30.

75 For 3D projects see: ‘Arts and Culture Experiments’ <<https://experiments.withgoogle.com/collection/arts-culture>> accessed 20 February 2020.

76 Weinberg (n 54) 10; Katyal (n 68) 1147.

77 Thingiverse <<https://www.thingiverse.com/tag:Nefertiti>> accessed 21 February 2020.

78 ‘Nefertiti Hack’ <<http://nefertitihack.alloversky.com/>> accessed 21 February 2020.

79 Painer (n 36) [92].

80 This depends on the national copyright laws of the given jurisdiction regarding joint and co-authorship.

81 Historic England, ‘3D Laser Scanning’ (n 6) 32.

on a project”.<sup>82</sup> If it means there is only one way of doing something, then there is no originality. But if it means that different operators will still make contributions, but their individual contribution is impossible to separate, then the outcome will be protected and these operators could be treated as joint authors.<sup>83</sup>

35 If the creation of 3D model was completely automated (and it could be soon, with the help of the technology), then we would have to check the copyright laws for computer-generated works. While there are references to the author of the computer program under EU Law, the rules on computer-generated works did not make it to the final draft of the Software Directive.<sup>84</sup> If such 3D scans are to be treated as computer-generated works, then the originality criteria to be applied is also uncertain.<sup>85</sup>

36 While determining the author, it is useful to understand the employment practices of the heritage sector. For such projects, the author would usually be the institution who scans their collections or the parties who run the on-site digitisation project. It would then be up to them to release them online for free or keep the models to themselves and use it for purposes such as making replicas for the gift shop. One important issue to consider here is whether the employees would hold copyright to the scans they created. Most civil law countries have rules that assume the employee as the author, unless there is a contractual provision; whereas common law countries usually carry the assumption that the works created during employment belong to the employer.<sup>86</sup>

37 It is less straightforward for projects that were outsourced to scanning companies. In finding a balance between the desire to have complete control over a project and the discouraging costs of scanning devices, it makes sense to rely on

contractors especially when the work is a one-off/ not continuous.<sup>87</sup> To avoid future problems with the third-party digitisers, cultural heritage institutions are usually advised to make it clear in the contracts regarding who will hold the copyright at the end of these projects.<sup>88</sup>

38 For the images used in photogrammetry, it can be challenging to determine their authors. While the tourist images in the abovementioned Bamiyan Buddhas project came from a named person who visited the area in 1960s,<sup>89</sup> it might not be equally straightforward due to the fact that lots of mobile phones have cameras now and some of the photographs could be taken in a hurry before the volunteers leave the heritage site in immediate danger. If the photographs of the volunteers are subject to copyright (noting the specific right for non-original photographs in jurisdictions such as Germany, Italy and Spain),<sup>90</sup> then the digitisers need the volunteer’s permission to reproduce their photographs. Even if these reproductions are only used for obtaining measurements between two points, the project would still be storing copies of these images. Furthermore, since the tourist images are very similar to each other, it could be impossible to distinguish the author if the end result is based on one specific work.<sup>91</sup>

39 Finally, it is important to note that determining an author means that these scans will not be in the public domain, unless the author choose to release them through Creative Commons or a similar license. It is a common criticism that heritage institutions are trying to control public domain works and pull them back into the scope of

82 Tucci, Cini and Nobile (n 11) 415.

83 The rules on joint authorship is not harmonised. Bently and Sherman (n 62) 139; Mark Perry and Thomas Margoni, ‘Ownership in Complex Authorship: A Comparative Study of Joint Works’ (2012) 34(1) EIPR 22.

84 Explanatory Memorandum to the proposal for a Software Directive, COM (88) 816 final, 17 March 1989; Ana Ramalho, ‘Will Robots Rule the (Artistic) World? A Proposed Model for the Legal Status of Creations by Artificial Intelligence Systems’ (2017) 12 Journal of Internet Law.

85 Bently and Sherman (n 62) 117; *Copinger & Skone James on Copyright* (Sweet & Maxwell 2017) para 3-274.

86 Sterling (n 48) 206-209; Jorgen Blomqvist, *Primer on International Copyright and Related Rights* (Edward Elgar 2014).

87 Historic England, ‘3D Laser Scanning’ (n 6) 45. Although it is about scanning books, see also Nick Poole, ‘The Cost of Digitising Europe’s Cultural Heritage’ Report for Comité des Sages of European Commission (2010), 43 for the cost difference between digitising in-house versus outsourcing (cheaper).

88 Margoni (n 55).

89 Grün, Remondino and Zhang (n 29) 184.

90 The Term Directive protects photographs that are the author’s own intellectual creation, but Article 6 allows Member States to protect other photographs too. See Copinger (n 85) 3-263; Margoni (n 55) 13; Bently and Sherman (n 62) 117.

91 As an interesting example on tourist photographs, see Oliver Smith, ‘How an Incredible Coincidence Sparked a Facebook Plagiarism Row’ (*The Telegraph*, 2015) <<https://www.telegraph.co.uk/travel/news/How-an-incredible-coincidence-sparked-a-facebook-plagiarism-row/>> accessed 7 May 2020.

65 copyright.<sup>92</sup> While some argue that it is unfair for public institutions to prevent others from enjoying these public domain works fully, others argue that their investment in digitising their collections should give them some form of benefit and copyright can be the right incentive. Copyright should establish a balance here, by rewarding the efforts that deserve protection while keeping the low effort, non-original engagement with cultural heritage outside the scope of copyright control. As the 3D projects are needed in order to overcome the risk of disappearance of heritage of all humankind, keeping a lenient approach to the likelihood of originality should not necessarily be interpreted as being detrimental to the public.

## E. Conclusion

40 The discussion above shows that for the scanning of cultural heritage, it is possible and, in some instances, highly likely for the outcome to be protected by copyright due to the varying methods, purposes and people involved. Each of these elements need to be assessed carefully for every 3D model. Both laser scanning and photogrammetry methods create works, that fit under the protected subject matter of copyright and display enough originality under EU law. While the literature usually assumes heritage scanning will mean creating identical copies, there are multiple possible purposes for carrying out 3D scanning and these purposes can lead to free and creative choices during the capturing and processing stages. Finally, there are many different parties collaborating in these projects and each contribution should be assessed carefully for determining the originality and the authorship of the work. It is important to determine these correctly, as the parties making the scans usually rely on copyright as an incentive to undertake such projects.

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92 Kenneth D Crews, 'Museum Policies and Art Images: Conflicting Objectives and Copyright Overreaching' (2012) 22 *Fordham Intell. Prop. Media & Ent. L.J.* 795; Ong (n 35) 186-187.

# The Quality of Law

How the European Court of Human Rights gradually became a European Constitutional Court for privacy cases

by **Bart van der Sloot\***

**Abstract:** Until very recently, the European Court of Human Rights was willing to assess whether Member States' executive branch had operated on a legal basis, whether national courts had struck a fair balance when adjudicating cases, and whether Member States had a positive obligation to ensure adequate protection of citizens' human rights. One thing it did not assess however, was whether Member States' legislative branch had respected the principles of the rule of law and the minimum requirements of

good law-making. That is, until recently. Propelled by cases revolving around mass surveillance activities, in just a small number of years, the Court has undergone a revolutionary transformation and now formally assesses the quality of Member States' laws and even advises Member States' legislative branch on how to amend its legal system in order to be Convention-compliant. Doing so, it has gradually turned into a European Constitutional Court, in particular for privacy cases.

Keywords: ECtHR; Article 8 ECHR; Rule of Law; Quality of Law; Minimum Requirements of Law

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## A. Introduction

1 Although initially, both states and individuals (natural persons, groups and legal persons) could submit a complaint under the European Convention on Human Rights (ECHR), the latter category could do so only with the former European Commission on Human Rights (ECmHR). The Commission could declare a case admissible or inadmissible but could not judge on the substance of the matter, a task which was left to the European Court of Human Rights (ECtHR). Even if a case brought by an individual was declared admissible, it could only be put before the Court by the Commission or by one of the Member States, not by the individual herself. This ensured that not every case in which an individual's private interest had been harmed would be assessed by the Court, but only those cases that the Member States

or the Commission felt had a broader significance, transcending the mere particularities of the claimant's case, therewith also addressing the fear of 'shoals of applications being made by individuals who imagine that they have a complaint of one kind or another against the country.'<sup>1</sup> However, over time, the Convention has been altered so that individuals can also bring cases directly before the Court when they have been declared admissible.<sup>2</sup> In addition,

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1 A. H. Robertson, *Collected edition of the "Travaux préparatoires" of the European Convention on Human Rights / Council of Europe* (vol II, Martinus Nijhoff, 1975-1985) 188.

2 Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 6.XI.1990.



inter-state complaints play no role of significance<sup>3</sup> and although the Convention formally allows groups and legal persons to issue a complaint, in practice, groups are denied that right by the Court<sup>4</sup> and it is very hesitant to allow legal persons to rely on certain human rights, such as the right to privacy.

- 2 Importantly, the Court has made clear that in principle, natural persons can do so only when their claim concerns the protection of their own, private interests. So-called *in abstracto* claims, which revolve around the legitimacy of a law or policy as such, are as a rule inadmissible; *a priori* claims are rejected as well, because the Court will only receive complaints about injury which has already materialized; and the ECtHR will also not receive an *actio popularis*, a case brought by a claimant, not to protect its own interests, but those of others or of society as a whole. As an effect, by far most cases before the Court concern the executive and the judicial branch of Member States and how they have acted in concrete cases. Although the Court has also been willing to find that a state is under a positive obligation to provide protection to the human rights of a claimant, it is important to note that even in these types of cases, the ECtHR will not hold that the Member State should change its laws, but only that in the specific case of the applicant, the state should have done more to provide adequate protection of her human rights or should have made an exception to the prevailing laws and policies in her specific case.
- 3 Even where, for example, a Member State's law allowed prison authorities to structurally monitor the correspondence of prisoners, the Court would not hold that the law or policy should be altered or revoked, but merely stress that in the specific case of the applicant, her human rights were violated by the unlawful actions of the executive branch.<sup>5</sup>

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Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby. Strasbourg, 11.V.1994.

- 3 Which is significant because inter-state complaints typically regard general matters such as whether Hungary is undermining the rule of law, whether Turkey was justified in invoking the state of emergency or whether Russia systematically discriminates against LGBTQ people.
- 4 Only individuals who claim to have been harmed by the same fact can bundle their complaints.
- 5 See e.g.: ECtHR, *Drozdowski v. Poland*, application no. 20841/02, 06 December 2005.

- 4 For more than 50 years, this has been the standard interpretation of the Convention. This makes it all the more remarkable that a fundamental revolution has materialised in just a small number of years. This article will discuss how that revolution has unfolded. First, it will discuss the choices made by the authors of the Convention on this point and the discussions over the role and position of the ECtHR when drafting the ECHR (section B). Subsequently, this article will show how a rather old doctrine, namely that laws should be accessible and foreseeable, was gradually turned into a tool that allows the ECtHR to assess the quality of laws and policies of Member States, especially in privacy-related matters (section C). This article will explain that this doctrine was developed in cases in which applicants could substantiate having been harmed individually and directly, not by the existence of a law or policy as such, but by its application in their specific case. Late 2015, however, the ECtHR made a next step by accepting an *in abstracto* complaint, and it has done so two more instances since.

These cases concern mass surveillance activities by national states. Because in these cases, the ECtHR cannot assess whether in the concrete matter of the case, the executive or judicial branch has struck a fair balance between different competing interests, it accepts that the only relevant test it can deploy is to evaluate the quality of laws and policies as such. Although it is still very hesitant in doing so, it is willing to assess in detail whether national laws abide by a long list of minimum requirements of law (section D). This radical shift is supported by a number of developments, such as that the Rules of the Court have been altered so as to allow the Court, when it has established a violation of the Convention, not only to grant compensation to the victims directly affected, but also to order the legislative branch of a Member State to alter its laws (section E). Finally, the analysis will reflect on the significance of this revolution and what it may mean in time for both the position of the ECtHR and the protection of human rights (section F).

## B. Drafting the Convention, or how the authors of the ECHR eventually favoured democracy over the rule of law

- 5 To understand the significance of the willingness of the European Court of Human Rights to scrutinise the legislative branch of the Member States of the Council of Europe, it is important to go back to the time when the European Convention on Human Rights was drafted. It was in the wake of the Second World War, in which regimes that had disregarded

human rights on a large scale had just been defeated and in which both communist and fascist totalitarian regimes still existed. The rule of law virtually did not exist under those administrations; laws were applied retroactively and arbitrarily and there was no real separation of power. Relying on the state of emergency, many regimes either passed aside the legislative power or turned it into a puppet of the executive branch. Laws and policies were designed not to serve the general interest but those of selected groups, and constitutions were revised to legitimise these administrations rather than to provide legal certainty to minorities. This sparked the creation of a number of human rights documents, such as the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

- 6 The original draft of the ECHR laid down a list of rights in the first article, enumerating the various freedoms per indent, and a general limitation clause in article 6, specifying that ‘no limitations shall be imposed except those established by the law, with the sole object of ensuring the recognition and respect for the rights and freedoms of others, or with the purpose of satisfying the just requirements of public morality, order and security in a democratic society.’<sup>6</sup> Later, an alternative proposal emerged, which was closer to the final text of the ECHR, which contained one right per article and laid down a limitation clause specific to each freedom. Especially with the so-called qualified rights (Arts 8-11 ECHR), the elements for legitimately imposing restrictions have remained essentially the same as in the original proposal: an interference should have a legal basis, serve a public interest, and be necessary in a democratic society. These conditions provide important safeguards in various ways. They not only require the executive power to act on a legal basis when interfering with a human right (adhering to the limits set by the legislative power), they also speak of a democratic society, in which laws are made directly or indirectly by its citizens; in addition, they make clear that the interference of a human right can never be considered legitimate when it serves to protect the interests of a particular group in society, instead of the general interest.
- 7 But when the representatives of the various countries that would later join the Convention drafted the text, it became clear that there was considerable discussion over the question of to what extent the ECtHR should scrutinise the legislative branch of Member States. One group stressed that the ultimate power in constitutional democracies was with the legislative branch, while the other group underlined that even the democratic legislator was bound by constitutional principles and the rule of law.

Although neither group was glaringly victorious, it is clear that the idea that the democratic legislator should not be scrutinised by the European Court of Human Rights eventually took the upper hand.

- 8 For example, Article 7 of the original proposal of the ECHR laid down: ‘The object of this collective guarantee shall be to ensure that the laws of each state in which are embodied the guaranteed rights and freedoms as well as the application of these laws are in accordance with “the general principles of law as recognised by civilised nations” and referred to in Article 38c of the Statute of the International Court of Justice.’<sup>7</sup> This provision essentially rejects the positivist view that there are no legal principles outside those that have been formally agreed upon and accepts that there are unwritten legal principles which laws set out by the democratic legislator must adhere to. Even if a regime would adopt laws that adhered to all formal legal principles, it could still conflict with unwritten principles of natural law, that are prior to and take precedence over man-made laws.<sup>8</sup> But the article was rejected<sup>9</sup> from the final text of the Convention; instead, Article 7 ECHR only contains one ‘general principle of law’, namely the prohibition of retroactive legislation. In addition, a reference to the rule of law was moved to the non-operative part of the Convention, the preamble, holding: ‘Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration’.
- 9 To provide another example, a proposal was made to annex a special Convention to the ECHR, to lay down principles of the rule of law. ‘In my opinion, what we must fear to-day is not the seizure of power by totalitarianism by means of violence, but rather that totalitarianism will attempt to put itself in power by pseudo-legitimate means. [] For example, the Italian constitution was never repealed, all constitutional principles remained in theory, but the special laws approved by the Chambers, elected in one misdirected campaign, robbed the constitution little by little of all its substance, especially of its substance of freedom. The battle against totalitarianism should rather be modified and should become a battle

7 *ibid*, p. 230. Statute of the International Court of Justice <<https://www.icj-cij.org/en/statute>>.

8 R. Lesaffer, “Argument from Roman law in current international law” (2005), 16(1), *European Journal of International Law*, 25-58. See also: Travaux Préparatoires Vol IV, p. 56.

9 Travaux Préparatoires Vol IV, p. 30. It was proposed and rejected again, Vol VI, p. 12 and p. 56.

6 Travaux Préparatoires. Vol I, p. 230.

against abuse of legislative power, rather than abuse of executive power.<sup>10</sup> It was suggested that the ECtHR should have the power to hold any law contrary to the ECHR unconstitutional *ipso jure*.<sup>11</sup> That proposal, however, was also rejected as well.

- 10 To provide a final example, a discussion emerged over Article 50 of the original Convention, which held that in case of a violation of the Convention, the Court could, if necessary, afford just satisfaction to the injured party.<sup>12</sup> The focus on relief for applicants was felt to be too limited to some authors of the Convention: 'It seems to suggest that the only form of reparation will be compensation. It seems to suggest that the European Court will be able to grant indemnities to victims, damages and interest, or reparation of this kind. It does not say that the European Court will be able to pronounce the nullity or invalidity of the rule, or the law, or the decree which constitutes a violation of the Convention. That, Ladies and Gentlemen, is something very grave. True, reparation in kind may be advisable where the victim is a specified individual. In case of an action *ultra vires* of this sort on the part of the local police, a mayor, a prefect, or even a minister, satisfaction may be given in the form of reparation in cash or the awarding of an indemnity. But can the graver form of violation which consists in removing a fundamental law guaranteeing a specific freedom for the whole nation, from the laws of a country in virtue of some law or decree, can such a violation be redressed by awarding a symbolic farthing darn ages to the citizens of the country? If, tomorrow, France were to sink into a dictatorship, and if her dictator were to suppress the freedom of the Press, would the European Court award a franc damages to all Frenchmen so as to compensate for the injury which the suppression of this fundamental freedom had caused them? Such a proceeding would not make sense. If we really want an European Court to succeed in guaranteeing the rights which we have placed under its protection, we must grant jurisdiction to declare void, if need be, the laws and decrees which violate the Convention.'<sup>13</sup>
- 11 Not only was this proposal rejected, it is this example that illustrates perfectly the sharp contrast between how one group had hoped the Convention-system would work and how it turned out in practice. While the hope of the 'constitutionalists' was that the Court would focus especially on questions over whether laws and the legal regime as such were in

conformity with the rule of law and whether they served the general interest, the Convention turned out to be a system providing relief to individuals who are harmed specifically by an action or inaction of the executive or judicial branch, such as when the police unlawfully enters a person's home. In one of its first decisions, the former European Commission on Human Rights delivered a final blow to the hope of this group by making clear that under the Convention-system, laws and policies will not be evaluated as such; only their application and effect in the concrete case of the claimant would.<sup>14</sup>

## C. The ECtHR's early case law, or how the notion of the Quality of Law emerged

- 12 For a long time, the requirement that an interference with a human right should have a legal basis was applied to the executive power only and focussed on the question of whether the executive power stayed within the limits set out by the law. This requires of the Court not so much a substantive analysis of the case, but a procedural one. When a violation is found on this point, this will usually result in a short judgment, a typical example being: 'The Court notes that the envelope in which the applicant's first letter of 21 May 2003 was sent to the Court from the Chelm Prison bears two stamps that read: "censored" and "the Chelm District Court". [] The Court observes that, according to Article 214 of the Code of Execution of Criminal Sentences, persons detained on remand should enjoy the same rights as those convicted by a final judgment. Accordingly, the prohibition of censorship of correspondence with the European Court of Human Rights contained in Article 103 of the same Code, which expressly relates to convicted persons, was also applicable to detained persons. Thus, censorship of the applicant's two letters to the Court was contrary to the domestic law. It follows that the interference in the present case was not "in accordance with the law".'<sup>15</sup>
- 13 But around the 1980s, a new doctrine started to emerge, namely that laws should be accessible and foreseeable. One of the first cases in which the Court evaluated these elements was in the well-known case of *Sunday Times* (1979), in which the applicants argued, *inter alia*, that the law of

10 Travaux Préparatoires, Vol II, p. 136-138.

11 Travaux Préparatoires Vol II, p. 140.

12 Article 50 original ECHR.

13 Travaux Préparatoires, Vol V, p. 300-302.

14 ECmHR, *Habitants D'Alsemberg, de Beersel, de Kraainem, d'Anvers et Environs, de Grand et Environs v. Belgiums*, application nos. 1474/62, 1677/62, 1691/62 and 1769/63, 05 March 1964.

15 ECtHR, *Lewak v. Poland*, application no. 21890/03, 06 September 2007.

contempt of court was so vague and uncertain and the principles enunciated in a decision at national level so novel that the restraint imposed on them could not be regarded as “prescribed by law”. The Court stressed that the word “law” in the expression “prescribed by law” covered not only statute but also unwritten law, including established doctrines in common law. It recognised the slightly different formulations used throughout the Convention, such as “in accordance with the law” (Art. 8 ECHR) and “provided for by law” (Arts. 9-11 ECHR), and stressed that two requirements followed from the latter formulation (but not from the formulation used in Art. 8 ECHR). ‘Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances.’<sup>16</sup>

- 14 Although the Court did not find a violation on this point in *Sunday Times*, it did set out the contours of what would become a new doctrine. In its judgement, the ECtHR shifts the attention from the question of whether the executive power has abided by the boundaries set out by the legislative power, to the question of whether laws and legal doctrines as such are sufficiently clear to citizens. Citizens should be able to foresee to a reasonable extent what repercussions certain actions or inactions will have. If citizens don’t know which actions are forbidden or not, they won’t be able to follow the rules. In this sense, it is a matter of legal effectiveness that citizens who generally want to follow the prevailing legal standards are able to do so.<sup>17</sup> Although in *Sunday Times*, the Court had made explicit that the principles of accessibility and foreseeability derived from the term ‘prescribed by law’, used in Articles 9, 10 and 11 ECHR, and not from ‘in accordance with the law’, used in Article 8 ECHR, just a number of years later, in the case of *Silver and others* (1983), this distinction was absolved.<sup>18</sup>

16 ECtHR, *Sunday Times v. the United Kingdom*, application no. 6538/74, 26 April 1979, § 49.

17 See also: ECmHR, *X. Ltd. and Y. v. the United Kingdom*, application no. 8710/79, 07 May 1982.

18 ECtHR, *Silver and others v. the United Kingdom*, application nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75

- 15 Although the European Court of Human Rights was initially hesitant to apply the principles of accessibility and foreseeability to matters concerning the right to privacy, it was with cases on Article 8 ECHR that this doctrine gained significance, precisely because these principles are difficult to uphold in cases revolving around secret surveillance and special police investigations (secrecy and unforeseeability being essential to secret surveillance measures). Because the guarantees of accessibility and foreseeability are applied flexibly in those types of cases, the Court has stressed that the law must provide for other guarantees. In *Malone* (1984), the Court stressed that the notion of foreseeability, cannot be exactly the same in the special context of interception of communications for the purposes of police investigations, but it also stressed ‘that the phrase “in accordance with the law” does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention. The phrase thus implies - and this follows from the object and purpose of Article 8 - that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1. Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident. Undoubtedly, [] the requirements of the Convention, notably in regard to foreseeability, cannot be exactly the same in the special context of interception of communications for the purposes of police investigations as they are where the object of the relevant law is to place restrictions on the conduct of individuals. In particular, the requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. Nevertheless, the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence.’<sup>19</sup>

- 16 In addition, the Court emphasised that when the legislative branch transferred powers to the executive branch, especially in contexts where individuals are left in the dark when the executive has utilised its discretion to use its powers, there is an extra onus on the legislator to set tight conditions and restrictions on the use of power. The Court reiterated that in *Silver and Others*, it held that a law

and 7136/75, 25 March 1983, § 85.

19 ECtHR, *Malone v. the United Kingdom*, application no. 8691/79, 02 august 1984, § 67.



which confers a discretion must indicate the scope of that discretion, although the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law. The degree of precision required of the law, the ECtHR went on to stress in *Malone*, however, will depend upon the particular subject-matter. 'Since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.'<sup>20</sup> In *Leander* (1987), this line of interpretation was confirmed when the Court stressed that, while laws can normally be more open, because policies and actions by governmental organisations are generally disclosed to the public, 'where the implementation of the law consists of secret measures, not open to scrutiny by the individuals concerned or by the public at large, the law itself, as opposed to the accompanying administrative practice, must indicate the scope of any discretion conferred on the competent authority with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.'<sup>21</sup>

- 17 The case of *Malone* had a significant impact on the principles of accessibility and foreseeability. Although the Court still points to the importance of legal certainty for citizens, its main concern is not so much with abuse of power by the executive branch (using powers beyond the boundaries set by the legislator) but with the arbitrary use of power (where the executive stays within those boundaries, but the problem is that the boundaries are very broad or non-existent). In addition, an important alteration is that the principle of foreseeability is interpreted not so much as requiring that citizens should be able to know which actions are or are not prohibited (as secret surveillance by police units or intelligence agencies are generally introduced to uncover terrorist cells, organised crimes, etc., about which there is generally no doubt whether they are prohibited or not) but with the foreseeability of how the executive branch would use its powers, when and to whom. Consequently, while the original formulation of the notions of accessibility

and foreseeability concerned the relationship between the legislative branch and citizens, this interpretation of the principles focusses primarily on the relationship between the legislative branch and the executive branch, as the legislative power must set clear boundaries for the use of power the executive must respect.<sup>22</sup>

- 18 Gradually, the Court expanded this doctrine and laid down specific requirements for Member States' legal regime, to minimise the risk of arbitrary use of power. In *Olsson* (1988), the Court decided that these minimum principles of law are not restricted to cases revolving around surveillance activities, but should be upheld more generally by Member States, such as when laws grant governmental organisations the power to take a child into public care. The ECtHR stressed in *Olsson* that the Swedish law was rather general and conferred a wide measure of discretion; in particular, it allowed for intervention by the authorities where a child's health or development was jeopardised or in danger, without requiring proof of actual harm. The Court did not find a violation of Article 8 ECHR on this point because the Member State had embedded sufficient checks and balances in its legal system: 'safeguards against arbitrary interference are provided by the fact that the exercise of nearly all the statutory powers is either entrusted to or is subject to review by the administrative courts at several levels.'<sup>23</sup> In the two parallel judgements of *Kruslin* and *Huvig* (1990), the Court focussed almost entirely on the existence of adequate safeguards against the abuse of power. It stressed that only some of the safeguards were expressly provided for in law and concluded that the system did not afford adequate safeguards, citing a number of reasons such as, but not limited to:

- Uncertainty with respect to the categories of people liable to have their telephones tapped;
- Uncertainty with respect to the nature of the offences which may give rise to such an order;
- Absence of a limit on the duration of telephone tapping;
- No procedure for drawing up the summary reports containing intercepted conversations;

<sup>20</sup> *ibid.*, § 68.

<sup>21</sup> ECtHR, *Leander v. Sweden*, application no. 9248/81, 26 March 1987.

<sup>22</sup> ECmHR, *Mersch and others v. Luxembourg*, application nos. 0439/83, 10440/83, 10441/83, 10452/83, 10512/83 and 10513/83, 10 May 1985.

<sup>23</sup> ECtHR, *Olsson v. Sweden*, application no. 10465/83, 24 March 1988, § 62.

- Uncertainty on the point of the precautions to be taken in order to communicate the recordings for possible inspection by the judge and the defence;
- Uncertainty about the circumstances in which recordings may or must be erased.<sup>24</sup>

19 Increasingly, the Court emphasised requirements such as oversight by an independent judge and whether the law indicates with sufficient clarity the scope and conditions of exercise of the authorities' discretionary power.<sup>25</sup> In *Weber and Saravia* (2006), the Court dedicated a separate part of its judgement to assessing the quality of law and recapitulated the minimum requirements<sup>26</sup> and an important step was made by the Court in *Liberty and others* (2008), where it underlined that although these requirements were first developed by the Court in connection to measures of surveillance targeted at specific individuals, the same rules should govern more general programmes of surveillance.<sup>27</sup>

24 ECtHR, *Kruslin v. France*, application no. 11801/85, 24 April 1990. ECtHR, *Huvig v. France*, application no. 11105/84, 24 April 1990.

25 ECtHR, *Kopp v. Switzerland*, application no. 23224/94, 25 March 1998. ECtHR, *Amann v. Switzerland*, application no. 27798/95, 16 February 2000. See also: ECtHR, *Valenzuela Contreras v. Spain*, application no. 27671/95, 30 July 1998. ECtHR, *Rotaru v. Romania*, application no. 28341/95, 04 May 2000. ECtHR, *Hasan and Chaush v. Bulgaria*, application no. 30985/96, 26 October 2000. ECtHR, *Gorzelik and others v. Poland*, application no. 44158/98, 17 February 2004. ECtHR, *Bordovskiy v. Russia*, application no. 49491/99, 08 February 2005.

26 ECtHR, *Weber and Saravia v. Germany*, application no. 54934/00, 29 June 2006, §94-95. See also: ECtHR, *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, application no. 62540/00, 28 June 2007.

27 ECtHR, *Liberty and others v. the United Kingdom*, application no. 58243/00, 01 July 2008. See also: ECtHR, *Iordachi and others v. Moldova*, application no. 25198/02, 10 February 2009. In 2010, the Court even applied the doctrine of quality of law to professional assistance with home births. ECtHR, *Ternovsky v. Hungary*, application no. 67545/09, 14 December 2010. But the Court also found limitations. For example, in the case of *Uzun*, the Court stressed that minimum requirements of law were developed by the Court in the context of applications concerning the interception of telecommunications. 'While the Court is not barred from gaining inspiration from these principles, it finds that these rather strict standards, set up and applied in the specific context of surveillance of telecommunications, are not applicable as such to cases such as the present one, concerning surveillance via GPS of movements in public places and thus a measure which must be considered to interfere less with the private life of

## D. The ECtHR's recent case law, or how the Minimum Requirements of Law are deployed to scrutinise mass surveillance regimes in *in abstracto* claims

20 An important next step was taken by the European Court of Human Rights in December 2015, in *Zakharov v. Russia*. That case was revolutionary for two reasons. First, after more than 60 years of rejecting in abstracto claims, in which the applicant complains about the law or policy of a Member State as such, without claiming to be harmed herself, the Court made explicit that in cases revolving around secret surveillance, where people generally do not know whether they have been the target of data gathering activities, this principle could no longer be upheld. 'In such circumstances the threat of surveillance can be claimed in itself to restrict free communication through the postal and telecommunication services, thereby constituting for all users, or potential users, a direct interference with the right guaranteed by Article 8. There is therefore a greater need for scrutiny by the Court, and an exception to the rule denying individuals the right to challenge a law in abstracto is justified. In such cases the individual does not need to demonstrate the existence of any risk that secret surveillance measures were applied to him. By contrast, if the national system provides for effective remedies, a widespread suspicion of abuse is more difficult to justify. In such cases, the individual may claim to be a victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures only if he is able to show that, due to his personal situation, he is potentially at risk of being subjected to such measures.' Second, because the Court cannot evaluate whether there was an interference with the right to privacy of the claimant, whether that interference was prescribed by law, whether that interference was in the public interests, and whether a fair balance was struck between the competing

the person concerned than the interception of his or her telephone conversations. It will therefore apply the more general principles on adequate protection against arbitrary interference with Article 8 [.]' ECtHR, *Uzun v. Germany*, application no. 35623/05, 02 September 2010. See also: ECtHR, *Del Rio Prada v. Spain*, application no. 42750/09, 21 October 2013. ECtHR, *Perincek v. Switzerland*, application no. 27510/08, 17 December 2013. ECtHR, *Szabó and Vissy v. Hungary*, application no. 37138/14, 12 January 2016. ECtHR, *Valenzuela Contreras v. Spain*, application no. 7671/95, 30 July 1998. ECtHR, *Craxi v. Italy*, application no. 25337/94, 17 July 2003. ECtHR, *Shimovolos v. Russia*, application no. 30194/09, 21 June 2011. ECtHR, *Sefilyan v. Armenia*, application no. 22491/08, 02 October 2012. ECtHR, *R.E. v. the United Kingdom*, application no. 62498/11, 27 October 2015.

interests at stake, the Court's only task is to assess whether the law of the Member State abides by the minimum principles of law.

- 21 It took a similar approach in two more cases since: *Centrum För Rättvisa v. Sweden* (2018)<sup>28</sup> and *Big Brother Watch and others v. the United Kingdom* (2019).<sup>29</sup> While *Zakharov* revolved around secret surveillance of selected persons or groups, the two others revolved around bulk interception regimes. While the claimant in *Zakharov* was a natural person, the Swedish case was brought by a legal person and the applicants in the *Big Brother Watch* case were both legal and natural persons. In the three cases, the minimum requirements are linked not only to the requirement of 'in accordance with the law', but in particular to the Preamble to the Convention. 'The "quality of law" in this sense implies that the domestic law must not only be accessible and foreseeable in its application, it must also ensure that secret surveillance measures are applied only when "necessary in a democratic society", in particular by providing for adequate and effective safeguards and guarantees against abuse.'<sup>30</sup> What is interesting, is that the minimum requirements of law almost seem to function as an instrument of privacy by design. Privacy by design usually refers to choices and limitations embedded in the technical infrastructure of an organisation, ensuring, for example, that employees within an organisation are unable to undermine important data protection principles. For example, the system can be programmed so that personal data will be automatically deleted after 1 year. In a similar vein, the European Court of Human Rights requires Member States to embed in their laws clear standard and limitations ensuring that processing (personal) data is kept to what is strictly necessary.

- 22 Before discussing the minimum requirements of law in detail, it is important to point out two things.

First, in *Big Brother Watch*, the Court discussed the scope of the minimum requirements. On the one hand, it stressed that it did not need to make a formal decision on the question of whether these principles should also apply to laws covering the processing of metadata, because in the case of *Big Brother Watch*, the same legal regime applied to both the processing of content data and the processing of

communications data.<sup>31</sup> On the other hand, however, it confirmed that these standards will not only apply to data collected by European intelligence agencies themselves, but also to data received from foreign counterparts, because Member States 'could use intelligence sharing to circumvent stronger domestic surveillance procedures and/or any legal limits which their agencies might be subject to as regards domestic intelligence operations, a suitable safeguard would be to provide that the bulk material transferred could only be searched if all the material requirements of a national search were fulfilled and this was duly authorised in the same way as a search of bulk material obtained by the signals intelligence agency using its own techniques.'<sup>32</sup>

Second, it is evident that the Court has 'learned' from national constitutional courts in Europe,<sup>33</sup> among others, because constitutional courts have traditionally been concerned with the reduction of arbitrariness. 'Arbitrariness is a specific and obnoxious vice when added to power. No one should have to live in circumstances where significant power can be exercised over them in an arbitrary manner. There are many other vices which depend on the substance of the law, but arbitrary power is vicious enough even without them and moreover can be vicious even were the substance to be fine. It is true that the more arbitrary the power, the less likely it is that the substance will be fine, but that is a different (and arguable) point. Arbitrary power is a free-standing vice, as it were, to be regarded with suspicion wherever it occurs.'<sup>34</sup>

- 23 One particular source of inspiration is the German Constitutional Court, that has focussed on the protection of the rule of law ever since its existence and expanded its understanding of the rule of law, or the *Rechtsstaat*: 'today's *Rechtsstaat* has become inextricably tied to constitutional democracy framed by fundamental substantive values, and its legality has become subjected to a set of substantive norms embodied in constitutional justice. Although today's *Rechtsstaat* in some sense incorporates elements of both its Kantian and positivistic counterparts, it is in key respects different from its predecessors and thus raises novel questions regarding law's legitimacy. Like its Kantian counterpart, today's *Rechtsstaat* enshrines fundamental rights above the realm of ordinary laws, although these rights are substantive

28 ECtHR, *Centrum för Rättvisa v. Sweden*, application no. 35252/08, 19 June 2018.

29 ECtHR, *Big Brother Watch and others v. the United Kingdom*, application nos. 58170/13, 62322/14 and 24960/15, 13 September 2018.

30 *Big Brother Watch*, § 236.

31 *Big Brother Watch*, § 352.

32 *Big Brother Watch*, § 423.

33 D. M. Beatty, *The ultimate rule of law* (Oxford University Press, 2004).

34 M. Krygier, 'What About the Rule of Law', (2014) *Constitutional Court Review* 5.

rather than formal and differ significantly in content from their Kantian predecessors. On the other hand, like its positivistic predecessor, today's *Rechtsstaat* institutionalizes legality, but it is a legality that is not merely dependent on consistency and predictability, but also contingent on constitutional conformity and on the realization of constitutionally recognized substantive goals. This, in turn, tends to constitutionalize all politics and to convert the *Rechtsstaat* into a *Verfassungsstaat* (i.e., a state rule through the constitution) as some German scholars have argued. Finally, even beyond constitutionalization as such, today's *Rechtsstaat* judicializes realms, such as the promotion of welfare, which were clearly relegated to politics by its nineteenth century predecessors. Thus, the Basic Law commands the German states to Under-to promote the *sozialer Rechtsstaat* or *sozialstaat* (i.e., the social welfare state through law) as well as democracy and republicanism.<sup>35</sup>

24 The fact that constitutional courts can be essential in safeguarding the rule of law against a simple majority vote has been underlined by recent developments in a number of eastern European countries, in particular Poland and Hungary, where semi-dictatorial regimes have risen to power. For example, the Hungarian constitutional order was modelled almost exclusively on the German *Rechtsstaat* concept. Ever since the late 1980s and early 1990s the rule of law has become a self-standing constitutional norm. Consequently, the Hungarian constitutional court served as an important counterforce to the Orban regime, declaring several legislative changes unconstitutional. Perhaps unsurprisingly, the 'government reacted by adopting the Fourth Amendment which incorporated into the Fundamental Law most of the provisions which had been found unconstitutional by the Court. In order to cement the superior constitutional authority of government acting in parliament, and to take the edge out of potential future attempts by the Court to oppose government action in the spirit of pre-2010 constitutionalism, the Fourth Amendment repealed every decision of the Constitutional Court which had been delivered prior to the entry into force of the Fundamental Law.<sup>36</sup>

25 The European Court of Human Rights has looked carefully to both the German, the eastern European and the southern European constitutional courts and the various minimum requirements of law embedded

in their jurisprudence. To provide a basic example, many constitutional orders contain an obligation for the legislator to seek the opinion of different state organs when proposing a law in parliament, while some legislators have ignored these rules. 'In the case law of constitutional courts this sort of non-compliance generally means a breach of the rules on legislative process and results in an invalid legal act.'<sup>37</sup> Other principles set out by national constitutional courts include, but are not limited to, that a law must provide for transparency of and sufficient judicial scrutiny on the use of power by the executive branch, respect for the fundamental rights of citizens and limits on the scope and duration of the use of power.<sup>38</sup>

26 Drawing both from these national constitutional courts and from the cases discussed in the previous section, in the cases of Zakharov, Centrum för Rättvisa and Big Brother Watch, the European Court of Human Rights distinguishes no less than nine minimum requirements of law, which the Member States' law must abide by. It assesses the legal regimes in Russia, Sweden and the United Kingdom step by step. This section will discuss per sub-section how the Court has interpreted these minimum requirements of laws and show that it will allow for exceptions to these principles in two types of cases. First, where a Member State performs poorly on one minimum requirement, but remedies that by performing exceptionally strong on another point. Second, when it is clear that in practice, power is not used arbitrarily, while the legal regime leaves room for doing so.<sup>39</sup>

37 T. Drinóczi, "Concept of quality in legislation—revisited: matter of perspective and a general overview", (2015) 36 *Statute Law Review* (3).

38 See e.g. C. Joerges, "Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration", (1996) 2:2 *European LJ* 105.. A. Stone Sweet, "The politics of constitutional review in France and Europe", (2007) 5 *International Journal of Constitutional Law* (1). P. Pasquino, "Constitutional adjudication and democracy. Comparative perspectives: USA, France, Italy", (1998) 11 *Ratio Juris* (1). F. Fabbrini, "Kelsen in Paris: France's Constitutional Reform and the Introduction of A Posteriori Constitutional Review of Legislation", (2008) 9 *German Law Journal* (10).

39 See on the point of the exceptions that are allowed to the minimum requirements of law more in detail: B. van der Sloot, 'The half-way revolution of the European Court of Human Rights, or the 'minimum' requirements of 'law' (2021), chapter in: CRID/CRIDS festschrift, forthcoming.

35 M. Rosenfeld, "The Rule of Law and the Legitimacy of Constitutional Democracy," (2001) 74 *Southern California Law Review* 5.

36 N. Chronowsk & M. Varju, "Two Eras of Hungarian constitutionalism: from the rule of law to rule by law"(2016) 8 *Hague Journal on the Rule of Law* (2).



## I. Accessibility of the domestic law

27 The first minimum requirement the Court sets out is that of accessibility. The foreseeability requirement is not incorporated in the list of minimum requirements of law as such. In its earlier jurisprudence, the ECtHR had already made clear that the requirement of accessibility, like that of foreseeability, has a different role and meaning in relation to surveillance activities by secret services and intelligence agencies. This is confirmed by the cases of *Zakharov*, *Centrum för Rättvisa* and *Big Brother Watch*. For example, in *Zakharov*, several rules and regulations were not made public by the government but published in a journal that was accessible only to people with a subscription. However, because a private website had picked the rules up and made them freely available to the public, the Court did ‘not find it necessary to pursue further the issue of the accessibility of the domestic law. It will concentrate instead on the requirements of “foreseeability” and “necessity”’.<sup>40</sup> Similarly, in *Big Brother Watch*, the discussion concerned the access to so-called ‘below the waterline arrangements’, which were not made public in any way. Instead of condemning such practice, the Court argued that in ‘the context of secret surveillance, it is inevitable that “below the waterline” arrangements will exist, and the real question for the Court is whether it can be satisfied, based on the “above the waterline” material, that the law is sufficiently foreseeable to minimise the risk of abuses of power. This is a question that goes to the foreseeability and necessity of the relevant law, rather than its accessibility.’<sup>41</sup> Consequently, although the Court finds potential flaws with respect to this minimum requirement of law in two cases (and it is these two cases in which the ECtHR has established a violation of Article 8 ECHR, not finding a violation of the right to privacy in *Centrum för Rättvisa*), it does not find a violation of Article 8 ECHR on this point yet, but rather stresses that it needs to see whether these deficiencies can be remedied by the other minimum requirements of law, derived from the principles of necessity and foreseeability.

## II. Scope of application of secret surveillance measures

28 The second minimum requirement is that national law must define the scope of application of secret surveillance measures by giving citizens an adequate indication as to the circumstances in which public authorities are empowered to resort

to such measures, in particular by clearly setting out (1) the nature of the offences which may give rise to an interception order and (2) a definition of the categories of people liable to be subject to surveillance measures. Countries have to ensure that their legal regimes conform to these standards, although the ECtHR also allows for a margin of discretion.

29 For example, in *Zakharov*, the Court noted with concern that Russian law allowed secret interception of communications in respect of a very wide range of criminal offences, including pickpocketing, and that interceptions could be ordered not only in respect of a suspect or an accused, but also in respect of a person who may have information about an offence or may have other information relevant to the criminal case. Furthermore, telephone or other communications could be intercepted following the receipt of information about events or activities endangering Russia’s national, military, economic or ecological security, without any further detail being provided about which activities might fall under these categories. Although the ECtHR accepted that the Russian law ‘leaves the authorities an almost unlimited degree of discretion in determining which events or acts constitute such a threat and whether that threat is serious enough to justify secret surveillance, thereby creating possibilities for abuse’,<sup>42</sup> it did not find a violation on this point. Instead, it referred to the fact that ‘prior judicial authorisation for interceptions is required in Russia. Such judicial authorisation may serve to limit the law-enforcement authorities’ discretion [...]’.<sup>43</sup> Yet again, the Court treats the minimum requirements not so much as independent principles, each of which must be satisfied, but as communicating vessels. If there are deficiencies with respect to one minimum requirement, such might be remedied by performing strongly on another minimum requirement, in particular by laying down adequate mechanisms of oversight.

30 Similarly, in *Big Brother Watch*, the applicants were mindful that the second sub-criterion (definition of the categories of people liable to be subject to surveillance measures) was null and void in bulk interception regimes, because of the indiscriminate nature of such programmes. Consequently, they suggested that this flaw should be remedied by including the following in the list of minimum requirements of law: a requirement on objective evidence of reasonable suspicion in relation to the persons for whom data is being sought; prior independent judicial authorisation of interception warrants; and the subsequent notification of the

<sup>40</sup> *Zakharov*, § 242.

<sup>41</sup> *Big Brother Watch*, § 326.

<sup>42</sup> *Zakharov*, § 248.

<sup>43</sup> *Zakharov*, § 249.

surveillance subject. They argued that due to recent technological developments, the interception of communications data now has greater potential than ever before to paint an intimate and detailed portrait of a person's private life. The ECtHR, however, felt it would be wrong to automatically assume that bulk interception constitutes a greater intrusion into the private life of an individual than targeted interception, which by its very nature is more likely to result in the acquisition and examination of a large volume of the individual's communications. Although the Court agreed that the additional requirements proposed by the applicants might constitute important safeguards in some cases, it did not consider it appropriate to add them to the list of minimum requirements in the case at hand. 'Bulk interception is by definition untargeted, and to require "reasonable suspicion" would render the operation of such a scheme impossible. Similarly, the requirement of "subsequent notification" assumes the existence of clearly defined surveillance targets, which is simply not the case in a bulk interception regime. Judicial authorisation, by contrast, is not inherently incompatible with the effective functioning of bulk interception. While the Court has recognised that judicial authorisation is an "important safeguard against arbitrariness", to date it has not considered it to be a "necessary requirement" or the exclusion of judicial control to be outside "the limits of what may be deemed necessary in a democratic society".'<sup>44</sup>

- 31 Instead, the Court distinguished between four phases of bulk interception regimes: (1) the interception of bulk data; (2) initial filtering and selection of the relevant data; (3) more in depth filtering of relevant data; and (4) the examination of the data finally deemed relevant. With respect to the first two stages, the ECtHR discussed, among others, whether domestic law gives citizens an adequate indication of the circumstances in which their communications might be intercepted. Although this was certainly not the case with the bulk interception regime in place in Britain, the Court did not find a violation on this point: 'while anyone could potentially have their communications intercepted under the section 8(4) regime, it is clear that the intelligence services are neither intercepting everyone's communications, nor exercising an unfettered discretion to intercept whatever communications they wish.'<sup>45</sup>

Consequently, the question whether this minimum requirement of law has been met is answered not only by looking at the legal regime in isolation, but also by referring to practice.<sup>46</sup>

### III. The duration of secret surveillance measures

- 32 A third minimum requirement of law regards a limitation on the duration of the secret surveillance measures. In its standard jurisprudence, the Court had already stressed that in general, it is not unreasonable to leave the overall duration of interception to the discretion of the relevant domestic authorities which have competence to issue and renew interception warrants, provided that adequate safeguards exist, such as a clear indication in the domestic law of (1) the period after which an interception warrant will expire, (2) the conditions under which a warrant can be renewed, and (3) the circumstances in which it must be cancelled.
- 33 In *Zakharov*, the Court found that the first two points had been met, but that the third point, the requirement to discontinue interception when no longer necessary, was covered by one of the two legal regimes under scrutiny only, which resulted in a violation of the minimum requirements of law.<sup>47</sup> In *Centrum för Rättvisa* the same problem emerged. While finding clear legal standards on the first two points, in 'respect of the third safeguard, the circumstances in which interception must be discontinued, the legislation is not equally clear. [] Nevertheless, notwithstanding that the relevant legislation is less clear with regard to the third safeguard, it must be borne in mind that any permit is valid for a maximum of six months and that a renewal requires a review as to whether the conditions are still met.'<sup>48</sup> The Court emphasised the existence of other forms of control and oversight in place, such as that the Foreign Intelligence Inspectorate having the power to decide that an intelligence interception should cease.<sup>49</sup> In *Big Brother Watch*, the discussion also concerned the third sub-requirement, as the national law only specified that the Secretary of State was under an

44 *Big Brother Watch*, § 318. See the critical opinion of Judge Koskelo, joined by judge Turkovic on this point, in the Partly Concurring, Partly Dissenting Opinion, points 23-27.

45 *Big Brother Watch*, § 337.

46 The Court did find a violation of the British regime because part of the collection of metadata/communication data was left unregulated, which is a violation not of the minimum requirements of law, but of the 'ordinary' 'in accordance with the law' requirement.

47 *Zakharov*, § 251-252.

48 *Centrum för Rättvisa*, § 129-130.

49 *Centrum för Rättvisa*, § 130.

obligation to cancel the orders when they were no longer necessary. Because the Secretary of State is part of the executive branch, it seems questionable whether this provision provides an adequate safeguard against potential abuse of power. The European Court of Human Rights, however, found no violation on this point, as ‘the duty on the Secretary of State to cancel warrants which were no longer necessary meant, in practice, that the intelligence services had to keep their warrants under continuous review.’<sup>50</sup> Again, the Court finds that a flaw with respect to the minimum requirements can be remedied by having in place adequate mechanisms of oversight (Centrum för Rättvisa) or by the self-restraint displayed in practice by the executive branch (Big Brother Watch).

#### IV. Procedures for processing the data

- 34 A fourth minimum requirement is that the law or relevant regulation must lay down procedures for storing, accessing, examining, using and destroying the gathered data. In essence, this requires Member States to lay down a data protection framework for intelligence agencies, which are not covered by the instruments of the European Union, in particular the General Data Protection Regulation<sup>51</sup> and the Law Enforcement Directive.<sup>52</sup>
- 35 In Zakharov, the Court found that although the Russian law had established an adequate framework on almost all accounts, it did not do so with respect to the deletion of data. Although the six-month storage time-limit set out in Russian law was in itself reasonable, the Court underlined the lack of a requirement to destroy immediately any data that are not relevant to the purpose for which they had been obtained. ‘The automatic storage for six months of clearly irrelevant data cannot be considered justified under Article 8. Furthermore, as regards the cases where the person has been charged with a

criminal offence, the Court notes with concern that Russian law allows unlimited discretion to the trial judge to store or to destroy the data used in evidence after the end of the trial. Russian law does not give citizens any indication as to the circumstances in which the intercept material may be stored after the end of the trial. The Court therefore considers that the domestic law is not sufficiently clear on this point.’<sup>53</sup>

- 36 Yet in Centrum för Rättvisa, the ECtHR found that under the prevailing law, intelligence had to be destroyed immediately when it appeared that they were deemed unimportant, their interception was unlawful or the data were shared in the context of professional secrecy; this regime, however, did not concern ‘raw data’, that is, data that have been collected, but have not yet been assessed on their potential value or relevance. ‘Although the FRA [National Defence Radio Establishment] may maintain databases for raw material containing personal data up to one year, it has to be kept in mind that raw material is unprocessed information. That is, it has yet to be subjected to manual treatment. The Court accepts that it is necessary for the FRA to store raw material before it can be manually processed.’<sup>54</sup> Consequently, it did not find a violation on this point, even though the raw data – of which in bulk interception regimes usually are mostly irrelevant for the purpose for which they have been collected – could be stored for up to a year.
- 37 In Big Brother Watch, the law required that every copy of intercepted material or data (together with any extracts and summaries) had to be destroyed as soon as retention was no longer necessary for the purposes. Again, the ECtHR seemed more lenient where it regarded the storage of raw data, of which under the prevailing regime, storage would ‘normally be no longer than two years’. The Court condoned this legal regime, referring both to practice and to the existence of adequate mechanisms for oversight: ‘while the specific retention periods are not in the public domain, it is clear that they cannot exceed two years and, in practice, they do not exceed one year (with much content and related communications data being retained for significantly shorter periods). Furthermore, where an application is lodged with the IPT [Investigatory Powers Tribunal], it can examine whether the time-limits for retention have been complied with and, if they have not, it may find that there has been a breach of Article 8 of the Convention and order the destruction of the relevant material.’<sup>55</sup>

50 Big Brother Watch, § 360.

51 Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

52 Directive 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

53 Zakharov, § 255-256.

54 Centrum för Rättvisa, § 146.

55 Big Brother Watch, § 372-374. In addition, when the Court

## V. Authorisation procedures

38 As a fifth minimum requirement of law, the Court has made clear that there must be an adequate authorisation procedure in place. In general, it will take into account a number of factors in assessing whether the authorisation procedures are capable of ensuring that secret surveillance is not ordered haphazardly, irregularly or without due and proper consideration. These factors include, in particular, (1) the competent authority to authorise the surveillance, (2) its scope of review, and (3) the content of the interception authorisation. The competent authority to authorise the surveillance may be a non-judicial authority, provided that it is sufficiently independent from the executive.

39 In *Zakharov*, the Court did not find a violation with respect to the first factor, because the law-enforcement agency seeking authorisation for interception had to submit a reasoned request to that effect to a judge and because that judge had to give reasons for the decision to authorise interceptions. On the second point, however, the Court did find a violation, reiterating that ‘it must be capable of verifying the existence of a reasonable suspicion against the person concerned, in particular, whether there are factual indications for suspecting that person of planning, committing or having committed criminal acts or other acts that may give rise to secret surveillance measures, such as, for example, acts endangering national security.’<sup>56</sup> The Court found the Russian legal system did not meet the minimum requirements of law, both because judicial scrutiny did not extend to materials about undercover agents or police informers or about the organisation and tactics of operational-search measures, disabling the court to assess whether there was ‘a sufficient factual basis to suspect the person in respect of whom operational-search measures are requested of a criminal offence or of activities endangering national, military, economic or ecological security’,<sup>57</sup> and because the courts were not required to execute a necessity and

proportionality check. It referred to the fact that in practice, courts never requested the interception agency to submit additional materials and ‘that a mere reference to the existence of information about a criminal offence or activities endangering national, military, economic or ecological security is considered to be sufficient for the authorisation to be granted.’<sup>58</sup> With respect to the content of the interception authorisation, the Court underlined that ‘it must clearly identify a specific person to be placed under surveillance or a single set of premises as the premises in respect of which the authorisation is ordered’,<sup>59</sup> which the ECtHR found one relevant regulatory regime did, while the other one did not because it did ‘not contain any requirements either with regard to the content of the request for interception or to the content of the interception authorisation. As a result, courts sometimes grant interception authorisations which do not mention a specific person or telephone number to be tapped, but authorise interception of all telephone communications in the area where a criminal offence has been committed. Some authorisations do not mention the duration for which interception is authorised.’<sup>60</sup> The Court found a violation of the minimum requirements of law on this point, also because an urgency procedure allowed authorities to bypass ordinary limitations to the use of powers.

40 In addition, the Court stressed that ‘the requirement to show an interception authorisation to the communications service provider before obtaining access to a person’s communications is one of the important safeguards against abuse by the law-enforcement authorities’,<sup>61</sup> and found that in certain circumstances, communications service providers had to install equipment giving the law-enforcement authorities direct access to all mobile telephone communications of all users and that they were under an obligation to create databases storing information about all subscribers, and the services provided to them, for three years; the secret services had direct remote access to those databases. This system, the Court found, was particularly prone to abuse, which is why it stressed that the need for safeguards against arbitrariness and abuse was particularly great. But the Court did not find a violation of the minimum requirements of law, instead suggesting that it would ‘examine with particular attention whether the supervision arrangements provided by Russian law are capable of ensuring that all interceptions are performed lawfully on the

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scrutinised the State’s receipt of material intercepted by the U.S. National Security Agency, it acknowledged that while the compliance of the British intelligence agencies with the data protection principles was subject to exemption by ministerial certificate, they could not be exempted from the obligation to comply with two data protection principles; namely, the storage limitation principle and the obligation to take adequate technical and organizational security measures, which is why it deemed that sufficient data protection standards were in place on this point. *Big Brother Watch*, § 43.

56 *Zakharov*, § 260.

57 *Zakharov*, § 261.

58 *Zakharov*, § 263.

59 *Zakharov*, § 264.

60 *Zakharov*, § 265.

61 *Zakharov*, § 269.



basis of proper judicial authorisation’,<sup>62</sup> shifting its attention from the existence of *ex ante* to *ex post* oversight.

- 41 In *Centrum för Rättvisa*, the ECtHR underlined that although ‘a requirement of prior judicial authorisation constitutes an important safeguard against arbitrariness, nevertheless, prior authorisation of such measures is not an absolute requirement *per se*, because where there is extensive subsequent judicial oversight, this may counterbalance the shortcomings of the authorisation.’<sup>63</sup> In addition, the Court stressed that although in *Zakharov* it had underlined the importance of public scrutiny, in the case of prior authorisations, complete secrecy is allowed, when adequate safeguards are put in place, which the ECtHR felt Sweden had: ‘while the privacy protection representative cannot appeal against a decision by the Foreign Intelligence Court or report any perceived irregularities to the supervisory bodies, the presence of the representative at the court’s examinations compensates, to a limited degree, for the lack of transparency concerning the court’s proceedings and decisions. [] As an additional safeguard against abuse and arbitrariness, the task of examining whether the mission is compatible with applicable legislation and whether the intelligence collection is proportional to the resultant interference with personal integrity has been entrusted to a body whose presiding members are or have been judges. Furthermore, the supervision of the Foreign Intelligence Court is extensive as the FRA, in its applications, must specify not only the mission request in question and the need for the intelligence sought but also the signal carriers to which access is needed and the search terms – or at least the categories of search terms – that will be used.’<sup>64</sup> In addition, it condoned the urgency procedure in place wherewith the executive power could itself decide to grant a permit, as the ‘legislation states that such a decision must be followed by an immediate notification to and a subsequent rapid review by the Foreign Intelligence Court where the permit may be changed or revoked’.<sup>65</sup>

- 42 In *Big Brother Watch*, the Court went even further. While the Court considered judicial authorisation to be an important safeguard, and perhaps even “best practice”, it stressed that by itself, it can neither be necessary nor sufficient to ensure compliance with Article 8 of the Convention. Even the requirement that a non-judicial body performing oversight

should be independent was put up for discussion by the Court, when it assessed the fact that under the prevailing legal regime, the executive branch itself assessed and authorised the warrants and it concluded: ‘It is true that the Court has generally required a non-judicial authority to be sufficiently independent of the executive. However, it must principally have regard to the actual operation of a system of interception as a whole, including the checks and balances on the exercise of power, and the existence (or absence) of any evidence of actual abuse, such as the authorising of secret surveillance measures haphazardly, irregularly or without due and proper consideration. In the present case there is no evidence to suggest that the Secretary of State was authorising warrants without due and proper consideration.’<sup>66</sup> Yet again, the Court refers to the fact that in practice, the authorities did not arbitrarily use their powers, although the legal regime allows them a rather broad margin of appreciation.

- 43 Finally, under the British regime, any breaches of safeguards should be notified to the Interception of Communications Commissioner, while the Commissioner observed that the process by which analysts selected material for examination, which did not require pre-authorisation by a more senior operational manager, relied mainly on the professional judgment of analysts, their training and subsequent management oversight. Although the Court agreed that it would be preferable for the selection of material by analysts to be subject at the very least to preauthorisation by a senior operational manager, given that analysts were carefully trained and vetted, records were kept and those records were subject to independent oversight and audit, ‘the absence of pre-authorisation would not, in and of itself, amount to a failure to provide adequate safeguards against abuse.’<sup>67</sup>

## VI. Ex post supervision of the implementation of secret surveillance measures

- 44 As a sixth minimum requirement of law, the regulatory regime must put a robust and independent *ex post* oversight mechanism in place on the use of powers by the executive branch. As has become clear from the previous sub-sections, it is this minimum requirement that is arguably the most important one to the ECtHR, as it allows flaws with respect to the other minimum requirements to be repaired, by having adequate mechanisms for oversight in place.

62 *Zakharov*, § 271.

63 *Centrum för Rättvisa*, § 133.

64 *Big Brother Watch*, § 138-139.

65 *Big Brother Watch*, § 140.

66 *Big Brother Watch*, § 377-378.

67 *Big Brother Watch*, § 344-345.

Again, like with *ex ante* oversight, the Court stresses that although it is in principle desirable to entrust supervisory control to a judge, supervision by a non-judicial body may be considered compatible with the Convention, provided that the supervisory body is independent of the authorities carrying out the surveillance, and is vested with sufficient powers and competence to exercise an effective and continuous control. In addition, the Court stresses, it is essential that such an oversight body has access to all relevant documents, including closed materials, and that all those involved in interception activities have a duty to disclose to it any material required. Still, the ECtHR allows for a number of exceptions to this minimum requirement.

45 In *Zakharov*, for example, the Court found the safeguards and competences of the various authorities with respect to oversight and control quite limited. Still, a legal framework was in place which, at least in theory, introduced some supervision by prosecutors, although their capacity to do so was limited and oversight on their activities was minimal. Yet again, the Court turns to the practical implementation and working of these safeguards, stressing that ‘it is for the Government to illustrate the practical effectiveness of the supervision arrangements with appropriate examples.’<sup>68</sup> As the Member State could not demonstrate that the prosecutor’s supervision of secret surveillance measures was effective in practice, because the prosecutor did not have access to all relevant documents, due to the fact that it could not scrutinise all relevant interceptions and because its operations were not subject to public scrutiny, the Court considered that the prosecutor’s supervision of interceptions as it was organised was not capable of providing adequate and effective guarantees against abuse. Interestingly, the Court did note that the public prosecutor could hardly be said to be an independent supervisory authority, but still it did not find a violation on that specific point.<sup>69</sup>

46 As discussed, in *Big Brother Watch* the Court distinguished between the four phases of bulk interception regimes previously mentioned: (1) the interception of bulk data; (2) initial filtering and selection of the relevant data; (3) more in depth filtering of relevant data; and (4) the examination of the data finally deemed relevant. Because of the meagre legal regime with respect to the first two stages, the Court required more rigorous safeguards to be in place with respect to the third and fourth stages. On this point, the Court stressed that it was not persuaded that the safeguards governing the selection of bearers for interception and the selection of intercepted material for examination

were sufficiently robust to provide adequate guarantees against abuse. Of greatest concern, it continued, was the absence of robust independent oversight of the selectors and search criteria used to filter intercepted communications.

47 ‘In practice, therefore, the only independent oversight of the process of filtering and selecting intercept data for examination is the *post factum* audit by the Interception of Communications Commissioner and, should an application be made to it, the IPT. [] In a bulk interception regime, where the discretion to intercept is not significantly curtailed by the terms of the warrant, the safeguards applicable at the filtering and selecting for examination stage must necessarily be more robust.’<sup>70</sup> The fact that this is perhaps the most important minimum condition of law was emphasised by the fact that on this point, the Court did not allow the Member State to remedy this flaw by referring to practice; rather, the ECtHR reasoned the other way around when it stresses that ‘while there is no evidence to suggest that the intelligence services are abusing their powers – on the contrary, the Interception of Communications Commissioner observed that the selection procedure was carefully and conscientiously undertaken by analysts –, the Court is not persuaded that the safeguards governing the selection of bearers for interception and the selection of intercepted material for examination are sufficiently robust to provide adequate guarantees against abuse.’<sup>71</sup>

## VII. Conditions for communicating data to and receiving data from other parties

48 A seventh minimum requirement of law concerns the sharing of intelligence data. The Court has held that when receiving data from or sharing data with foreign intelligence agencies, the minimum requirements of law should apply *mutatis mutandis*.

49 In *Centrum för Rättvisa*, the ECtHR stressed that the purpose of signals intelligence naturally demands that it may be reported to concerned national authorities, in particular the authority which ordered the mission. Under the Swedish legal regime, discretion was given to the government to communicate personal data to states or organisations when deemed to be in the Swedish interest. The Court did note that the Swedish law did not indicate that potential harm to the individuals concerned must also be considered and that there

68 *Zakharov*, § 284.

69 *Zakharov*, § 279.

70 *Big Brother Watch*, § 346.

71 *Big Brother Watch*, § 347.

was no legal provision requiring the recipient to protect the data with the same or similar safeguards as those applicable under Swedish law, which meant that there were no legal limits imposed on the authority of the Swedish authorities when deciding on whether to share data with foreign counterparts. Still, referring to the existence of adequate mechanisms of oversight yet again, although in ‘the Court’s view, the mentioned lack of specification in the provisions regulating the communication of personal data to other states and international organisations gives some cause for concern with respect to the possible abuse of the rights of individuals. On the whole, however, the Court considered that the supervisory elements described below sufficiently counterbalance these regulatory shortcomings.’<sup>72</sup>

- 50 In *Big Brother Watch*, the Court assessed whether the regime for obtaining intelligence from foreign (non-European) counterparts abided by the minimum requirements of law. Remarkably, it did not assess the situation in which data were sent by foreign intelligence agencies to the British authorities on their own initiative, because the British government asserted that this rarely happens. ‘As the Government, at the hearing, informed the Court that it was “implausible and rare” for intercept material to be obtained “unsolicited”, the Court will restrict its examination to material falling into the second and third categories.’<sup>73</sup> Consequently, yet again, the Court refers to the fact that in practice, a certain power or discretion is seldom used in order to justify a legal regime, although the law itself may not meet the minimum requirements of law. The Court did discuss instances in which the British authorities requested intelligence from their counterparts and acknowledged that under the regulatory regime, in exceptional circumstances, a request for communications could be made in the absence of a relevant interception warrant, albeit only if such did not amount to a deliberate circumvention of the legal requirements in place. In such a case, the request had to be considered and decided on by the Secretary of State personally and be notified to the Interception of Communications Commissioner. Again, the Court found such a regime unproblematic because in practice, it was not used, stressing that ‘no request for intercept material has ever been made in the absence of an existing RIPA warrant.’<sup>74</sup>

72 Centrum för Rättvisa, § 150.

73 *Big Brother Watch*, § 417.

74 *Big Brother Watch*, § 429-430.

## VIII. Notification of interception of communications

- 51 The eighth minimum requirement of law is that the people subject to secret surveillance should be notified thereof. Although this principle is included in its lists of minimum requirements, it seems to serve primarily as barter. The ECtHR acknowledges that it may not be ‘feasible in practice to require subsequent notification in all cases. The activity or danger against which a particular series of surveillance measures is directed may continue for years, even decades, after the suspension of those measures. Subsequent notification to each individual affected by a suspended measure might well jeopardise the long-term purpose that originally prompted the surveillance. Furthermore, such notification might serve to reveal the working methods and fields of operation of the intelligence services and even possibly to identify their agents.’<sup>75</sup> Consequently, this requirement has played a minor role of significance itself, and serves primarily as an argument for the ECtHR to stress that to remedy a deficiency with respect to this minimum requirement, Member States should put in place additional mechanisms of oversight and relief.
- 52 For example, in *Zhakarov*, although the Court formally underlined that notification should happen as soon as it is possible (although that might take years or even decades), in practice, persons were not notified at any point or under any circumstances in Russia. That meant that unless criminal proceedings had been opened against the interception subject and the intercepted data had been used as evidence, or unless there had been a leak, the person concerned would never find out that her communications had been intercepted. In addition, access to the information was conditional on the person’s ability to prove that his communications were intercepted. Information was provided only in very limited circumstances, namely if the person’s guilt had not been proved in accordance with the procedure prescribed by law, that is, she had not been charged or the charges had been dropped on the ground that the alleged offence was not committed or that one or more elements of a criminal offence were missing. Even then, only information that did not disclose State secrets would be provided, where information concerning the facilities used in operational search activities, the methods employed, the officials involved, and the data collected were considered a State secret. Although the Court was clearly unsympathetic to this approach, it did not find a violation on this point, stressing that it would bear in mind the absence of notification and the lack of an effective possibility of requesting and obtaining

75 *Zakharov*, § 287; Centrum för Rättvisa, § 164.

information when assessing the effectiveness of remedies available under Russian law.<sup>76</sup>

- 53 To provide another example, in *Centrum för Rättvisa*, there was a legal obligation to inform natural persons that were subject to surveillance activities, at the latest one month after the signals intelligence mission was concluded, except where secrecy was required. Just as in *Zakharov*, in practice, a notification had never been made by the governmental authorities, citing reasons of secrecy. Remarkably, the Court did not find a violation on this point because the claimant in the Swedish case was a legal person. 'Taking into account that the requirement to notify the subject of secret surveillance measures is not applicable to the applicant and is, in any event, devoid of practical significance,'<sup>77</sup> like in *Zakharov*, the Court concluded that its findings on the point of the notification would be taken into account when evaluating the last minimum requirement of law: the available remedies.

## IX. Available remedies

- 54 The final minimum requirement of law is that the legal regime of the Member State must lay down robust and effective remedies, in particular for people that were subject to secret surveillance. In this respect, the Court has made clear that review and supervision of secret surveillance measures may come into play at three stages: when the surveillance is first ordered; while it is being carried out; and after it has been terminated. As regards the first two stages, the very nature and logic of secret surveillance dictate that not only the surveillance itself but also the accompanying review should be affected without the individual's knowledge. Consequently, since the individual will necessarily be prevented from seeking an effective remedy of her own accord or from taking a direct part in any review proceedings, it is essential that the procedures established should themselves provide adequate and equivalent guarantees safeguarding her rights.
- 55 In *Zakharov*, where the remedies were available only to persons who were in possession of information about the interception of their communications, while the subjects of interception were not notified at any point and there was no possibility of requesting and obtaining information about interceptions from the authorities, the Court found that Russian law did not provide for effective remedies to a person who suspects that she has been subjected to secret surveillance.<sup>78</sup>
- 56 In *Centrum för Rättvisa*, the Foreign Intelligence Inspectorate, at the request of an individual, could investigate whether her communications had been intercepted through signals intelligence, and if so, could verify whether the interception and treatment of the information was in accordance with law. A request could be made by legal and natural persons regardless of nationality and residence, which is why the Court was satisfied that the remedies available were not dependent on prior notification and were adequate. This is remarkable because, speaking of practical relevance, being able to submit a claim without having any indication that one's rights may be violated seems illusory. In addition, the Court acknowledged that the Inspectorate did not have the authority to order compensation to be paid, that the individual could not obtain information whether her communications had actually been intercepted – only if there had been any unlawfulness – and that the decision of the Inspectorate was final. This meant that an individual who was not satisfied with the response from the Inspectorate could not seek review and that the procedure to correct, block or destroy personal data was dependent on the individual's knowledge that personal data had been registered as well as on the nature of that data.<sup>79</sup>
- 57 The reason for the Court's lenience was based on the fact that Swedish law provides for several remedies of a general nature, in particular the possibility of addressing individual complaints to the Parliamentary Ombudsmen and the Chancellor of Justice. The two institutions had the right of access to documents and other materials. While their decisions were not legally binding, their opinions command great respect in Sweden, according to the Court. They also had the power to initiate criminal or disciplinary proceedings against public officials for actions taken in the discharge of their duties. The Court deemed it of relevance that a practice had developed in the last several years according to which the Chancellor may receive and resolve individual compensation claims for alleged violations. The Court also noted that the Data Protection Authority could receive and examine individual complaints under the Personal Data Act. 'In the Court's view, the aggregate of remedies, although not providing a full and public response to the objections raised by a complainant, must be considered sufficient in the present context, which involves an abstract challenge to the signals intelligence regime itself and does not concern a complaint against a particular

<sup>76</sup> *Zakharov*, § 290-291.

<sup>77</sup> *Centrum för Rättvisa*, § 167.

<sup>78</sup> *Zakharov*, § 300.

<sup>79</sup> *Centrum för Rättvisa*, § 173.



intelligence measure. In reaching this conclusion, the Court attaches importance to the earlier stages of supervision of the regime, including the detailed judicial examination by the Foreign Intelligence Court of the FRA's requests for permits to conduct signals intelligence and the extensive and partly public supervision by several bodies, in particular the Foreign Intelligence Inspectorate.<sup>80</sup> Yet again, both practice and the fact that there is judicial oversight, remedy a deficiency as to this minimum requirement.

## E. Recent developments, or how the European Court of Human Rights has gradually also become a European Constitutional Court

58 It is clear from the previous section that the Court is willing to scrutinise Member States' laws at a very detailed level, evaluating whether a considerable number of minimum requirements and sub-requirements have been met. At the same time, the Court adopts a flexible approach. First, when scrutinising laws, it often assesses how certain powers are used in practice. Although formally speaking, a governmental organisation may be vested with too broad powers, devoid of the necessary safeguards and conditionalities, the ECtHR may still deem the law convention-compliant when in practice, the organisation uses its powers discretely. Second, when the Court establishes what seems to be a flaw in the legal regime with respect to one of the minimum requirements of law, it often allows Member States to remedy that flaw by performing strongly on one of the other minimum requirements of law, in particular the existence of adequate judicial oversight. Consequently, it is questionable whether both the term 'minimum' and the term 'law' are entirely appropriate when the Court speaks of the 'minimum requirements of law'.

59 Nevertheless, it is clear that these cases will have an enormous impact on the Court's jurisprudence in the coming years,<sup>81</sup> as it takes a fundamentally

different approach than it did for more than 50 years. In these types of cases, the Court not so much assesses whether the executive branch is abusing its powers, but rather, whether the legislative branch has granted the executive power such broad powers and laid down so few limitations, that it is nearly impossible for the executive branch to violate the law. Just like the constitutionalists had wanted when drafting the European Convention on Human Rights and setting out the powers and competences of the European Court of Human Rights, the Court now accepts the task of scrutinising the legislative branch as well. To be able to do so adequately, two final limitations on its powers have been removed as well, which will be discussed in this section. First, the Court would normally only evaluate cases after all domestic remedies have been exhausted. Second, the Court would normally only establish a violation of the Convention and would not specify that, let alone how, the national legislator should change its laws and policies.

60 Ever since its foundation, the ECtHR requires applicants to exhaust all domestic remedies before the Court will declare an application admissible. Thus, normally, a claimant would need to go to a district court, a court of appeal and the supreme court at the national level before being allowed to bring the case to the attention to the ECtHR. This ensures that a Member State can remedy a potential violation of the Convention by having in place effective remedies for victims; for example, when a claimant's house was unlawfully entered by the police, and a judge at the national level has established a violation of her right to privacy and has awarded adequate compensation, she will no longer be accepted in her claim by the ECtHR. The European Court of Human Rights is consequently not a court of first instance; it is not even a court of fourth instance (next to the three levels of judicial scrutiny traditionally provided at the national level). This means that it will not redo the case in its entirety, but instead focus only on the question of whether there has been a potential violation of the Convention: 'the Strasbourg Court is not a court of "fourth instance", it is not a court of appeal, or a court of revision or of cassation. It cannot question the domestic courts' establishment of the facts in your case, nor their assessment or application of domestic law, nor your guilt or innocence in a criminal case.'<sup>82</sup>

61 However, in the types of cases discussed in sections D and E, the Court allows for an exception to this

80 Centrum för Rättvisa, § 178.

81 Already, even in cases in which the ECtHR does not apply the 'quality of law' doctrine as such, it is increasingly willing to carefully scrutinise laws in order to assess whether there are adequate safeguards against the abuse of power, under the heading of 'necessary in a democratic society'. ECtHR, *Trajkovski and Chipovski v. North Macedonia*, application nos. 53205/13 and 63320/13, 13 February 2020, § 53-54. See also: See also, inter alia: ECtHR, *Gaughran v. the United Kingdom*, application no. 45245/15, 13 February 2020. ECtHR, *S. and Marper v. the United*

Kingdom, application nos. 30562/04 and 30566/04, 04 December 2008.

82 <[https://www.echr.coe.int/Documents/COURtalks\\_Inad\\_Talk\\_ENG.PDF](https://www.echr.coe.int/Documents/COURtalks_Inad_Talk_ENG.PDF)>.

rule, because it feels that the domestic remedies are ineffective or because the question of whether they are effective is at the core of the complaint by the applicants. If domestic remedies do not allow individuals a right to appeal to a court, or if that court does not have full discretion to scrutinise the actions of the executive branch or the legal regime as such, or if the body performing oversight is not sufficiently independent or equipped, individuals are allowed to bring their case directly to the ECtHR. For example, in *Zhakarov*, the Court found several flaws with respect to the minimum requirements of law – as discussed in section C – and concluded: ‘In view of the above considerations, the Court finds that Russian law does not provide for effective remedies to a person who suspects that he has been subjected to secret surveillance. By depriving the subject of interception of the effective possibility of challenging interceptions retrospectively, Russian law thus eschews an important safeguard against the improper use of secret surveillance measures. For the above reasons, the Court also rejects the Government’s objection as to non-exhaustion of domestic remedies.’<sup>83</sup>

- 62 In *Big Brother Watch*, which concerned in part the same regime as was brought forward for evaluation to the Court several years ago, in *Kennedy* (2010),<sup>84</sup> the ECtHR went one step further. In *Kennedy*, the Court had found several flaws in the national system of supervision and oversight, but in *Big Brother Watch*, the Court considered that in view both of the manner in which the Investigatory Powers Tribunal (IPT) had exercised its powers and the very real impact its judgments had on domestic law and practice, ‘the concerns expressed by the Court in *Kennedy* about its effectiveness as a remedy for complaints about the general compliance of a secret surveillance regime are no longer valid.’<sup>85</sup> The Court acknowledged that this must mean in principle that the claims in *Big Brother Watch* had to be declared inadmissible, because the applicants had not exhausted all domestic remedies. But the Court allowed an exception because the applicants had reason to believe that the IPT did not provide an adequate form of oversight. This means that not only an objective evaluation of the adequacy of the domestic remedies can exempt applicants from the requirements to exhaust them, but also a justified subjective feeling as to their effectiveness.

- 63 This flexibility signals that in general, the Court is increasingly willing to act as a court of first instance

in a wide range of cases. In particular with respect to the *in abstracto* claims discussed in section D, the European Court of Human Rights is transforming from a court which assesses whether in a concrete case, one or more human rights of the applicant have been violated and whether compensation is required, to a court that assesses the quality of laws in general, not as a court of last instance, but as a court of first instance. Not only natural persons who have been harmed directly and individually are allowed to submit a complaint, people and organisations, such as civil rights organisations, will be received in their application when they invoke societal interests and the principles of the rule of law. Just like a constitutional court might do at a national level, where constitutional courts often also act as the court of first instance in matters concerning the legality, legitimacy and constitutionality of laws and policies, it assesses whether a law respects the basic principles connected to the rule of law and separation of power. Not surprisingly, some judges of the European Court of Human Rights have explicitly described the ECtHR as a ‘European Constitutional Court’<sup>86</sup> and although not making such explicit statements itself, the ECtHR is increasingly using terms that seem inspired by constitutional courts at the national level (that assess, *inter alia*, the ‘constitutionality’ or ‘constitution-compliance’ of national laws), by stressing that it performs a test of ‘conventionality’, ‘convention-compliance’ or ‘convention-check’ to describe its evaluative tasks.<sup>87</sup>

86 ECtHR, *Baka v. Hungary*, application no. 20261/12, 23 June 2016.

87 ECtHR, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, application no. 45036/98, 30 June 2005. ECtHR, *Sorensen and Rasussen v. Denmark*, application nos. 52562/99 52620/99, 11 January 2006. ECtHR, *Kart v. Turkey*, application no. 8917/05, 08 July 2008. ECtHR, *Nilsen v. the United Kingdom*, application no. 36882/05, 09 March 2010. ECtHR, *O.H. v. Germany*, application no. 4646/08, 24 November 2011. ECtHR, *Kronfeldner v. Germany*, application no. 21906/09, 19 January 2012. ECtHR, *Interdnestrcom v. Moldova*, application no. 48814/06, 13 March 2012. ECtHR, *K v. Germany*, application no. 61827/09, 07 June 2012. ECtHR, *G. v. Germany*, application no. 65210/09, 07 June 2012. ECtHR, *M.N. and F.Z. v. France and Greece*, application nos. 59677/09 and 1453/10, 08 January 2013. ECtHR, *Animal Defenders International v. the United Kingdom*, application no. 48876/08, 22 April 2013. ECtHR, *Lynch and Whelan v. Ireland*, application nos. 70495/10 and 74565/10, 18 June 2013. ECtHR, *Povse v. Austria*, application no. 3890/11, 18 June 2013. ECtHR, *Mikalauskas v. Malta*, application no. 4458/10, 23 July 2013. ECtHR, *Avotins v. Latvia*, application no. 17502/07, 25 February 2014. ECtHR, *Niskasaari and Otavamedia Oy v. Finland*, application no. 32297/10, 23 June 2015. ECtHR, *Maslak and Michalkova v. Czech Republic*, application no. 52028/13, 14 January 2016. ECtHR, *Duong v. v. Czech*

83 *Zakharov*, § 300-301.

84 ECtHR, *Kennedy v. the United Kingdom*, application no. 26839/05, 18 May 2010.

85 *Big Brother Watch*, § 253.

Republic, application no. 21381/11, 14 January 2016. ECtHR, J.N. v. the United Kingdom, application no. 37289/12, 19 May 2016. ECtHR, Avotins v. Latvia, application no. 17502/07, 23 May 2016. ECtHR, Al-Dulimi and Montana Management Inc. v. Switzerland, application no. 5809/08, 21 June 2016. ECtHR, V. M. v. the United Kingdom, application no. 49734/12, 01 September 2016. ECtHR, J.M.O. v. the United Kingdom, application no. 54318/14, 21 February 2017. ECtHR, Draga v. the United Kingdom, application no. 33341/13, 25 April 2017. ECtHR, S.M.M. v. the United Kingdom, application no. 77450/12, 22 June 2017. ECtHR, Dakir v. Belgium, application no. 4619/12, 11 July 2017. ECtHR, Burmych and others v. Ukraine, application nos. 46852/13, 47786/13, 54125/13, 56605/13 and 3653/14, 12 October 2017. ECtHR, Aliyev v. Azerbaijan, application nos. 68762/14 and 71200/14, 20 September 2018. ECtHR, F.J.M. v. the United Kingdom, application no. 76202/16, 06 November 2018. ECtHR, Zammit and Vassallo v. Malta, application no. 43675/16, 28 May 2019. ECtHR, G. v. Germany, application no. 9173/14, 28 May 2019. ECtHR, Jeantet v. France, application no. 40629/16, 24 September 2019. ECtHR, Petithory Lanzmann v. France, application no. 23038/19, 12 November 2019. Terminology that is echoed in concurring and dissenting opinions: ECtHR, Nada v. Switzerland, application no. 10593/08, 12 September 2012. ECtHR, Calovskis v. Latvia, application no. 22205/13, 24 July 2014. ECtHR, Delta Pekarny A.S. v. Czech Republic, application no. 97/11, 02 October 2014. ECtHR, Y.Y. v. Turkey, application no. 14793/08, 10 March 2015. ECtHR, Biao v. Denmark, application no. 38590/10, 24 May 2016. ECtHR, J.K. and others v. Sweden, application no. 59166/12, 23 August 2016. ECtHR, De Tommaso v. Italy, application no. 43395/09, 23 February 2017. ECtHR, Correia De Matos, application no. 56402/12, 04 April 2018. ECtHR, Svetina v. Slovenia, application no. 38059/13, 22 May 2018. ECtHR, G.I.E.M. S.R.L. and others v. Italy, application nos. 1828/06, 34163/07 and 19029/11, 28 June 2018. Is used by applicants: ECtHR, P4 Radio Hele Norge Asa v. Norway, application no. 76682/01, 06 May 2003. ECtHR, Py v. France, application no. 66289/01, 11 January 2005. ECtHR, Behrami and Behrami v. France and Saramati v. France, Germany and Norway, application nos. 71412/01 and 78166/01, 02 May 2007. ECtHR, Vassis and others v. France, application no. 62736/09, 27 June 2013. ECtHR, Gerasimenko and others v. Russia, application nos. 5821/10 and 65523/12, 01 December 2016. ECtHR, Paradiso and Campanelli v. Italy, application no. 25358/12, 24 January 2017. ECtHR, Larrea and others v. France, application nos. 56710/13, 56727/13 and 57412/13, 07 February 2017. ECtHR, McGill and Hewitt v. the United Kingdom, application nos. 7690/18 and 9348/18, 14 May 2019. ECtHR, S.A. Bio D'Ardennes v. Belgium, application no. 44457/11, 12 November 2019. And by governments: ECtHR, Kanagaratnam and others v. Belgium, application no. 15297/09, 13 December 2011. ECtHR, Michaud v. France, application no. 12323/11, 06 December 2012. ECtHR, Emars v. Latvia, application no. 22412/08, 18 November 2014. ECtHR, Kiril Zlatkov Nikolov v. France, application nos. 70474/11 and 68038/12, 10 November 2016. ECtHR, Charron and Merle-Montet v.

64 This means that the Court, at least in these types of cases, has transformed from a traditional human rights court, that assesses in concreto whether one of more of the human rights of an applicant have been violated and if so, whether damages should be awarded, to a constitutional court, that assesses laws in abstracto and tests them on general principles deriving from the rule of law and the separation of powers. As Judge Pinto de Albuquerque explained in his partly concurring, partly dissenting opinion in Villanianatos and others (2013), when the ECtHR assesses laws in abstracto, it does ‘an abstract review of the “conventionality” of a Greek law, while acting as a court of first instance. The Grand Chamber not only reviews the Convention compliance of a law which has not been applied to the applicants, but furthermore does it without the benefit of prior scrutiny of that same legislation by the national courts. In other words, the Grand Chamber invests itself with the power to examine in abstracto the Convention compliance of laws without any prior national judicial review.’<sup>88</sup> The Court’s use of such terminology is not restricted to cases described in sections C and D,<sup>89</sup> but applied more broadly to a wide variety of cases, for example when it stresses that it performs a ‘review of Convention compliance’ of laws that prohibit the full-face veil in public places.<sup>90</sup>

65 In addition, a second limitation to the ECtHR’s capacity to scrutinise Member States’ legislative branch was removed. Normally, even in cases revolving around the quality of law, the ECtHR would not say that, let alone specify how, a Member State would need to change its laws. Formally speaking, the Court only holds that there has been a violation of the Convention and whether the state needs to pay damages to the applicants. One of the problems of focusing on concrete violations of the Convention was that structural problems were sometimes left unaddressed. Suppose a Member State had in place a law or policy through which the legislative power granted the executive power the authority to violate the Convention. Under its standards approach, the ECtHR would not rule that that law or policy should be changed or amended, but only that the violation in a concrete matter was in violation of the Convention.

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France, application no. 22612/15, 16 January 2018.

88 ECtHR, Matelly v. France, application no. 10609/10, 02 November 2014.

89 See for example: Centrum För Rättvisa v. Sweden, § 97-98 and Big Brother Watch on multiple occasions.

90 ECtHR, S.A.S. v. France, application no. 43835/11, 01 July 2014, §153-154. See also: ECtHR, Dakir v. Belgium, application no. 4619/12, 11 July 2017. ECtHR, Belcacemi and Oussar v. Belgium, application no. 37798/13, 11 July 2017.



66 Thus, if the Polish parliament granted prison authorities the power to constantly monitor all correspondence by prisoners, the ECtHR would not say that the law should be amended, but only find a violation of the Convention if an applicant claimed that her correspondence was unlawfully monitored, perhaps awarding a small amount of money by way of remedy. Although the implicit message was clear, several countries simply refused to change their laws and rather continued to pay damages to victims. Although in a way, the judgements discussed in section D provide a partial solution to this problem, because the ECtHR does not look at concrete violations stemming from a potentially more structural problem, but at the law or policy as such. In another way it makes things worse, because the Court does not award any damages to the applicants in these cases due to the fact that they have not suffered any concrete harm. This means that even the incentive of paying continuous damages is removed.

67 This approach has had two consequences. First, because the Court did not order the legislative branch explicitly to remedy legislative regime and structural problems as such, a continuing violation of the Convention could persist. Second, and following from that, this sometimes resulted in a high number of cases before the Court, on occasions reaching a number of several thousand individual applications per underlying issue.<sup>91</sup> Seeing this problem, at the Conference on the Future of the European Court of Human Rights on 18–19 February 2010, the Interlaken Declaration and Action Plan was adopted, requesting the Court to develop clear and predictable standards for a “pilot judgment” procedure.<sup>92</sup> By 2011, the Court embedded a new rule in the Rules of the Court, which specified that the Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications.<sup>93</sup> A pilot-judgment procedure may be initiated by the Court of its own motion or at the request of one or both parties.<sup>94</sup> In such a judgement,

the Court has to identify both the nature of the structural or systemic problem or other dysfunction, as well as the type of remedial measures which the Member State concerned is required to take at the domestic level by virtue of the operative provisions of the judgment. The Court may even direct in the operative provisions of the pilot judgment that the remedial measures be adopted within a specified time. The Court may adjourn the examination of all similar applications pending the adoption of the remedial measures required by virtue of the operative provisions of the pilot judgment.<sup>95</sup>

68 Such judgements have been issued a significant number of times since and have been considered with respect to Article 8 ECHR several times as well.<sup>96</sup> For example, in *Kuric and others* (2012), the applicants claimed that they had been arbitrarily deprived of the possibility of preserving their status as permanent residents in Slovenia. The Court observed that the “erasure” of the applicants’ names from the register, together with the names of more than 25,000 others, occurred as a result of the joint effect of two sections of the legislation. *Inter alia*, it found that the domestic legal system failed to clearly regulate the consequences of the “erasure” and the residence status of those who had been subjected to it. Therefore, not only were the applicants not in a position to foresee the measure complained of, but they were also unable to envisage its repercussions on their private or family life, or both. Consequently, the Court found a violation of Article 8 ECHR in that specific case, for which it awarded substantial amounts of damages.

69 In addition, it stressed that normally, ‘the Court’s judgments are essentially declaratory, the respondent State remains free, subject to the supervision of the Committee of Ministers, to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court’s judgment. However, in exceptional cases, with a view to helping the respondent State to fulfil its obligations under Article 46, the Court will seek to indicate the type of measure that might be taken in order to put an end to a situation it has found to exist. In the present case, the Court has found violations of the applicants’ rights guaranteed by Articles 8, 13 and 14, which essentially originated in the prolonged failure of the Slovenian authorities, in spite of

91 <[https://www.echr.coe.int/Documents/FS\\_Pilot\\_judgments\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf)>.

92 <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12418&lang=en>>.

93 <<https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-3481961-3922418&filename=New%20rule%20on%20pilot%20judgment%20procedure%2023.03.11.pdf>>.

94 <[https://www.echr.coe.int/Documents/Pilot\\_judgment\\_procedure\\_ENG.pdf](https://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf)>.

95 Rule 61, Rules of the Court. <[https://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf)>.

96 Though claims to that end are also sometimes rejected: ECtHR, *Jurek v. Poland*, application no. 31888/06, 14 December 2010. ECtHR, *Pisarkiewicz v. Poland*, application no. 222/05, 14 December 2010. ECtHR, *Gorski v. Poland*, application no. 10827/07, 14 December 2010.



the Constitutional Court's leading judgments, to regularise the applicants' residence status following their "erasure" and to provide them with adequate redress.<sup>97</sup> That is why the Court decided to issue a pilot judgment as well, indicating that the Member State should, within one year, set up an *ad hoc* domestic compensation scheme. In addition, it ruled that the examination of all similar applications would be adjourned pending the adoption of these measures.<sup>98</sup>

- 70 Another example is the case of Novruk and others (2016), in which the applicants argued that their private life in Russia was disrupted by an exclusion order. The Court found that in the light of the overwhelming European and international consensus geared towards abolishing the outstanding restrictions on entry, stay and residence of HIV-positive nonnationals who constitute a particularly vulnerable group, Russia did not advance compelling reasons or any objective justification for their differential treatment for health reasons and consequently found a violation of Articles 8 and 14 ECHR. In addition to complaining about their own situation, the applicants claimed that there was a structural policy of the Russian government on this point, which Russia denied. The Court stressed that it was concerned that the scope of the proposed draft legislation adopted by the national legislator, that was aimed at remedying the situation, was restricted to those non-nationals who had permanently resident spouses, parents or children in Russia, which it felt was too limited to adequately remedy the situation. It abstained at that moment from issuing a pilot judgement directly, giving the Russian legislator the chance to remedy the situation itself in full, but at the same time made clear: 'Should the efforts made by the Government to tackle the underlying Convention problem or the remit of the envisaged reform prove to be insufficient, the Court may reassess the need to apply the pilot-judgment procedure to this type of case.'<sup>99</sup>

97 ECtHR, Kuric and others v. Slovenia, application no. 26828/06, 26 June 2012, § 406-408.

98 The pilot judgement is now closed: ECtHR, Anastasov and others v. Slovenia, application no. 65020/13, 18 November 2016.

99 ECtHR, Novruk and others v. Russia, application nos. 31039/11, 48511/11, 76810/12, 14618/13 and 13817/14, 15 March 2016, § 135.

## F. Analysis

- 71 Just after the Second World War, H.L.A. Hart and Lon Fuller engaged in a now classic debate, *inter alia*, about a German court's decision on the so called grudge informer. In 1944 a woman, in trying to get rid of her husband, reported to the authorities derogatory remarks her husband had made about Hitler while home on leave from the German army. After the Second World War, she was put on trial; she defended herself by stressing that her conduct was required by the prevailing laws at that time. The court of last resort held that she was guilty nevertheless since she followed a Nazi law out of free choice that conflicted with the 'sound conscience and basic sense of justice inherent to all decent human beings'. This allusion to pre- or supra-legal norms, that the constitutionalists had wanted to put in the European Convention on Human Rights, infuriated Hart. A stern positivist, he believed that there were no such things as pre- or supra-legal norms, only man made laws. He believed fervently that the question of fact, what is a law or not, should be detached from the normative question, whether a law is good. If laws were adopted according to the prevailing legal standards, they should be considered law, however callous the content of the law might be.<sup>100</sup>

- 72 Lon Fuller, to the contrary, replied that the question of what is and what ought to be cannot be separated.<sup>101</sup> He did not so much refer to pre- or supra-legal norms, that are derived from natural law, but used the term 'inner morality' of law. He believed that, much like a craftsman has to adhere to certain standards and practices when making a table – and a table needs to accord to a number of minimum principles to be called a table proper – a lawmaker needs to abide by certain standards and practices and a law must meet a number of minimum requirements to be called a law proper.<sup>102</sup> If a chair has one uneven leg, we might call it dysfunctional, if it lacks one leg altogether we might call it defect or broken and if it has no legs whatsoever, we might call it a cushion instead of a chair. The same applies to a legal order.

- 73 Consequently, Fuller argued that legal orders must not be approached merely as factual objects; rather, taking a teleological approach, he stressed that they should be viewed as purposive enterprises. Legal

100 H. L. A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harvard Law Review (4).

101 L. L. Fuller, 'Positivism and Fidelity to Law — A Reply to Professor Hart', (1958) 71 Harvard Law Review (4).

102 L. L. Fuller, *The Morality of Law* (Yale University Press, 1969), 96.

orders are made by men for a purpose; namely, first to ensure order and second to achieve certain general, common goals. As an end in itself and as an instrument to reach these societal goals, legal orders must abide by the minimum standards of the rule of law to be effective. Respect for the 'inner morality' of law, among others, ensures that citizens are able to take into account the norms the laws provide.<sup>103</sup> Fuller specified a number of minimum requirements of law and failure to meet those: 'The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.'<sup>104</sup>

- 74 Consequently, Fuller questioned whether the Nazi laws on which the grudge informer based the legitimacy of her actions, could properly be called laws and could be considered binding, because the legal order the Nazi regime had put in place failed to meet a high number of these minimum requirements.<sup>105</sup> Importantly, Fuller also stressed that these minimum requirements of law should not be understood as absolute, stand-alone principles. There is no legal regime that can fulfil them all to an optimal extent. He stressed two limitations in particular.

103 See further: L. L. Fuller, 'Means and Ends'. In: L. L. Fuller, *The Principles of Social Order* (Duke University Press, 1981).

104 L. L. Fuller, *The Morality of Law*, p. 39.

105 Fuller also thought the law in the case of the grudge informer had been incorrectly applied in the private domain by the Nazi court. 'This question becomes acute when we note that the act applies only to public acts or utterances, whereas the husband's remarks were in the privacy of his own home. Now it appears that the Nazi courts (and it should be noted we are dealing with a special military court) quite generally disregarded this limitation and extended the act to all utterances, private or public.' Is Professor Hart prepared to say that the legal meaning of this statute is to be determined in the light of this apparently uniform principle of judicial interpretation? L. L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart', (1958) 71 *Harvard Law Review* 630, p. 654.

- 75 First, Fuller distinguished between two kinds of morality, namely the morality of duty and the morality of aspiration. The morality of aspiration is aimed at the ideal, the maximum, something that shall never be attained. The morality of duty, in contrast, starts at the bottom, at the minimum rules which need to be respected, without exception.<sup>106</sup> As Fuller explained, there are always a multitude of different aspirations working at the same time: e.g., one strives to be the perfect parent, a good spouse and productive employee at the same time. The attempt should be to find the right equilibrium between those different ideals, as the pursuit of one may block or hinder the pursuit of others. Although the respect for the basic dignity and autonomy of citizens was part of the morality of duty, interestingly, Fuller categorised the eight principles derived from the 'inner morality of law' as matters of aspiration. Only in a utopia can all eight elements be respected in full. He referred anecdotally to the efforts of Communist Poland to make laws so clear that they would be intelligible even to the workers and the peasants. The result was, however, that this type of clarity could only be achieved at the cost of legal consistency and the overall coherence of the system.

- 76 Second, Fuller stressed that rules can never be understood in isolation. A judge, when interpreting a legal regime, should always look to practice.<sup>107</sup> Fuller believed that positive law is built on customs and pre-legal norms; for example, a rule prohibiting vehicles in the park presupposes some general understanding of what a park and a vehicle are, why the rule was adopted and in which contexts it should be applied.<sup>108</sup> If we want to interpret a text, for example, we have to know what the writer wanted to convey and it should best be read by someone who is aware of this purpose. If a mechanic were to write an instruction on how to build a machine in poor English, Fuller illustrates, and two persons were to read his instructions, an English professor and another mechanic, Fuller argues that the latter would not get lost in the 'literal or factual' interpretation of the text, but try to find its essence and would thus understand the instructions better than the English professor. 'As for the application of the dichotomy of *is* and *ought* to the law, it is fairly clear that with legal precepts, as with the instructions for assembling a machine, what a direction *is* can be understood only by seeing toward what end result it is aimed. The

106 L. L. Fuller, 'The Morality of Law', p. 18.

107 L. L. Fuller, 'Some presuppositions shaping the concept of "Socialization"', p. 39-40. In: J. L. Tapp & F. J. Levinne, *Law, justice and the individual in society: psychological and legal issues* (Holt, Rinehart and Winston, 1977).

108 L. L. Fuller, *Anatomy of the law* (Penguin Books, 1971), 60.

essential meaning of a legal rule lies in a purpose, or more commonly, in a congeries of purposes. Within the framework of this purpose, or set of related purposes, the sharp dichotomy between fact and evaluation cannot be maintained; the “fact” involved is not a static datum but something that reaches toward an objective and that can be understood only in terms of that reaching.<sup>109</sup>

- 77 Much like these two ideal positions, this article has explained that there were two groups with contrasting perspectives when the European Convention on Human Rights was drafted. The first group focussed primarily on potential violations of the executive and potentially the judicial branch in concrete instances; remedies could be afforded by the European Court of Human Rights by awarding damages to the victims of those violations, such as when the executive branch had operated outside the bounds set by the legislative branch. This group did not want to include in the operative part of the Convention references to pre- or supra-legal norms. The second group wanted to focus in particular on the more general and societal problems that derived from laws and policies as such and wanted the Court to be able to assess pre- or supra-legal norms and the principles derived from the rule of law. The second group wanted the Court to scrutinise the national legislative branch and in their view, the Court should not only be able to award damages to the victims of a specific violation of the Convention, it should have the power to require Member States to amend or change their laws and policies as well.
- 78 Although neither group was glaringly victorious, it is clear that idea that the democratic legislator should not be scrutinised by the European Court of Human Rights took the upper hand. Both through changes made to the Convention and through its interpretation by the Court, the Convention-system moved increasingly towards providing relief only to natural persons who could demonstrate that they had been harmed in their individual interests in their specific case. Consequently, by far most cases before the Court concerned the executive and the judicial branch of Member States and how they had acted in concrete cases. This article has shown that while for more than 50 years, this has been the standard interpretation of the ECHR, in the last few years, the Court has made a fundamental change to its approach.
- 79 Starting around the 1980s, the ECtHR began to focus on the accessibility and foreseeability of laws and policies, shifting the attention from the question

of whether the executive power had abided by the boundaries set out by the legislative power, to the question of whether the legislator had made laws that were sufficiently clear to citizens. Citizens should be able to know to a reasonable extent what repercussions certain actions or inactions have; if citizens don't know which actions are forbidden, they won't be able to follow the rules. Although the Court initially connected these principles to the term ‘prescribed by law’, used in Articles 9, 10 and 11 ECHR, and not to ‘in accordance with the law’, used in Article 8 ECHR, it later absolved this distinction. Referring more and more to the principles connected to the ‘rule of law’ contained in the preamble of the ECHR, and it was especially in cases with respect to the right to privacy that this approach gained significance.

- 80 Especially in cases revolving around surveillance activities by special police units and intelligence agencies, the ECtHR acknowledged that the principles of accessibility and foreseeability in their traditional meaning held little sway, unpredictability and unforeseeability being one of the *conditio sine qua non* for effective secret surveillance. That is why the Court stressed that the legal regime should have in place additional safeguards to remedy the fact that these standard principles could not be met. Doing so, it shifted its attention from the relationship between the legislator and citizens to the relationship between the legislative branch and the executive branch and from abuse of power (where the executive branch uses powers beyond the boundaries set by the legislator) to the danger of arbitrary use of power (where the executive stays within those boundaries, but the problem is that the boundaries are very broad or non-existent).
- 81 Slowly but surely, the ‘quality of law’ became a standard doctrine applied in a wide variety of cases. The Court required laws, *inter alia*, to specify clearly the categories of people liable to be subject to the use of power by the executive branch and the nature of the offences which may give rise to such measures, to set limits on the duration of the measures, specify procedures to be followed and the circumstances in which recorded data must be erased, specify with sufficient clarity the scope and conditions of exercise of the authorities’ discretionary power, provide adequate and effective safeguards against abuse, and lay down procedures for supervision and independent and impartial judicial oversight.
- 82 An important next step was taken by the European Court of Human Rights in the case *Zakharov* in December 2015. That case was revolutionary for two reasons. First, after more than 60 years of rejecting *in abstracto* claims, the Court made explicit that in cases revolving around secret surveillance, where people generally do not know whether they have been the

109 L. L. Fuller, “American Legal Philosophy at Mid-Century: A Review of Edwin W. Patterson’s *Jurisprudence, Men and Ideas of the Law*”, (1953-1954) 6 *Journal of Legal Education* 457, p. 470-471.

target of data gathering activities, this principle could no longer be upheld. Second, because the Court cannot evaluate whether there was an interference of the right to privacy of the claimant, whether that interference was prescribed by law, whether that interference was in the public interests, and whether a fair balance was struck between the competing interests at stake. The Court's only task is to assess whether the law of the Member State abides by the 'minimum principles of law'. It took a similar approach in the subsequent cases of *Centrum För Rättvisa* and *Big Brother Watch*.

- 83 In these cases, the Court carefully scrutinised the laws and policies before it on no less than nine minimum requirements of law: (1) accessibility of the domestic law; (2) scope of application of the secret surveillance measures; (3) the duration of secret surveillance measures; (4) the procedures for processing data; (5) authorisation procedures; (6) ex post supervision of the implementation of secret surveillance measures; (7) conditions for communicating data to and receiving data from other parties; (8) notification of interception of communications; and (9) available remedies. It found multiple violations of these minimum requirements in *Zakharov* and *Big Brother Watch*. In *Centrum För Rättvisa*, the European Court of Human Rights did not find a violation, but stressed that there was room for improvement of the Swedish legal system on a number of points.
- 84 In these cases, the Court not so much assesses whether the executive branch is abusing its powers, but rather, whether the legislative branch has granted the executive power such broad powers and laid down so few limitations, that it is nearly impossible for the executive branch to violate the law. Just like the constitutionalists had wanted when drafting the European Convention on Human Rights and setting out the powers and competences of the European Court of Human Rights, the Court now accepts the task of scrutinising the legislative branch as well. Interestingly, it takes a similar approach to Lon Fuller, who had specified eight minimum requirements of legal orders. Understanding the Court's approach through a Fullerian lens might also solve the puzzle of why the ECtHR allows for exceptions to the minimum requirements of law when either practice is such that there is no arbitrary use of power or when a deficiency with respect to one minimum requirement of law is remedied by a Member State performing exceptionally strong on another minimum requirement of law. Like Fuller had proposed, the ECtHR does not so much treat these principles as 'minimum' requirements of 'law', but as principles of aspiration. If a law fails to meet all these principles, it clearly cannot be called a law proper, but there is no law that accords in full to all these standards.

- 85 Finally, this article showed that in order to be able to fully scrutinise Member States' legislative branch, the European Court of Human Rights removed two final limitations.
- 86 First, the Court would normally only evaluate cases after all domestic remedies had been exhausted. However, the Court allows for an exception to this rule when it feels that the domestic remedies are ineffective or when the question whether they are effective is at the core of the complaint by the applicants. If domestic remedies do not allow individuals a right to appeal to a court, or if that court does not have full discretion to scrutinise the actions of the executive branch or the legal regime as such, or if the body performing oversight is not sufficiently independent or equipped, individuals are allowed to bring their case directly to the ECtHR. Doing so, in particular with respect to the *in abstracto* claims, the European Court of Human Rights is transforming from a court which assesses whether in a concrete case, one or more human rights of the applicant have been violated and whether compensation is required, to a court that assesses the quality of laws in general, not as a court of last instance, but as a court of first instance. Not only natural persons who have been harmed directly and individually are allowed to submit a complaint, people and organisations, such as civil rights organisations, will be received in their application if they invoke societal interests. Just like a constitutional court might do at a national level, it assesses whether a law respects the basic principles connected to the rule of law and separation of power. Not surprisingly, a number of judges on the ECtHR have described its role as a European Constitutional Court.
- 87 Second, even in cases revolving around the quality of law, the ECtHR would normally not say that, let alone specify how, a Member State would need to change its laws. Formally speaking, the Court only holds that there has been a violation of the Convention and determines whether the state needs to pay damages to the applicants. This approach had two consequences. First, because the Court did not order the legislative branch to explicitly remedy the structural problem as such, a continuing violation of the Convention could persist. Second, and following from that, this sometimes resulted in a high number of cases before it. That is why the Court adopted a new rule, which specifies that the Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications. In such a judgement, the Court has to identify both the nature of the structural or systemic problem, or other dysfunction, as well as the type of remedial measures which the Member State concerned is



required to take at the domestic level by virtue of the operative provisions of the judgment. The Court may even direct in the operative provisions of the pilot judgment that the remedial measures be adopted within a specified time.

- 88 This completes the circle. The constitutionalists had hoped to have a reference to supra-legal standards and the rule of law in the Convention and hoped the Court would focus on scrutinising laws and policies as such and remedy structural and societal problems. But the Convention and the practice of the European Court of Human Rights went in the opposite direction, focussing almost without exception on concrete violations brought by natural persons that had been harmed directly and individually from that Convention violation and awarding damages to them specifically. In just a number of years, the Court has revised its stance fundamentally and is willing to focus on the role of the legislator, assess the quality of laws in detail, and even instruct the legislator on how to revise or amend its legal regime. Whether this is merely because the Court was faced with the practical problem that it received thousands of similar cases on an underlying structural problem that was left unaddressed on the one hand and with the fact that no cases could be brought with respect to mass surveillance measures, of which the victims typically remain unaware, on the other hand, or that the Court is alarmed both by the rise of populist and totalitarian regimes in eastern Europe and by the ease with which the legislative branch throughout Europe is willing to give blanket and unconditioned power to the executive branch in the fight against terrorism and organised crime is unclear. What is clear is that it was precisely these types of problems that the constitutionalists were concerned with: both the shoals of complaints of natural persons and the lack of scrutiny at the point where it was needed the most – the legislative branch.

# Debts, Money, Intellectual Property, Data and the Concept of Dematerialised Property

by Andreas Rahmatian\*

**Abstract:** Debts, (electronic) money, intellectual property, and, in principle, data and digitised objects (if ownership rights are to be recognised for these), can be conceptualised as versions of the general principle of dematerialised property. This article discusses first the concept of dematerialised property and its application to debts, money and intellectual property. Then it deals with the idea of ownership of data within traditional property concepts.

While data ownership can theoretically be accommodated fairly easily within the framework of dematerialised property, there are several reasons, both theoretical and from a legal policy perspective, which make the introduction of data ownership modelled upon conventional (intellectual) property rights problematic.

**Keywords:** dematerialised property; money creation; intellectual property theory; data ownership

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## A. Introduction

1 The modern economy relies more and more on intangible assets, whether financial assets (ultimately a form of debt, particularly in its most significant version: money), or intellectual property and data, while the production and sale of physical goods and assets becomes less important. Some commentators seem to suggest that the law of property struggles when it tries to keep up with these developments. In fact, an underlying concept of modern property law systems appears well-equipped to meet these new challenges, and although lawyers hardly address this concept specifically, it is in reality impliedly accepted: the concept of *dematerialised property*. This concept will be discussed in the following article, with some of its most important practical applications: debts, money, intellectual property, and, at least potentially, data and digitised objects.

2 First, one has to explain how the term ‘property’ is used and understood in the following discussion. The English word ‘property’, also in its technical-legal meaning, is ambiguous,<sup>1</sup> and at the start of the discussion it is necessary to define the term ‘property’ as follows: ‘property’ means (a) assets or wherewithal or ‘*patrimonium*’ of a person, (b) property right, (c) property object or ‘thing’ or *res* (the latter term will be used in the following), and, finally, (d) ‘ownership’, although this meaning is imprecise and should better be avoided.<sup>2</sup>

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1 See also Lutz-Christian Wolff, ‘The relationship between contract law and property law’, (2020) 49(1) *Common Law World Review*, 34–36.

2 Andreas Rahmatian, *Lord Kames. Legal and Social Theorist* (Edinburgh University Press, 2015) 221–224.

Relevant for the following discussion are meanings (b) and (c) – property right and property object. It will become clear that in the concept of dematerialised property<sup>3</sup> ‘property right’ and ‘property object’ are in fact interchangeable terms.

## B. The concept of dematerialised property

- 3 Different legal systems have different definitions of property rights, but historically property objects or ‘things’ in law have generally been regarded as being physical things, at least initially. In German law, property or things (*Sachen*) are indeed only physical objects (§ 90 German Civil Code, BGB),<sup>4</sup> but that forces Germany to recognise debts (*Forderungen*)<sup>5</sup> and intellectual property rights as quasi-property in effect,<sup>6</sup> so that functionally this narrow definition of property, which seems to have developed rather fortuitously and can be traced back to a particular romanist interpretation of property by the German

Historical School in the nineteenth century,<sup>7</sup> is really upheld in practice. The treatment of licences in German author’s rights law (*Urheberrecht*) makes the interpretation of such property-like *sui generis* rights as ‘quasi-property’ particularly apparent.<sup>8</sup> More practical is a wide definition of property, for example in Austria’s § 285 of the General Civil Code (ABGB), which stipulates that everything that is different from the human being and serves the use of man, is a thing or *res* in law.<sup>9</sup> A similar approach is taken in other jurisdictions, for example in France,<sup>10</sup> England<sup>11</sup> or Scotland.<sup>12</sup> Accordingly, property objects can be corporeal as well as incorporeal, or, in the terminology of English law, tangible, intangible and purely intangible. ‘Pure intangibles’ denotes property created as legal concepts, for example debts or intellectual property rights, while ‘intangibles’ can also mean intangible objects of the physical world, such as gas or electricity.<sup>13</sup> Although theoretically corporeal (both moveable and immovable) and incorporeal property are only sub-categories of the same legal concept of property (unitary concept of property), the different legal systems are bound to take account of the (non-)physicality of a *res* and to provide adequate provisions, for example in relation to the acquisition of possession or ownership or

3 See Andreas Rahmatian, ‘Intellectual Property and the Concept of Dematerialised Property’, in: Sue Bright (ed.), *Modern Studies in Property Law*, vol. 6 (Hart Publishing, 2011) 361-383, at 361; Rahmatian, *Lord Kames* (n 2) 228-230; Andreas Rahmatian, *Credit and Creed. A Critical Legal Theory of Money* (Routledge, 2020) 6-18.

4 § 90 BGB: ‘Sachen im Sinne des Gesetzes sind nur körperliche Gegenstände.’ Similar Dutch Civil Code (*Burgerlijk Wetboek*), art 5:1: ownership refers to corporeal objects.

5 This becomes apparent in the situation of the assignment of debts or claims (*Forderungsabtretung*), where the attribution to a creditor is changed, which requires the application of a quasi-proprietarian speciality principle, like with actual property rights, see e.g. Dieter Medicus, *Schuldrecht I. Allgemeiner Teil*, 14th ed. (C. H. Beck, 2003) 350, for Germany. Transferability is generally an indication of the existence of a property right, at least functionally, see for English law, Kevin Gray and Susan Francis Gray, *Elements of Land Law*, 5<sup>th</sup> ed. (Oxford University Press, 2009) 96-98.

6 In the case of intellectual property rights, these are *Immaterialgüterrechte* (literally, ‘rights of incorporeal goods’), see for Germany and the German author’s rights law which, due to its strong personal component, is not regarded as a true property right, Vogel in Gerhard Schricker (ed.) *Urheberrecht. Kommentar*, 4th ed. (C. H. Beck, 2010) 58, n 26: ‘quasi-dingliches Recht’, on the historical development, *ibid* at 86, n 109; Schulze in Thomas Dreier and Gernot Schulze, *Urheberrechtsgesetz. Kommentar*, 5th ed. (C. H. Beck, 2015) 79, n 11: the notion that the work that is protected by the author’s right (‘copyright’) is made concrete or is realised in the physical piece of work (*ibid*), already hints at the idea of dematerialised property, see below.

7 Maximilian Haedicke, *Rechtskauf und Rechtsmängelhaftung* (Mohr Siebeck, 2003) 35.

8 While the author’s right itself and its exploitation rights (*Verwertungsrechte*) are not transferable in German law (see German § 29 (1) *Urheberrechtsgesetz* 1965), the licences (*Nutzungsrechte*) granted under an existing author’s right are transferable, with author’s consent (which cannot be withheld in bad faith, German § 34 (1) *Urheberrechtsgesetz* 1965), see Schricker/Loewenheim in Schricker (n 6) 581, n 50.

9 § 285 ABGB: ‘Alles, was von der Person unterschieden ist, und zum Gebrauche der Menschen dient, wird im rechtlichen Sinne eine Sache genannt.’

10 François Terré and Philippe Simler, *Droit civil: Les biens*, 9<sup>th</sup> ed. (Dalloz, 2014) 43.

11 E.g. Michael Bridge, *Personal Property Law*, 4<sup>th</sup> ed. (Oxford University Press, 2015) 13-16: choses in possession (tangible chattels), choses in action (debts), (pure) intangibles.

12 Kenneth G. C. Reid (and contributors), *The Law of Property in Scotland* (Butterworths, 1996) 17, 22, para. 11 and note 4, para. 16.

13 Bridge (n 11) 13, 16. In reality the distinction between ‘pure intangibles’ and ‘intangibles’ is often not strictly made.

the grant of security rights over property, which reflect the tangible or intangible nature of the *res* in question.<sup>14</sup> That problem will not be discussed in the present context.

- 4 On this basis, one can develop the property concept further. Property is not primarily a connection between a person and an object, but a legal relationship between persons with regard to things (relational concept of property).<sup>15</sup> The law determines what this proprietary relationship consists of, by essentially ordering a specific behaviour towards persons in respect of things which makes them ‘their’ things. This is commonly referred to as the property right (or ‘real right’<sup>16</sup>), the subjective exclusive right to a *res*, enforceable *erga omnes*<sup>17</sup> (in English law: ‘a property right binds the world’)<sup>18</sup> different from, and independent of, an underlying contractual relationship that would only bind the contracting parties.<sup>19</sup> The property right of ownership, being the most extensive property right,<sup>20</sup> is enforced by the owner against, for example, the trespasser or the thief in relation to a *res*, such as

a plot of land or a watch as an instance of that *res* (on the idea of the ‘instance’, see immediately below).<sup>21</sup> Thus ‘property’ is the creature of the law; there are no ‘natural’ property rights,<sup>22</sup> in contrast to some natural law theories of property. The exclusive rights to a *res*, the property rights or real rights, actually create the property or *res* by protecting it *erga omnes*. There are evidently physical objects in the natural world, either as natural or as man-made products, like an apple or a car, but they are only recognised by, and incorporated in, the system of the law by (potentially)<sup>23</sup> attaching property rights to them: only then they are objects or ‘things’ for the purpose of the law, otherwise they are non-existent for the law. This is therefore an entirely constructivist idea of property: it is the law that makes the object to a thing or *res* in law and therefore ‘constructs’ it as ‘real’ from a legal perspective. The physical existence of an object in the natural world is not legally imperative.

- 5 Consequently, the *res* is a legal construct that is ‘filled’ by physical objects of whichever kind, being a field, a car, or a book. These are concrete instances of the *res*, that is, the legal conception that turns physical objects into ‘property’, or more precisely, property objects in law, a process which one can call, somewhat unattractively, ‘propertisation’. The *res* as such is only *res* because of the property rights attached to it: by turning physical objects into *res* they incorporate the object of the natural world (the ‘is’) into the normative world of the law (the ‘ought’). In fact, the physical object of property only represents, but does not constitute, the *res* which is the legal concept of ‘property object’. This physical object operates as a ‘social reifier’ of the *res*, being a material representation of an abstract legal concept. It becomes clear again that the physicality of the object representing the legal notion of the *res* is conceptually unnecessary. Therefore, the *res* may be represented by a physical thing, but equally it

14 For an ownership transfer, physical delivery is possible in relation to moveable property (or, if unsuitable, through symbols), or change of registration in case of land/immoveable property, or information of the debtor (intimation) to perfect the transfer of a claim/debt in case of an assignment (depending on the jurisdiction in question).

15 The relational concept of property is not a new theory, although some sociologically informed authors seem to suggest this, but can be traced back to the eighteenth century at least, see in particular Immanuel Kant, *Die Metaphysik der Sitten*, Wilhelm Weischedel (ed.), (Werkausgabe Band VIII) (Suhrkamp Taschenbuch Verlag, 1977) 371-372. For more discussion, see e.g. Rahmatian, *Lord Kames* (n 2) 225-226. It is rather a truism that property rights are ultimately enforceable only against persons, see e.g. Reid (n 12) 8, para. 3.

16 Here the term ‘real’ has to be understood in its original Latin meaning, from which also the word *res* (‘thing’) derives. The words ‘real estate’ and the technical term for land/immoveable property in English law, ‘real property’, are examples of that.

17 Franz Bydlinski, *System und Prinzipien des Privatrechts* (Springer Verlag, 1996) 315-318.

18 E. g. Bridge (n 11) 1-4.

19 Bydlinski (n 17) 171-172, 174.

20 There are of course more limited, or subordinate real rights, such as the pledge, the mortgage or real security or hypothec (the exact terminology depends on the jurisdiction in question), the easement or servitude (such as a right of way) and so on. This is not discussed further.

21 In the present context, the nature or content of real rights, such as ownership, is not discussed. For the ‘internal side’ of real rights, see e.g. Rahmatian, *Dematerialised Property* (n 3) 366-367.

22 This follows ultimately Jeremy Bentham, see Jeremy Bentham, ‘Principles of the Civil Code’, in: *The Theory of Legislation*, 7<sup>th</sup> ed. (R. Hildreth, trans.) (Kegan Paul, Trench, Trübner, 1891) 88-236, at 111-113, and David Hume, see David Hume, *A Treatise of Human Nature*, book 3, part 2, L. A. Selby-Bigge (ed.) (Clarendon Press, 1960) 491.

23 This comprises cases of *res nullius* where currently there is no property right attached in a given case but could be established through finding, occupation etc.



can be made concrete in the form of a non-physical legal concept itself, the most practical example being intellectual property rights.<sup>24</sup>

- 6 This is the idea of *dematerialised property*: the ‘ought’ of the *res* need not be materialised as an ‘is’ in form of a physical object as a social reifier that may indicate socially the adhering legal real right – this is in fact insignificant. Human behavioural patterns creating property rights may be supported by physical objects – for example the social act of delivery of a thing (*traditio*) for denoting the transfer of ownership in that thing to a new owner – but the actual real right (including attribution changes of that right) and the *res* it thereby creates through the proprietary protection of that very *res* are independent of any physicality. As the real right creates the *res*, the normative terms ‘property right’ and ‘property object’ are conceptually interchangeable. With regard to intellectual property, this is obvious: the terms ‘intellectual property right’ and ‘intellectual property’ are indeed equivalent, also in practical use. As far as corporeal property is concerned, the expression ‘property right’ denotes more the real right to the thing, while the term ‘property’ (in the specific meaning of ‘thing’) emphasises the property object represented by a physical thing, such as a chattel. Conceptually, however, right and ‘thing’ (here understood as the legal concept of the *res*) are substitutable also in the case of tangible property, as explained before.
- 7 This idea of normative dematerialisation makes the following argument, often found in property theory, in fact irrelevant: that intellectual property rights – and also data, for that matter<sup>25</sup> – are non-rivalrous goods, unlike physical property, and are therefore not actual property. The legal question is not whether the consumption of the good by one individual does (not) prevent or reduce availability of the good for consumption by others, but whether there is a normative creation of ‘property’, or a *res*, and that applies to tangible and intangible property alike: in this way, the rivalrous nature is normatively ordered, not legally acknowledged in line with existing physical circumstances.<sup>26</sup> In copyright, protection is not granted for ‘ideas’ that are non-

rivalrous, but for distinct individual expressions of the author who uses and shapes these ideas, and it is their expression and the legal protection by copyright attached to them, which creates normatively the rivalrous good (if one wants to adhere to this concept for pure intangibles at all). In this regard the same would have to apply for data, so the problem of proprietary protection of data cannot be solved on this basis.

## C. Applications of dematerialised property I: debts, (electronic) money and intellectual property rights

- 8 A typical application of dematerialised property are also legal concepts, so that a physical object as an instance of the *res* to which the property right relates (and which the property right by way of this relation creates) is actually not possible. This is the case of debts and intellectual property rights in particular.
- 9 The debt is an entirely legal creature with no physical appearance in nature. Some legal systems deny the debt proprietary quality (Germany, §§ 90, 903 BGB), but functionally the debt is unquestionably property of the creditor (thus more precisely ‘claim’, from the creditor’s perspective)<sup>27</sup> which also materialises in the assignability of the debt to a new creditor. Transferability (in principle, but there may be transfer prohibitions) indicates the quality as property.<sup>28</sup> As no physicality exists, the transfer or assignment cannot be made public by way of overt acts that denote and make apparent the change of attribution<sup>29</sup> in form of a physical handing over or change of possession (delivery, *traditio*), so that legal systems insist on the compliance with certain formalities to perfect or make effective the assignment (for example intimation/information of the debtor of the assignment – the individual jurisdictions differ here). These formalities perform an evidentiary and a channelling function, to speak

24 Rahmatian, *Dematerialised Property* (n 3) 371.

25 Francesco Banterle, ‘Data Ownership in the Data Economy: A European Dilemma’, in: T.-E. Synodinou *et al.* (eds), *EU Internet Law in the Digital Era* (Springer International Publishing, 2020) 199–225, at 213; Thomas Hoeren and Philip Bitter, ‘Data ownership is dead: long live data ownership’, (2018) 40 (6) *European Intellectual Property Review*, 347.

26 Andreas Rahmatian, *Copyright and Creativity: The Making of Property Rights in Creative Works* (Edward Elgar Publishing, 2011) 103, in relation to copyright.

27 English legal language does not make a distinction between debt (debtor’s side of the obligation) and claim (creditor’s side), as for example German law and French law do, compare Rahmatian, *Credit and Creed* (n 3) 13.

28 For English law, see Gray and Gray (n 5) 96–98.

29 Or ‘ownership’ of the debt/claim, although some legal systems, for example Germany and Austria, avoid this term and talk about ‘*Rechtszuständigkeit*’ (attribution or allocation of the debt/claim) but functionally this is of course ownership, that is, the most unlimited form of allocation.

with Fuller.<sup>30</sup> However, debts can be, and are often, reified in form of a corporeal reifier, that is, a paper that denotes, proves, and often even creates, the debt it represents. This is the case of negotiable instruments. The transfer of the debt can thus be made corporeal and visualised, and, particularly with bills of exchange, the formalised transfer of the debt (negotiation) carries further rights in connection with, and as a result of, that transfer (especially secondary liability).<sup>31</sup>

- 10 A special form of debt, where transferability is its very essence and purpose, is money. This becomes apparent if one looks at the money creation process. Bank money is discussed first, since bank money is today by far the more important form of money compared to cash (about 97% of all circulating money is bank money),<sup>32</sup> and since bank money is historically older than the modern system of cash that replaced the old forms of commodity money and commodity-backed money of the nineteenth and early twentieth centuries. Bank money is created when a bank grants a loan to its customer. The bank credits the customer's account with the loan sum, so that the bank, as account provider, is debtor of the customer in respect of the loan sum, while the customer, as borrower, is insofar creditor, as if the customer had paid funds (e.g. cash) into his account with the bank. At the same time, the bank, as lender, is creditor to the customer who as the borrower has to repay the loan debt to the bank. The money, in form of the granted loan sum in the bank account (bank money), is therefore a circulating debt (or circulating credit from the creditor's perspective): it appears as an asset of the customer-borrower in his account and can therefore be transferred to a third party for the payment of goods or services obtained from this third party. That third party, upon receipt of the bank money in his account, can use this money for the payment of a fourth party – so the debt or money circulates in the economy. However, independent of that circulation the borrower has to repay the loan granted, invariably together with interest.<sup>33</sup> Money, being circulating debt or credit, and at the same time loan debt, is therefore a janiform debt

or a janiform money-debt *res* (property object): it is (a) a loan debt which stays between bank as lender and customer as borrower, (b) it circulates as debt in the economy because it is used for payment to discharge money debts (typically as a result of sales contracts) and thereby operates as, and is, money. Gradual repayment of the loan debt reduces and extinguishes the debt and destroys money which the debt constitutes.<sup>34</sup> Obviously the repayment of a loan only destroys money in relation to the amount of money circulating in the economy as a whole; it does not destroy the particular circulating sum of money which was created on the grant of that loan in question, because the loan debt and the circulating debt are separated from one another as from the first payment of the borrower out of his account to the third party.<sup>35</sup>

- 11 Cash, as the most important form of central bank money, is conceptually not different to commercial bank money or simply 'bank money', only that the circulating debt is issued by a central bank and effectively not redeemable, for example in gold, since the gold standard has long been abolished. Furthermore, the debt is represented by a banknote, technically a promissory note or IOU (the English banknotes are still styled as promissory notes), so that the creditor is the holder of the banknote (a bearer instrument) and the debtor the central bank (which is in turn the creditor of the state or government at whose behest the central bank issues cash). The banknote therefore represents both the moveable property-*res* (as the physical paper) and the debt-*res* (as the money this note denotes). The debt-*res* (money) that is represented by the banknote as a social reifier and (technically) negotiable instrument is practically nugatory, because claiming payment of the debt embodied in the banknote entitles only to payment by other banknotes, and necessarily in full and final satisfaction of the debt, so that the debt is self-referential.<sup>36</sup> While in the case of cash the money debt-*res* is represented by a banknote as a social reifier or physical object that is (especially historically) a negotiable instrument, there is hardly any representation of the bank money-debt *res*: the representation of the bank money debt effectively amounts to its creation: a written line of numbers on a bank account statement.<sup>37</sup>

30 Lon L. Fuller, 'Consideration and Form', (1941) 41 (5) *Columbia Law Review*, 800-801.

31 E.g. M. A. Clarke, R. J. A. Hooley, R. J. C. Munday, L. S. Sealy, A. M. Tettenborn, P. G. Turner, *Commercial Law: Text, Cases, and Materials* (5<sup>th</sup> edn) (Oxford University Press, 2017) 691, 699, for English law.

32 Bank of England (McLeay, Michael, Radia, Amar and Thomas, Ryland), 'Money Creation in the Modern Economy', (2014) *Quarterly Bulletin* Q1, 15.

33 Rahmatian, *Credit and Creed* (n 3) 66-69, with further discussion and references.

34 Bank of England (n 32) 16.

35 Rahmatian, *Credit and Creed* (n 3) 67, 72, 81-83, 201.

36 Rahmatian, *Credit and Creed* (n 3) 63-64. There are very rare cases where the debt represented by a banknote is not nugatory, see *ibid* at 64.

37 Rahmatian, *Credit and Creed* (n 3) 23-24.

- 12 Bank money is in reality electronic money today. The times when bank money was recorded in the paper books of the bank, for example the money created following the grant of a loan ('fountain pen money') are long gone. Bank money is recorded or created by way of input of computer data. It is also possible to replace physical cash or paper money by digital cash or 'e-money', and projects of this kind already exist.<sup>38</sup> Besides, there are private digital currencies, such as Bitcoin or Ethernet. What the quality of these types of money is from a legal (not technological) perspective, depends particularly on the origin of that money (that is, who is the issuer), and is a complicated matter.<sup>39</sup> However, relevant in this context is that, according to the concept of dematerialised property, it is possible that the *res* is represented by a physical object (cash), but this is not necessary (bank money, electronic money).
- 13 Intellectual property rights are not debts. With financial assets, such as money, a debtor is required to create the asset: no debtor – no creditor – no asset. Hence the complete repayment of a money debt as a result of a loan destroys money<sup>40</sup> because it extinguishes the debt which money constitutes. Intellectual property is not a financial asset, because there is no debtor who would otherwise be indispensable for the creation and the maintenance of this form of *res*. Intellectual property rights are rather 'real assets', therefore conceptually related to tangible assets (not to financial assets), that is, to *res* represented by physical objects. However, while in case of tangible property a physical object that represents a *res* reifies the *res* directly (e.g. land, a car), intellectual property rights as necessarily incorporeal legal concepts can only have an *indirect* reifier in form of a physical object. Copyright illustrates that nicely. The physical copy of a book, for example, represents, as a tangible reifier, *directly* the *res* of the corporeal property, and that is what the buyer of the book obtains as the new owner after a sale of the book to him. The copy of the book also represents *indirectly* the *res* of the copyright in the text, the literary work which the text constitutes. This copyright-property in the *res* is not transferred with the sale of the physical copy. Thus the physical object, the copy of the book, is *direct* reifier of the moveable property *res* and at the same time *indirect* reifier of the copyright-*res*.<sup>41</sup> Here the situation of

intellectual property is conceptually similar to the banknote, as we have seen before. This is even more accentuated in the case of the visual arts. While text, or literary works can exist in an intangible form (the oral traditions of epic poetry are such an example), visual arts require a tangible expression for their very existence: the oil on canvas is reifier of the legal concept 'moveable property' and at the same time for the legal concept 'intellectual property' in the form 'artistic work'.<sup>42</sup> Hence the copyright system of the UK requires recording or fixation for copyright protection for literary, dramatic and musical works, but not explicitly for artistic works,<sup>43</sup> because an artistic work cannot come into existence without fixation. The case of music is more complicated because the musical score, for example, does not necessarily represent the musical work as such, so that the reifier of the copyright *res* directed at the musical work is further removed from the *res* it represents.<sup>44</sup>

- 14 With patents the intellectual property (*res*) is represented by the specific text of the patent as granted, particularly the claims which create the patent-*res*, not by a machine incorporating the patent (if such a machine exists already).<sup>45</sup> It could not be otherwise because the delineation and extent of the property right cannot be provided by a representing physical object, as would be in case of tangible property. As the patent is an abstract legal concept, it is the law as the originator of the concept which must create and define the extent and content of the patent through the written text of the patent specification. For that the law cannot rely on the qualities of an existing physical object in the natural world. (Registered) trade marks are now regarded as property in their own right, not merely as signifiers of goodwill of a business. Thus a trade mark is indirect reifier of the *res* 'business goodwill' (origin, quality and communication functions of the trade mark) and direct reifier of the *res* 'sign' in form of a graphical representation (in case of the classical pictorial mark or a word).<sup>46</sup>

38 Rahmatian, *Credit and Creed* (n 3) 21, 24.

39 Further discussion in Rahmatian, *Credit and Creed* (n 3) 94–103, 150, with further references.

40 Bank of England (n 32) 16, and above.

41 Compare Code de la Propriété Intellectuelle 1992, art. L. 111-3: 'La propriété incorporelle définie par l'article L. 111-1 est indépendante de la propriété de l'objet matériel.'

42 Rahmatian, *Dematerialised Property* (n 3) 17.

43 UK Copyright, Designs and Patents Act 1988, s. 3 (2).

44 Rahmatian, *Copyright and Creativity* (n 26) 18.

45 Rahmatian, *Dematerialised Property* (n 3) 375–376.

46 Rahmatian, *Dematerialised Property* (n 3) 378.

## D. Applications of dematerialised property II: data, digitised objects

### I. Data

- 15 Having discussed the established examples of intangible and tangible property as versions of the *res*, one can now consider phenomena where their proprietary nature is much less certain. The pure and strict application of the conception of dematerialised property does not pose any particular difficulties when data and digitised objects are to be included as further forms of dematerialised property. The problem is rather whether the effects of such an incorporation are desirable from a legal policy perspective.<sup>47</sup>
- 16 In a modern, service industry-oriented economy it is advantageous to give up on the materiality or physicality of an object as a prerequisite for qualifying as property. The concept of dematerialised property emphasises the constructive nature of the legal idea of property: it is not a material object from which property rights flow, but the abstract legal concept of property rights rather brings property or 'things' in law into existence, so that any physicality is legally irrelevant. Accordingly, data can also be defined as '*res*' by the law, and become (incorporeal) property, similar to debts and intellectual property rights.
- 17 However, a complete incorporation of data as just another form of property into the existing property regime of private law systems can cause some difficulties.<sup>48</sup> The obvious problem is the practical effect of the property right to which data are

supposed to be subjected to: (i) what exactly is the property object (the *res*, or its reification in a given concrete example), (ii) what is the content of the real right in relation to data? (iii) who is the property right allocated to? (iv) how can this allocation be changed, that is, how can ownership in the data be transferred? The following discussion will consider these aspects in turn.

- 18 (i) While with conventional property, also incorporeal property, the property object can usually be made out quite clearly (a copyright in a literary work, a debt arising from a contract of sale), with data the matter is less clear. Unlike specific incorporeal things, data are rarely single individual data or objects, but data sets, large amounts of data, which are a kind of *universitas rerum*,<sup>49</sup> thus an object of property which consists of many separate parts forming a whole, such as a flock of sheep, a library or a business. In contrast to these usual examples, an amount of data normally and quickly grows, and, furthermore, can be duplicated and copied as true unaltered digital copies of the original, so that the extent of a given *universitas rerum* of data cannot be ascertained clearly at a given time. It may also be difficult to separate and distinguish clearly one *universitas rerum* or set of data from another set of data, but that would be necessary for an unambiguous allocation to a certain right-holder or owner. A herd of cattle could not be multiplied quickly, and not at all through 'electronic' copying, and every cow could be ascertained as being part of a certain *universitas rerum* by way of earmarks or branding (hence the 'maverick (cattle) laws' in some States of the USA).<sup>50</sup> Therefore an analysis of the possible proprietary quality of data which seeks to establish parallels with *universitas rerum*, such as an enterprise or even a herd of animals, must probably fail. The separate parts of this *universitas rerum* do not grow in an unregulated arbitrary manner and particularly do not reproduce as identical copies like digital copies of data. In addition, a herd of animals can be delimited and remains ascertainable because the animals keep together because of their natural instincts. Data obviously do not have these qualities.

47 See Hoeren and Bitter (n 25) 347-348. See also, from the perspective of German law, and its narrow concept of 'thing' (*Sache*) in § 90 BGB, Jürgen Kühling, Florian Sackmann, „Rechte an Daten: Regulierungsbedarf aus Sicht des Verbraucherschutzes?“, Berlin: Verbraucherzentrale Bundesverband e.V., (2018) 7-8, available at: <[https://www.vzbv.de/sites/default/files/downloads/2018/11/26/18-11-01\\_gutachten\\_kuehling-sackmann-rechte-an-daten.pdf](https://www.vzbv.de/sites/default/files/downloads/2018/11/26/18-11-01_gutachten_kuehling-sackmann-rechte-an-daten.pdf)> (visited 28/05/2020).

48 A discussion of this problem from a US-American perspective by Jorge L. Contreras, 'The false promise of health data ownership', (2019) 94(4) *New York University Law Review*, 634-636, especially the test whether an intangible could be property, according to *Kremen v. Cohen*, 337 F.3d 1024, at 1030 (9th Cir. 2003): 'First, there must be an interest capable of precise definition; second, it must be capable of exclusive possession or control; and third, the putative owner must have established a legitimate claim to exclusivity.' (According to the Court, domain names would satisfy these criteria).

49 'Gesamtsache' in German legal language, see e.g. § 302 Austrian ABGB. The German BGB does not have this term.

50 A maverick cow was an unbranded cow so that it could not be allocated to an owner. 'Maverick laws' would provide sales, ownership allocation rules and access to land rights in relation to such unbranded cattle, for example the Wyoming Legislative Assembly's 1884 'Act to Provide for the Gathering and Sale of Mavericks', see James Winton Eaton, 'The Wyoming Stock Growers Association's Treatment of Nonmember Cattlemen during the 1880s', (1984) 58 (1) *Agricultural History*, 71.



19 Furthermore, the incorporeal nature of data prevents possession as it can be exercised with regard to physical things. Possession would also assist in defining the object of property in question. However, the equivalent of ‘possession of a right’ (*Rechtsbesitz* in German legal language) could be implemented by exercising the right. Change of possession and the connected act of publicity as an indication of change of ownership is not available with incorporeal data either, nor can an apparent authority be founded in relation to data, being an ‘appearance of having the right’ (*Rechtsschein* in German legal language), the central reason for the justification of the exception to the *nemo plus iuris transferre potest quam ipse habet* or *nemo dat*-rule.<sup>51</sup> A transfer of data rights (and data as objects – again the *res* appears to be created by the real rights) would realistically have to be subjected to particular formality rules (see below under iv).

20 It is therefore not clear which object the data ownership right would really refer to at a given moment, in contrast to, say, a specific claim to deliver or to pay the price in a particular sales contract which is directed as a specifiable object of property. This could also become problematic if one envisages the possibility of subordinate real rights of security over data. If data are to be property then at least theoretically they could be pledged or subjected to another security right as any moveable or also incorporeal property: many jurisdictions have the assignment in security, and patents or trade marks can be mortgaged or equivalent security rights granted over them. From a legal policy perspective, it would be advisable to prohibit the grant of security rights over data altogether, not only because it potentially undermines the intended protection of the data subject, but also because it avoids the problem of the principle of speciality for the grant of security rights in civil law jurisdictions (English law does not have such a restriction, as the institute of the floating charge shows).<sup>52</sup> According to this speciality principle (*Spezialitätsgrundsatz* in German legal language), a creation of a pledge over things in their entirety, without identifying a specific *res* to which the pledge shall attach, is impossible.<sup>53</sup> However, German law, for example, allows a security in collective entities of moveables, but whether data would be able to benefit from this

wider interpretation of the speciality principle is very doubtful, given that the pledge and similar security rights are based on the physicality of the property and on possession which become naturally impossible in the case of data.

21 One also has to distinguish between the data carrier (a CD-ROM, USB-stick etc.) and the data on it. The problem resembles that of copyright where the ownership transfer of the physical work does not entail the transfer of the copyright in the work, and physical object and copyright follow different ownership and property transfer rules (those of moveable property and of intellectual property, respectively).<sup>54</sup> This also applies to works of art, thus the purchase of a painting does not include the transfer of the artist’s copyright to the buyer of the painting. However, this idea had not been taken for granted but developed over the years. For example, the old Austrian Author’s Rights Act of 1846 contained a presumption of the transfer of the author’s right together with the purchase and ownership transfer of works of art.<sup>55</sup>

22 In a similar vein, the data carrier follows the usual rules of moveable property, while data, if conceptualised as property, are subjected to their own property rules, and transfer of ownership of one does not automatically entail transfer of ownership of the other. The discussion in English law and Scots law about whether software is to be regarded as ‘goods’ within the meaning of the Sale of Goods Act 1979<sup>56</sup> or not illustrates this. A recent decision of the English Court of Appeal,<sup>57</sup> following, *inter alia*, earlier Scottish authority,<sup>58</sup> decided that the supply of software without tangible media is not to be regarded as a sale of ‘goods’. An earlier English case<sup>59</sup> clarified that a computer disc is within the definition of ‘goods’, while a program, of itself, is not. The statutory definition of ‘goods’ in the Sale of Goods Act which excludes ‘choses in action’, that is,

54 See above under 3.

55 § 11 of *Allerhöchstes Patent vom 19. October 1846 zum Schutze des literarischen und artistischen Eigenthums gegen unbefugte Veröffentlichung, Nachdruck und Nachbildung*, Justizgesetzsammlung 1846, Nr. 992, S. 375.

56 Sale of Goods Act 1979, s. 61 (1): ‘goods’ includes all personal chattels other than things in action and money.

57 *Computer Associates UK Ltd. v. The Software Incubator Ltd.* [2018] EWCA Civ 518, [2018] ECC 25, especially paras. 30–34.

58 *Beta Computers (Europe) Ltd v Adobe Systems (Europe) Ltd* 1996 S.L.T. 604.

59 *St Albans DC v International Computers Ltd* [1996] 4 All E.R. 481; [1997] F.S.R 251.

51 E.g. Andreas Rahmatian, ‘A Comparison of German Moveable Property Law and English Personal Property Law’, (2008) 3 (1) *Journal of Comparative Law*, 225, with further references.

52 The floating charge is only available for companies, see John Birds, Daniel Attenborough, Mark Leiser, Matteo Solinas, Michael R Varney, Zinian Zhang, *Boyle & Birds’ Company Law*, 10<sup>th</sup> ed. (LexisNexis, 2019), 305.

53 See e.g. Rahmatian, *German Moveable Property* (n 51) 230–231, with further references.

debts, aims at the corporality of the *res* (or its refier, respectively) for such a distinction: in the case of a physical object the Sale of Goods Act applies; in the case of software (being also a particular form of data), which could be seen as analogous to debts and other incorporeal property, copyright applies.<sup>60</sup> However, one has to distinguish between what the objective of copyright protection is and what a *sui generis* protection of data aims at, even where the phenomenon in question is both data and copyright work, such as with computer programmes (below under (iii)).

- 23 (ii) All real rights, particularly the most extensive and most important one, ownership, can be analysed as having an internal side (broadly, the right to use) and an external side (broadly, the right to exclude).<sup>61</sup> Intellectual property rights as intangible property rights can be used as guidance for the application of these principles to data to ascertain the content of data ownership. In the case of intellectual property rights, the right to use materialises particularly in the right to use or exploit in accordance with the nature and the rules of the intellectual property right in question, for example with regard to copyright/author's right, the use manifests itself in the 'acts restricted by copyright' (in the UK)<sup>62</sup> or the 'Verwertungsrechte' (in Germany).<sup>63</sup> Furthermore, an essential aspect of the right to use is the right to assign and to license.<sup>64</sup> The right to exclude manifests itself in the infringement provisions which mirror the acts restricted by the intellectual property right.
- 24 Theoretically, the incorporeal property 'data' could have a similar regime. The practical realisation however requires a more adjusted definition. The most important rights in relation to data are (i) access to (and information about) personal data, and (ii) controlling the use,<sup>65</sup> processing and transfer of, personal data by the person from whom these personal data have been collected. The General Data Protection Regulation (GDPR) provides such rights

already in arts. 13, 15, 17, 18 and 20 in particular.<sup>66</sup> However, these rights are specific rights granted by public law (administrative law) and not instances of property ownership under private law (*ius utendi, fruendi, abutendi*): thus a right which has not specifically been granted by law (typically a statute) cannot be assumed to exist. In contrast, the private law approach to ownership considers ownership as the widest possible property right<sup>67</sup> of which the scope is only restricted by specific public law (e.g. building regulations) and private law rules (e.g. rights of way in land law, permitted acts/defences in intellectual property law), but otherwise unlimited and not in need of legislative intervention that identifies the existence or exercise of a concrete right of exploitation. Even if data ownership were introduced in the form of *Immaterialgüterrechte* ('rights of incorporeal goods', an attractive option in Germany for systemic reasons), it would structurally still be an individual quasi-ownership right of a citizen under private law for the purpose of use and exclusion: this is a functional (dynamic) interpretation of ownership which does not adhere (statically) to any materiality of a property object.<sup>68</sup> Any public law regulation is therefore necessarily more casuistic and at the risk of becoming obsolete soon if not updated regularly. The private law/property approach is invariably more elastic, but less exact which makes a constitutional law assessment of proportionality and of the balance of conflicting interests in respect of human rights less predictable (e.g. privacy against collection, use and transfer of data).<sup>69</sup> However, the practical result, for example in relation to sensitive health data, may well be the

60 In relation to the contractual (not proprietary) side the UK Consumer Rights Act 2015, ss. 33 *et seq.* applies now when the supply of 'digital content' (data which are produced and supplied in digital form) is involved, provided the contract is concluded between a trader and a consumer (*ibid* s. 2).

61 Compare § 903 BGB for a standard definition of the ownership right.

62 UK Copyright, Designs and Patents Act 1988, ss. 16 *et seq.*

63 §§ 15 *et seq.* German Urheberrechtsgesetz 1965.

64 For copyright in the UK and other jurisdictions, see e.g. Rahmatian, *Copyright and Creativity* (n 26) 201–208.

65 That includes the erasure of data.

66 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 4. 5. 2016 OJ L 119/1.

67 E.g. Antony M. Honoré, 'Ownership' in: Antony G. Guest (ed.), *Oxford Essays in Jurisprudence (First Series)* (Oxford University Press, 1961) 107–147, at 108, 112. See also the legal definitions in § 903 German BGB, § 354 Austrian ABGB, Art 544 French Code Civil, Art 641 Swiss ZGB.

68 Karl-Heinz Fezer, *Repräsentatives Dateneigentum: Ein zivilgesellschaftliches Bürgerrecht* (Konrad-Adenauer-Stiftung, 2018) 14, 48 available at: <[https://www.kas.de/c/document\\_library/get\\_file?uuid=f828a351-a2f6-11c1-b720-1aa08eaccff9&groupId=252038](https://www.kas.de/c/document_library/get_file?uuid=f828a351-a2f6-11c1-b720-1aa08eaccff9&groupId=252038)> (visited 29/05/2020).

69 Such a proportionality test also appears in Directive 95/46/EC (General Data Protection Regulation), art. 6 (1) (f).

same, whether achieved through public law control by the data subject or private law ownership by the data owner.<sup>70</sup>

- 25 (iii) An additional problem of an alignment of data ownership with traditional property ownership rules is that the creator of the property object as the ‘instantiation’ or reification (if any) of the *res*, the data, and the person entitled to the data (ownership) are not necessarily the same, as would normally be the case with the rules of accession and specification in moveable property<sup>71</sup> or with the rules of authorship in copyright.<sup>72</sup> Generally, ownership requires an owner, the beneficiary of the real right. In the case of data ownership, the ‘owner’ of the data entitled to the rights that this ownership confers is less clear-cut than, for example, with regard to copyright ownership.
- 26 One could assume that copyright could provide a good role model for data ownership allocation, the identification of the actual ‘owner’ of data collected or generated. Both apply to incorporeal property objects. However, what makes the issue murkier is that data can actually be copyright-property objects themselves if they are part of a computer programme or a database.<sup>73</sup> The fact that a phenomenon or a physical entity or appearance can fall into two different regimes of regulation is nothing new. Within intellectual property for example, a typical overlap is the copyright protection which a figurative trade mark obtains as an artistic work.<sup>74</sup> Trade mark and copyright protection may apply simultaneously, but the protection mechanisms have different objectives (protection of the artistic work the trade mark’s design constitutes, protection of the business goodwill the trade mark denotes). In relation to the copy of a book, this copy is reifier of the tangible moveable property and of the literary

work as copyright- property object, and subject to the respective different rules, as has been discussed before.

- 27 Data (if they are not just data *per se*) could be copyright-protected under certain circumstances, particularly if they are software. Besides, independent of a potential copyright protection, one could introduce a *sui generis* data property right. However, the different aims of copyright and of a possible data-ownership protection appear in the different ownership orientation. In case of copyright, the copyright owner is (initially at least if copyright can be assigned at all) the author, the maker of the copyright work, such as the writer of the novel, the composer of the piece of music, the maker of the database (where the database under its *sui generis* protection of the database right is additionally copyright-protected)<sup>75</sup> or the programmer of the software.<sup>76</sup> The idea of the protection is that the author can reap commercially the benefits of his or her work without undercutting and parasitical competition by competitors (the competition protection-oriented copyright approach) or that the personality of the author which is reflected in the work that he or she creates is protected (also) through the protection of that work (the personality-protection approach of author’s rights).<sup>77</sup>
- 28 However, in the case of possible data ownership, the matter is different. Here the originator, creator, collector or controller of the data,<sup>78</sup> to follow the terminology of the General Data Protection Regulation (GDPR),<sup>79</sup> who would be the owner of the data if the copyright model were followed, is, from a legal policy perspective, often not the preferred entitled person who could exercise (quasi) ownership rights over the data. The data ‘owner’ should rather be the data subject,<sup>80</sup> that is, the person in relation to whom personal data have been generated, processed and collected, but not the person who has generated

70 Barbara J. Evans, ‘Much Ado about Data Ownership’, (2011) 25 *Harvard Journal of Law and Technology*, 74.

71 See, e.g., the comparison between the UK and Germany in relation to accession by Rahmatian, *German Moveable Property* (n 51) 227-229, with further references.

72 UK Copyright, Designs and Patents Act 1988, s. 9 (1), § 7 German Urheberrechtsgesetz 1965, French Code de la Propriété Intellectuelle 1992, art. L. 111-3.

73 E.g. Michal Koščík and Matěj Myška, ‘Database authorship and ownership of sui generis database rights in data-driven research’, (2017) 31(1) *International Review of Law, Computers & Technology*, 46-54.

74 E.g. Nuno de Araújo Sousa e Silva, *The Ownership Problems of Overlaps in European Intellectual Property* (Nomos Verlagsgesellschaft, 2014) 19-20.

75 See UK Copyright, Designs and Patents Act 1988, s. 3A (2).

76 UK Copyright, Designs and Patents Act 1988, ss. 3(1)(b), 9, §§ 7, 69a (3) German Urheberrechtsgesetz 1965.

77 Rahmatian, *Copyright and Creativity* (n 26) 35, 47.

78 Often with a ‘processor’ of data as the controller’s agent.

79 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 4. 5. 2016 OJ L 119/1, art 4 (7).

80 General Data Protection Regulation, Art 6 (1) (a), Art. 9 (1), Art. 13 and Recital 7; Banterle (n 25) 212.

the data (controller) or has had generated the data for him (through a processor as agent) as the ‘data-author’ in copyright terminology.<sup>81</sup> In the case of data ownership, it does not matter who ‘created’ the personal data, what matters is who is affected by the data. The originator and generator of sensitive health data may be the doctor who diagnoses a heart disease, but the patient should be the beneficiary of a data ownership right, which he can then exercise to prevent the data from being passed on to his life insurance company. The GDPR takes this view in several provisions,<sup>82</sup> though from a public law-regulatory perspective, not as an instance of a private-law concept of ownership with the owner’s rights to use and to exclude which derive from that ownership right.<sup>83</sup>

- 29 There can also be a conflict between an existing copyright the data controller may have (as a result of electronic database and software-based data processing) and the rights of a data subject as a *sui generis* data owner. The GDPR briefly refers to such a conflict in Recital (63) and states that copyright and other intellectual property rights, while preserved in principle, cannot be used to prevent *per se* the data subject’s right of access to personal data.<sup>84</sup> The issue as to whether, and to what extent, copyright can protect data, is a complicated one: data *per se* cannot attract copyright protection – they are information or ‘ideas’ in the system of copyright,<sup>85</sup> although even information could get protection to a limited extent now if it qualifies as online use of parts of press publications.<sup>86</sup> However, data collections, by virtue

of their selection and arrangement, can be protected under copyright if they fulfil the copyright/author’s right originality requirement of the jurisdiction in question, or under database right if they constitute the database author’s ‘own intellectual creation’.<sup>87</sup> The extent to which the data subject (or data owner in a *sui generis* data ownership conception) can prevail over such conflicting intellectual property rights is ultimately an issue of weighing the incompatible interests against each other under constitutional law and to allow a proportionate restriction of the ownership right of intellectual property in favour of the public law right of data access or private law right of *sui generis* data ownership. Rights of freedom of expression which prevail over copyright and confidential information are familiar examples of such a conflict.<sup>88</sup>

- 30 (iv) If *sui generis* data ownership is recognised, the right to use will involve the right to transfer data under this ownership right. The transfer of data ownership within the system of existing private laws can lead to certain difficulties, particularly if one envisages a harmonised approach at least across Europe. However, such an approach is practically inevitable because the common use of data invariably entails data transfer, and, in contrast to land, the incorporeal nature of data makes a restriction to any one national jurisdiction impossible. Intellectual property rights show a similar characteristic and therefore have a long tradition of international harmonisation, for example by the TRIPS Agreement.<sup>89</sup> A transfer of data in accordance with ordinary property transfer rules would force the data ownership transfer to comply with the specific different national systems of ownership transfer, notably, the abstract transfer of ownership or abstract real conveyance (Germany, Greece), or the causal transfer of ownership (Austria, Switzerland, Hungary etc.), or the consensual transfer of ownership (France, Belgium, Italy, and effectively also England within the scope of the Sale of Goods Act 1979),<sup>90</sup> whereby the consensual

81 Particularly if Anglo-Saxon copyright philosophy were followed, then the processor of data would probably not be ‘owner’ of such data, because he processes the data on behalf of the controller, being an analogy to the ‘works made for hire’-doctrine in the USA, see US Copyright Act 1976, 17 USC §§ 101, 201 (b).

82 Regulation (EU) 2016/679 (General Data Protection Regulation), arts. 13, 15, 16, 17, 18, 20 and 21.

83 See above under (ii).

84 Regulation (EU) 2016/679 (General Data Protection Regulation), Recital (63): ‘[The data subject’s right of access to personal data] should not adversely affect the rights or freedoms of others, including trade secrets or intellectual property and in particular the copyright protecting the software. However, the result of those considerations should not be a refusal to provide all information to the data subject.’

85 See e.g. Contreras (n 48) 630–631, for US law.

86 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/

EC and 2001/29/EC, OJ L 130, Art. 15, and Recital (58).

87 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, Art. 3 (1). See also Banterle (2020: 206–210).

88 For the UK, for example, see Lionel Bently, Brad Sherman, Dev Gangjee, Phillip Johnson, *Intellectual Property Law* (5th edn) (Oxford University Press, 2018) 257, 1256.

89 Agreement On Trade-Related Aspects of Intellectual Property Rights 1995 (TRIPS Agreement).

90 UK Sale of Goods Act 1979, ss. 17, 18 rule 1. This provision also applies in Scotland.



transfer of ownership is arguably a subset of the causal ownership transfer.<sup>91</sup> One can test the transfer method of data ownership in the light of these different national legal traditions,<sup>92</sup> but it is more expedient to stipulate a *sui generis* transfer method for data ownership. There is a perfect precedent for a separate transfer regime for incorporeal property: the transfer or assignment of intellectual property rights, for example the transfer of a trade mark to a new owner,<sup>93</sup> or the assignment of copyright,<sup>94</sup> where that is possible.<sup>95</sup>

- 31 Such a *sui generis* transfer method for data ownership could perhaps be provided in a harmonising instrument, such as an EU-Directive. It is not certain whether there are problems of competence of EU legislation in this regard, because property is an exclusive matter for the EU Member States.<sup>96</sup> That seems to be undisputable in relation to land (immoveable property), but with regard to intellectual property the issue is far less clear. There is a harmonising Trade Mark Directive<sup>97</sup> which does regulate trade mark transfers (with reference to national procedures for recording the transfers in the Member States' registers, and

these are essentially the same) – and trade marks are unquestionably property.<sup>98</sup> Furthermore, the Trade Mark Regulation invents the creature of the EU trade mark which is an EU-property right (and the regulation obviously also contains trade mark transfer rules, including the formality requirement of registration of the transfer).<sup>99</sup> For the possible proprietary nature of data and their transfer as property, the role model is more the trade mark than land, one would think. The dematerialised property concept rejects the tangible nature of some forms of property as a blueprint for all property rights at any rate. The method of concluding an international treaty between the EU Member States outside EU law to overcome jurisdictional problems ('enhanced cooperation'), as has been done for the envisaged unified patent court system (Unified Patent Court Agreement),<sup>100</sup> is also an option, but a controversial one.<sup>101</sup> However, the future of the unified patent and its court system is in doubt at the moment anyway.<sup>102</sup>

- 32 The rules for the derivative acquisition of ownership are in fact directed more towards tangible property, so that transfer rules for incorporeal property, such as for the assignment of debts or the transfer of negotiable instruments, would be a more appropriate role model. In addition, although the abstract/causal/

91 Rahmatian, *German Moveable Property* (n 51) 217, 219.

92 Andreas Boerding, Nicolai Culik, Christian Doecke, Thomas Hoeren, Tim Juelicher, Charlotte Roettgen, Max V. Schoenfeld, 'Data Ownership – A Property Rights Approach from a European Perspective', (2018) 11 (2) *Journal of Civil Law Studies*, 342-346, 352-354.

93 E.g. UK Trade Marks Act 1994, s. 24; § 27 German Markengesetz 1994; French Code de La Propriété Intellectuelle 1992, art. L. 714-1.

94 UK Copyright, Designs and Patents Act 1988, s. 90; French Code de La Propriété Intellectuelle 1992, art. L. 131-3 and art. L. 131-4; Michel Vivant and Jean-Michel Bruguière, *Droit d'auteur et droits voisins*, 2<sup>nd</sup> ed. (Dalloz, 2013) 672. On the distinction between cession and licence in French author's rights law and its relative unimportance (compared to the UK), see Rahmatian, *Copyright and Creativity* (n 26) 205-208, with further references.

95 An assignment of the author's right is not possible in Germany or Austria because of their monist systems of author's right, see Germany, § 29 Urheberrechtsgesetz 1965, Austria, § 23 (3) Urheberrechtsgesetz 1936. On the monist system of author's rights in the context of assignments, see Rahmatian, *Copyright and Creativity* (n 26) 49-51, 206-207.

96 This concern has been raised by Boerding *et al.* (n 92) 353.

97 Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (Text with EEA relevance), OJ L 336, p. 1-26.

98 *ibid*, art. 22.

99 Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark, OJ L 078, 24.3.2009, p.1, art. 17.

100 Agreement on a Unified Patent Court, OJ C 175, 20. 6. 2013, p. 1-40, following the Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJEU L 361, 31. 12. 2012, p. 1.

101 Legal challenges against this form of law making by Italy and Spain, see CJEU C-274/11 and C-395/11 *Spain and Italy v. Council*. They were unsuccessful, *ibid*, paras. 36-37, 68, 77, 82-83, 92.

102 This is not so much because the UK after Brexit (as from 1 February 2020) decided not to cooperate, see 'The Unified Patent Court after Brexit', (European Parliament, At A Glance, JURI Committee) Policy Department for Citizens' Rights and Constitutional Affairs PE 649.575, March 2020, available at: [https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/649575/IPOL\\_ATA\(2020\)649575\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/649575/IPOL_ATA(2020)649575_EN.pdf) (accessed 16 April 2020). More problematic is that the German Constitutional Court rejected the adopted process of the accession of Germany to the Unified Patent Court system as unconstitutional, see German Bundesverfassungsgericht, Beschluss des Zweiten Senats vom 13. Februar 2020 - 2 BvR 739/17 (issued 20 March 2020). The current coronavirus crisis will delay further a possible solution.

consensual conveyance rules may be preserved technically in the case of the assignment of claims (debts), their actual realisation is rather merely notional. The causal conveyance as one version of ownership transfer may serve as an example. In Austria, ownership transfer requires a contract (title) directed at the transfer of ownership (such as a sale) and a *traditio*, the (actual or symbolical) delivery of the property in question to the acquirer (conveyance) to effect an ownership transfer (causal conveyance).<sup>103</sup> The assignment of debts (*Zession*) theoretically follows this principle in Austrian law,<sup>104</sup> but the contract (the assignment agreement) and the conveyance (the actual assignment or cession) fall into one act in reality, particularly since the assignment itself can be effected without any formalities, only that it becomes enforceable against the debtor once the assignment has been intimated to him.<sup>105</sup> Theoretically this process complies with the principle of the contract as the necessary cause for the validity of the conveyance, but that amounts to a doctrinal legal reinterpretation without becoming apparent (or relevant) in social reality. A practical solution for the transfer of data ownership would be, as a constitutive formality rule, a written instrument signed by the owner and transferor of the data to effect a valid transfer of data ownership, similar to the assignment of copyright provision in the UK.<sup>106</sup>

## II. Digitised objects

- 33 From an IT-perspective, digitised objects also constitute a form of data, but from a property theorist's perspective, they are theoretically a creation of a separate virtual (that is, incorporeally represented) *res* from a tangible prototype, thus, for example, a painting or a letter and the digitisation of it. For the idea of dematerialised property the difference only refers to the reifier, not to the concept itself. However, the digitised copy would hardly become the object of separate copyright protection (or perhaps neighbouring rights protection in author's rights countries), because usually there would not be more than format-shifting copying or reproduction (from paper to electronic digitisation) which could not attract separate copyright. The matter is not entirely clear-cut, because the English courts have given copyright protection to a photograph

taken from a picture in *Graves' Case*,<sup>107</sup> and it is not a far-stretching legal analogy to consider digitised copies as equivalent to photographs. Whether *Graves' Case* has survived the ruling of the CJEU in *Painer*<sup>108</sup> and in similar cases,<sup>109</sup> is however doubtful (and in turn, it is not predictable if and how CJEU-judgments remain relevant as persuasive authority in Britain after Brexit). In any case, if the digitised copy achieves the required European originality standard of 'own intellectual creation'<sup>110</sup> (that could be difficult in practice for mere digitisations), then it will obtain copyright protection in its own right. If, however, the digitisation cannot be brought under an intellectual property right (copyright) at all, then it is not a *res*, but a *nullum*, in law, because the real right creates the thing.<sup>111</sup> There may be unfair competition protection remedies for such digitised copies in continental European countries, such as Germany and Austria ('*ergänzender Leistungsschutz*', '*Ausbeutung*', a protection against parasitical free-ride),<sup>112</sup> but these remedies do not create or confer a real right, so there is still no *res*.

- 34 However, if there is a selection or arrangement of digitised copies, there can be protection by a database right<sup>113</sup> and, if an underlying software is involved, separate copyright protection for that software would apply,<sup>114</sup> though not for the single digitised object (copy). The potentially disconcerting

103 § 380 Austrian ABGB.

104 E.g. Helmut Koziol and Rudolf Welser, *Grundriß des bürgerlichen Rechts, Vol 1: Allgemeiner Teil und Schuldrecht*, 9th ed. (Manz Verlag, 1992), 292.

105 §§ 1393, 1395, 1396 Austrian ABGB.

106 See UK Copyright, Designs and Patents Act 1988, s. 90 (3).

107 *Graves' Case* (1869) LR 4 QB 715.

108 *Painer v. Standard Verlags GmbH, Axel Springer AG, Süddeutsche Zeitung GmbH, Spiegel-Verlag Rudolf Augstein GmbH & Co. KG, Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co KG* (C-145/10).

109 The first of its kind was *Infopaq International v. Danske Dagblades Forening* (C-5/08).

110 *Painer v. Standard Verlags GmbH and others* (C-145/10) paras. 86-92.

111 See above under B.

112 Germany: § 4 (3) UWG 2004 (*Gesetz gegen den unlauteren Wettbewerb*, Unfair Competition Act), and Horst-Peter Götting, *Gewerblicher Rechtsschutz*, 9th ed. (C. H. Beck, 2010) 74-75; Austria § 1 (1) (1) UWG 1984 (*Gesetz gegen den unlauteren Wettbewerb*, Unfair Competition Act), and Andreas Wiebe et al., *Wettbewerbs- und Immaterialgüterrecht*, 4th ed. (Facultas Verlag, 2018) 332-333.

113 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, Art. 1 (1) and (2).

114 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, Art. 1 (1) and (3).

aspect of this protection regime is that a prototype, which is in the public domain itself (for example a baroque painting) can be ‘cocooned’ by layers of protection for the digitised version, so that the original is effectively dragged out of the public domain and covered by copyright, particularly if access to the original work is in reality only made possible through the digitised copy. The prohibition of the circumvention of technological measures against copying in the Information Society Directive<sup>115</sup> reinforces this effect.

## E. Conclusion

- 35 Debts, money, intellectual property, and – to the extent to which one is able to or wants to recognise property rights in them – data and digitised objects, are all versions of the general principle of *dematerialised property*. Property is a normative creation, it is not dependent on, or attaches to, a physical object in the real world – that is conceptually irrelevant. ‘Property’ is a creature of the law: the exclusive rights to a thing or *res*, the property rights or real rights, actually create the property or *res* by protecting it *erga omnes*. The physical objects in the natural world (natural or man-made ones) are only recognised by, and incorporated in, the system of the law by attaching property rights to them: only then they are objects or ‘things’ for the purpose of the law, otherwise they are non-existent for the law. An intangible object, such as an intellectual property right, is also created by the law, but there is no physical object which represents this *res*, at least not directly. Again, the law (*qua* property rights) creates the thing, here one with no physical manifestation. The same idea can be applied to data if one wants to establish a concept of data ownership. However, that is ultimately a decision of legal policy, not of property law and legal theory.

115 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, Art. 6.

# Secondary communication under the EU copyright *acquis* after *Tom Kabinet*

Between exhaustion and securing work's exploitation

by Liliia Oprysk\*

**Abstract:** Since the adoption of the InfoSoc Directive, the CJEU has been dealing with a variety of questions on the interpretation of the broad right of communication to the public. A substantial share of the references for a preliminary ruling concerns secondary communication, which relies on communication initially authorised by the right holder. Despite the seemingly clear language of Article 3(3) of the InfoSoc Directive denying the exhaustion of communication right, the Court has occasionally exempted secondary acts from the authorisation of the right holder, relying on the arguments resembling the exhaustion principle of the right of distribution in respect of the tangible copies of a work. In the recent *Tom Kabinet* judgment, the CJEU denied the direct application of the principle in the case of the resale

of e-books facilitated by the *Tom Kabinet* platform. Whereas the judgment is of significance to the future of the exhaustion principle under the *acquis*, this article focuses on its broader implications on secondary communication. The article argues that the decision is in line with the developments under the jurisprudence but is by no means a final say on the extent of exclusive control over secondary communication in the digital environment. Besides raising the question of appropriate boundaries of the exclusive rights and their role in the digital markets, the judgment invites the legislator to revise the framework and restore the legal certainty in respect of the scope of exclusive control over the work's communication to the public.

**Keywords:** digital exhaustion; CJEU; communication to the public; new public; *Tom Kabinet*; *UsedSoft*

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## A. Introduction

1 The exclusive rights under copyright ought to incentivise the creation and exploitation of works by subjecting to right holder's authorisation acts, which are likely to interfere with a work's exploitation. The ever-widening catalogue of rights has been constructed over decades in response to technological developments.<sup>1</sup> By all means the most

significant development of the last decades has been

available at: <<https://dspace.ut.ee/handle/10062/66906>>. The research leading to this article was supported by the Estonian Research Council grant PUT PRG 124.

- 1 See Ohly on the history of copyright as expanding exclusive rights, Ansgar Ohly, 'Economic Rights' in Estelle Declaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar Publishing 2009) 238. Also, Synodinou on copyright resisting new technologies and gradually expanding the scope of the rights, Tatiana-Eleni Synodinou, 'Copyright Law: An Ancient History, a Contemporary Challenge' in Andrej Savin and Jan Trzaskowski (eds), *Research Handbook on EU Internet Law* (Edward Elgar Publishing 2014) 81.

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the recognition of a broad right of communicating a work to the public, encompassing a wide variety of acts taking place both in the digital and in the analogue environment. Previously, securing control over new ways of dissemination would often require introducing a new right. Recognition of the broad communication right largely removed the need to constantly update the catalogue of rights. The question is rather whether certain acts ought to be exempted from the exclusive control.

2 This is something the Court of Justice of the European Union (CJEU) has recently been dealing with a lot. The assessment of whether a particular act falls under the right of communication to the public has been subject to a variety of criteria which weigh differently depending on a case. Indeed, hyperlinking to already lawfully available content or transfer of access to lawfully acquired content have different implications for the interests of right holders than an unauthorised upload of a work on the Internet prior to its first disclosure or than an aggregation of hyperlinks providing access to infringing copies of a work. The development leads to a case-by-case assessment, which, in the absence of mechanisms to systematise the approach, comes at the lack of legal certainty.<sup>2</sup>

3 In the light of the broad control over electronic dissemination accorded to the right holders, the question arises whether some limits on the exclusive control are desirable, in particular when it comes to its reach beyond authorising every independent communication of a work.<sup>3</sup> Given the apparent lack of mechanisms for confining the exclusive control over communication to what is necessary, trying out the well-established limits, such as the exhaustion principle in the digital environment, appears rather symptomatic. Whereas the latest judgment on exhaustion in the *Tom Kabinet* case does not come

as a surprise following the opinion of the AG,<sup>4</sup> it is rather disappointing for those advocating for a more holistic approach to the question of permissible boundaries of exclusive control.<sup>5</sup>

4 This article places the decision *Tom Kabinet* in a broader context of the extent of the exclusive rights and the developments under the *acquis*. First, it explores the exhaustion principle as a mechanism of delineating exclusive control in respect of secondary communication of work. Second, it demonstrates how the assumption of no general boundaries of the right of communication to the public pursuant to Article 3(3) of the InfoSoc Directive has been challenged by the developments under the *acquis*. Third, it illustrates how the decision in *Tom Kabinet* fits the development and advances the need for a flexible assessment not accommodated under the secondary law, which necessitates distinguishing between primary and secondary communication of a work.

## B. Exhaustion principle and secondary communication of a work

5 Copyright does not provide a single right to control every aspect of a work's communication. Instead, it provides a variety of rights with the respective limits, designed to confine the protection to what is necessary to attain its objectives.<sup>6</sup> From the economic perspective, the exclusive control is usually justified over the acts which affect the exploitation

2 Furthermore, the combination of broad, all-encompassing rights and an exhaustive list of narrowly defined limitations results in an asymmetry implicating the task of balancing the divergent objectives of copyright protection and interferes with the freedom of Member States to devise their own solutions. See Ohly (n 1) 236; Mireille van Eechoud and others, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Kluwer Law International 2009) 94–118; P Bernt Hugenholtz, 'The Creeping Unification of Copyright in Europe' in Tatiana-Eleni Synodinou (ed), *Pluralism or Universalism in International Copyright Law* (Kluwer Law International 2019); Morten Rosenmeier, Kacper Szkalej and Sanna Wolk, *EU Copyright Law: Subsistence, Exploitation and Protection of Rights* (Wolters Kluwer 2019) 17–24.

3 Independent communication such as upload of a work and making it accessible to the public, transmission of a work etc., where the parameters of communication are determined by a person carrying out an act of communication.

4 Case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others* [2019] EU:C:2019:1111 and Opinion of AG Szpunar.

5 In the context of the *Tom Kabinet* reference, see Caterina Sganga, 'A Plea for Digital Exhaustion in EU Copyright Law' (2018) 9 JIPITEC 211; Péter Mezei, *Copyright Exhaustion: Law and Policy in the United States and the European Union* (Cambridge University Press 2018) 148–155; Liliia Oprysk, '"Digital" Exhaustion and the EU (Digital) Single Market' in Tatiana-Eleni Synodinou, Philippe Jouglaux, Christiana Markou, Thalia Prastitou (eds), *EU Internet Law in the Digital Era* (Springer 2020). Generally on extending exhaustion to digital distribution see Stavroula Karapapa, 'Reconstructing Copyright Exhaustion in the Online World' (2014) 4 IPQ 304; Ole-Andreas Rognstad, 'Legally Flawed but Politically Sound? Digital Exhaustion of Copyright in Europe after UsedSoft' (2014) 4 Oslo Law Review 1.

6 Ana Ramahlo, *The Competence of the European Union in Copyright Lawmaking: A Normative Perspective of EU Powers for Copyright Harmonization* (Springer International 2016) 72.

opportunities of a work.<sup>7</sup> Reproduction of a work, distribution of copies or work's performance call for authorisation from the right holder, which would allow the latter to ask for remuneration for such exploitation. Once communication of a work has taken place pursuant to the right holder's authorisation, the question arises whether exclusive control ought to stretch beyond such primary communication, e.g. to the acts such as the resale of distributed copies or retransmission of an authorised performance.

- 6 The current EU legal framework does not explicitly draw a line between primary and secondary communication; every communication of a work ought to be authorised by the right holder. In practice, however, the primary or secondary nature of communication can play a role in the exercise of exclusive rights. For instance, the SatCab Directive provides that simultaneous cross-border retransmission without altering the signal's content should take place on the basis of an individual or compulsory license.<sup>8</sup> Under the CJEU jurisprudence, a set of criteria emerged in respect of hyperlinking, which appear to be grouped differently depending on whether a link points to authorised communication of a work, is combined with an unauthorised upload of a copy, or forms a part of aggregated links to infringing copies.<sup>9</sup>

7 On the incentive theory of copyright as the main economic approach to the extent of protection, see Joost Poort, 'Borderlines of Copyright Protection: An Economic Analysis' in P Bernt Hugenholtz (ed), *Copyright Reconstructed: Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change*, vol 41 (Kluwer Law International 2018) 293. The incentive theory justifies protection against acts that, as a consequence of market failure, negatively and significantly influence exploitation opportunities and, thus, the incentives to create.

8 Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L 248/15, art 8(1).

9 On the various criteria applied by the CJEU in the linking cases see João Pedro Quintais, 'Untangling the Hyperlinking Web: In Search of the Online Right of Communication to the Public' (2018) 21 *The Journal of World Intellectual Property* 385–420. On the emerging distinction under the communication to the public right, see Ansgar Ohly, 'Unmittelbare Und Mittelbare Verletzung Des Rechts Der Öffentlichen Wiedergabe Nach Dem „Córdoba“-Urteil Des EuGH' (2018) 10 *GRUR* 996, 998–1000; Liliia Oprysk, *Reconciling the Material and Immaterial Dissemination Rights in the Light of the Developments under the EU Copyright Acquis* (Tartu University Press 2020) 267–278.

- 7 The most prominent example of distinguishing between primary and secondary communication (dissemination) of a work is to be found under the right of distribution and its inherent limit in the form of the exhaustion principle. The principle exempts secondary and consequent distribution (e.g. resale of copies) from the right holder's control, provided that the initial distribution has been authorised. Hence, it is necessary to differentiate between the distribution of each new copy, which falls under the exclusive right and, therefore, requires authorisation, and the redistribution of already sold copies, which falls outside the right holder's control.

- 8 The exhaustion principle serves a number of objectives, such as resolving the conflict between property rights in a tangible embodiment of a work and copyright holder's rights to a copy or facilitating trade and free movement of goods.<sup>10</sup> Exempting resale of copies from authorisation by means of the exhaustion principle has also been explained by the fact that the right holder had a chance to ask for appropriate reward when selling a copy.<sup>11</sup> The question that arises is whether digital copies could and should be considered equivalent to tangible copies for the purpose of applying the exhaustion principle. Whilst theories relying on exhaustion resolving the property rights conflict or facilitating trade are of minor importance (if at all) in the digital realm, remuneration theory remains equally relevant. In fact, boundaries of the exclusive control over online dissemination are of great importance for access to works and their preservation, as well as to competition and innovation.<sup>12</sup>

10 Further on the theories of exhaustion, see P Bernt Hugenholtz, 'Adapting Copyright the Information Superhighway' in P Bernt Hugenholtz (ed), *The Future of Copyright in a Digital Environment* (Kluwer Law International 1996) 96–97; Ulrich Joos, *Die Erschöpfungslehre im Urheberrecht: eine Untersuchung zu Rechtsinhalt und Aufspaltbarkeit des Urheberrechts mit vergleichenden Hinweisen auf Warenzeichenrecht, Patentrecht und Sortenschutz* (CH Beck 1991) 51–67; Mezei (n 5) 6–14. Also, Lucas holding that the principle is backed by different types of considerations but lacking clear boundaries, André Lucas, 'International Exhaustion' in Lionel Bently, Uma Suthersanen and Paul LC Torremans (eds), *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace* (Edward Elgar Publishing 2010) 306.

11 Walter Blocher and Michael M Walter, 'Computer Program Directive' in Michael M Walter and Silke von Lewinski (eds), *European Copyright Law: A Commentary* (Oxford University Press 2010) 134. Also, Case C-128/11 *UsedSoft GmbH v Oracle International Corp* [2012] EU:C:2012:407, paras 62–63.

12 See Sganga (n 5) 230–232.

- 9 Whereas the exhaustion principle can be expressed in a variety of ways,<sup>13</sup> under the EU *acquis* it is harmonised in its most rigid form. According to Article 4(2) of the InfoSoc Directive, the distribution right is not exhausted except where a first sale or other transfer of ownership is taking place with the right holder's authorisation within the territory of the EEA. Hence, the provision simply exempts subsequent distribution from authorisation without contemplating circumstances of such distribution.<sup>14</sup> The wording of the principle has been influenced by the objectives beyond the mere delineation of the right holder's control over tangible copies.<sup>15</sup> Most importantly, it has been appropriated to solve the conflict between the exclusive rights under the national laws and the free movement of goods as one of the cornerstones of the EU internal market.<sup>16</sup>
- 10 The two-fold nature of the exhaustion principle under the EU copyright *acquis* has implicated its further development. Focusing on the free movement of goods in the internal market as the main rationale, preparatory works for the secondary EU law instruments, in particular the InfoSoc Directive, failed to acknowledge yet address the other function of the principle, i.e. it drawing a general boundary of exclusive control.<sup>17</sup> The CJEU,

in turn, has interpreted the Directives harmonising the exhaustion principle inconsistently, alternating between literal and teleological interpretation, as well as between the different rationales of the principle. Whereas in *UsedSoft* the Court recalled the principle's function to delimit the exclusive control of the right holder to what is necessary,<sup>18</sup> in the recent *Tom Kabinet* judgment the Court has focused mostly on examining the legislative intent, largely overlooking the broader function of the principle.

- 11 The latter development is unfortunate, especially given the developments on the secondary communication falling under the scope of the rights other than distribution. As will be demonstrated in the following sections, *Tom Kabinet* presented an excellent opportunity to systematise the approach to secondary communication and to distinguish between the question of the boundary of control over particular forms of communication and the question of permissible conduct of a third party such as *Tom Kabinet* platform.

## C. The CJEU and the lack of general limits of control over the secondary communication

- 13 For instance, under the copyright acts in Scandinavia, the exhaustion principle is worded in the way that a copy which has been handed over with the copyright holders' consent can be freely resold. Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, SFS 1960:729, 19 §; Lov om opphavsrett til åndsverk Mv. (Åndsverkloven) LOV-2018-06-15-40, § 27. Similar, the Model law on copyright developed prior to the extensive international harmonisation simply allowed resell of copies without authorisation or remuneration to the right holders, see Committee of Experts on Model provisions for legislation in the field of copyright. First Session. Draft model provisions for legislation in the field of copyright. Memorandum prepared by the International Bureau. II Draft provisions. CE/MPC/1/2-II 1989 [1989] 11.
- 14 Besides, of course, the territoriality of the rights.
- 15 For instance, it has first been harmonised for neighbouring rights under the Rental and Lending Rights Directive and at the time where the rental took off and it was necessary to delineate sale from rental. See more in Oprysk (n 9) 159–168; Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L 376/28 (Rental and Lending Rights Directive) art 9 (2).
- 16 Frank Gotzen, 'Distribution and Exhaustion in the EC' (1990) 12 EIPR 299, 300–302.
- 17 At the time of the InfoSoc harmonisation, the principle

- 12 The stark distinction between the right of distribution (subject to the exhaustion principle) and the right of communication to the public under the EU copyright *acquis* was laid in the 1990s following the intensive international harmonisation of copyright. At the time of rapid technological development and the emergence of the Internet as a dissemination channel, the copyright holder's control over digital distribution had to be secured. This has led to the harmonisation of a broad communication to the public right, which covered

was copied from the previous Rental and Lending Rights Directive without any further elaboration, as it was considered to be a settled principle stemming from the preceding case law dealing with the cross-border movement of goods. Green Paper on Copyright in Information Society. COM(95) 382 final. 19 July 1995 [1995] 47. Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society. COM (97) [1998] OJ C 108/6 45. Opinion on the proposal for a Council Directive on the legal protection of computer programs. Economic and Social Committee 89/C 329/02 [1989] OJ L 329/4.

- 18 To allow control over resale of copies downloaded from the Internet would go beyond what is necessary to safeguard the subject-matter, where the right holder *had a chance to obtain appropriate remuneration through the first sale*. See *UsedSoft* (n 11) paras 62–63.

acts ranging from secondary cable retransmission to any act (primary or secondary) of communication. Unlike the distribution right, the harmonised right knew no general boundary.<sup>19</sup>

- 13 With the InfoSoc Directive similarly drawing a distinction between distribution and communication rights, the question of the appropriate extent of exclusive control could have been settled prematurely. On the one hand, a variety of concerns have been mitigated by further technological development and available means of enforcing extensive control over individual copies of a work.<sup>20</sup> On the other hand, the online environment has enabled a variety of ways to engage with lawfully communicated content, which do not necessarily substantially interfere with its exploitation.<sup>21</sup>
- 14 The CJEU jurisprudence is a perfect illustration of the issues arising from the lack of flexibility resulting from seemingly denying any limit over the right holder's control over the communication of a work. AG Sánchez-Bordona has recently described the body of case law with a quote from Ansel Adams: "There is nothing worse than a sharp image of a fuzzy concept".<sup>22</sup> The jurisprudence of the Court interpreting the right of communication to the public concerns predominantly secondary communication, which relies either on authorised or unauthorised primary communication. The absence of a distinction between the primary and secondary communication, however, upsets the legal certainty, because cases which visibly interfere with a work's exploitation (e.g. unauthorised multiplication and upload of copies) are subject to the same criteria as a mere link to the work lawfully made available online.

- 15 Article 3(3) of the InfoSoc Directive strongly suggests that no limits comparable to the exhaustion principle ought to be placed on the acts falling under the right of communication to the public. Despite the restrictive wording, the Court has at times exercised remarkable flexibility when dealing with the boundaries of the communication to the public right.<sup>23</sup> The exclusivity of the right holder's control has occasionally been downgraded, leading to competition instead of foreclosing any market for subsequent exploiters of a work.<sup>24</sup> The Court has effectively exempted certain secondary acts of communication from the right holder's control without a reference to Article 3(3), using the arguments resembling the ones justifying exhaustion.<sup>25</sup>
- 16 The rigid regulation of the reach of exclusive rights, which fails to appreciate the circumstances of a case at hand, led to a situation where it is a matter of disputing the application of one or another right, rather than reasoning about the appropriate scope of exclusive control. The recent *Tom Kabinet* judgment has timely illustrated the deficiencies of the current legislative framework in providing satisfactory answers to the question of how far the exclusive control ought to stretch and why particular acts ought to be exempted from authorisation. The CJEU decision demonstrates both that extending the exhaustion principle to the digital environment might not be a viable solution and that a taxonomy of acts falling under the communication to the public is ever more pressing.

19 The adoption of the WIPO Copyright Treaty has been crucial to copyright development. In particular, Articles 6 and 8 harmonising the distribution and communication to the public rights. WIPO Copyright Treaty, adopted in Geneva on 20 December 1996.

20 On the role of technological protection measures in securing control over consumption, see Reto M Hilty, 'Kontrolle Der Digitalen Werknutzung Zwischen Vertrag Und Erschöpfung' (2018) 120 GRUR 865, 877.

21 For instance, hyperlinking is important to the functioning of the Internet and to sharing of the information without necessarily harming the interests of the right holders, when no duplication of a work through unauthorised upload occurs.

22 Case C-161/17 *Land Nordrhein-Westfalen v Dirk Renckhoff* [2018] EU:C:2018:634, Opinion of Campos Sánchez-Bordona, para 5.

23 See empirical study by Tito Rendas, 'Copyright, Technology and the CJEU: An Empirical Study' (2018) 49 IIC 153. Also, on the Court being motivated to reach a reasonable result at the expenses of traditional copyright concepts, providing flexibility by considering fair competition and market effect, see Thomas Riis, 'Ophavsrettens Fleksibilitet' (2013) 82 NIR 139, 139–140.

24 Guido Westkamp, 'One or Several Super-Rights? The (Subtle) Impact of the Digital Single Market on a Future EU Copyright Architecture' in Kung-Chung Liu and Reto M Hilty (eds), *Remuneration of Copyright Owners*, vol 27 (Springer 2017) 39.

25 Sganga (n 5) 213, 227–228.



## I. Trying out exhaustion online: *UsedSoft v Tom Kabinet*

- 17 The first and the only instance where the CJEU has clearly fully endorsed the principle of exhaustion in the digital realm is the *UsedSoft* case, where a secondary market of software licenses was at stake.<sup>26</sup> *UsedSoft* sold “used” software licenses to next acquirers, which were then able to download a respective installation file directly from the vendor’s webpage. Although no transfer of copies was taking place in the traditional sense, the effect was that the use of particular software was transferred from one person to another. This, as far as users themselves were concerned, constituted resale of such a license.
- 18 The CJEU jumped right into the interpretation of the exhaustion principle under the Software Directive.<sup>27</sup> The Court concentrated on the core implication of the principle, namely the effect of restricting the reach of exclusive rights over secondary dissemination. As the CJEU noted, limiting the exhaustion principle to tangible copies would provide the right holder with excessive control over intangible copies, which would undoubtedly go beyond what is necessary to achieve the objectives of copyright protection.<sup>28</sup> The question was thus whether the immaterial nature of copies justified conferring broader protection than the one in place for tangible copies, even though the secondary EU law did not provide a clear basis.
- 19 The reference in *Tom Kabinet* presented an opportunity to consider extending the application of the exhaustion principle also to e-books falling under the InfoSoc Directive, potentially opening the floor for extending it to a variety of subject matters regulated by that Directive.<sup>29</sup> The Court denied the extension of the principle to e-books in the situation at stake. However, the decision is hardly a final say on the question; the extension of the principle to digital copies could, for instance, take place through legislative intervention. Even more so, the judgment

does not settle the issue of appropriate boundaries of other exclusive rights, namely the communication to the public right, the scope of which is everything but clear.

- 20 The Court has effectively avoided answering the question of what the consequences are for exercising the exclusive right to disseminate a work by distributing electronic copies for unlimited use against a one-time fee for the right holder’s exclusive control over the subsequent distribution of such copies. The national court has carefully phrased the questions in the language of the *UsedSoft* decision.<sup>30</sup> The CJEU has, however, rephrased them, shifting the focus of the enquiry and avoiding any closer examination of the consequences of the exercise of the right beyond the literal interpretation of the Directive.
- 21 The CJEU acknowledged the intent of the legislator to strictly distinguish between the distribution of tangible copies and dissemination of intangible copies for the purpose of applying exhaustion.<sup>31</sup> Compared to the *UsedSoft* decision, the Court did not spend much time considering whether distribution of e-books could be considered analogous to the sale of printed copies. It was recalled that the Court considered the sale of software by download from the Internet equivalent to the sale of software on a tangible medium, which then justified treating them in a similar manner in light of the principle of equal treatment.<sup>32</sup> The same could not be said about the sale of printed books and sale of e-books, as the latter do not deteriorate and are perfect substitutes, and their exchange requires no additional cost nor effort. This, the Court held, means that a parallel second-hand market would be likely to affect the interests of copyright holders in obtaining appropriate reward much more than the market for second-hand tangible objects, contrary to the objective of the high level of protection.<sup>33</sup>
- 22 The CJEU appears to have dealt with a variety of issues with remarkable efficacy. First is the relation between appropriate reward and the high level of protection as the objectives of the copyright *acquis*.<sup>34</sup> Second is assessing the likely impact of the

<sup>26</sup> *UsedSoft* (n 11).

<sup>27</sup> The discussion on the right itself went not much further beyond holding that “online transmission method is the functional equivalent of the supply of a tangible medium. See *UsedSoft* (n 11) para 61. The argument of the EC that such transmission fell under the right of communication to the public under the InfoSoc Directive was dismissed, as the Court stated that transfer of ownership taking place changes it into an act of distribution, see *UsedSoft* (n 11) para 52.

<sup>28</sup> *ibid* paras 53–64.

<sup>29</sup> Extending the principle to digital copies has been endorsed, among others, by Sganga (n 5) 234–237.

<sup>30</sup> For instance, using the notion of “remuneration equivalent to the economic value of the work”. For the questions asked by the referring court, see *Tom Kabinet* (n 4) para 30.

<sup>31</sup> *ibid* paras 41–52.

<sup>32</sup> *ibid* para 57.

<sup>33</sup> *ibid* para 58.

<sup>34</sup> On the unclear stand of the high level of protection vis-à-vis other objectives of the *acquis*, see Alexander Peukert,

secondary market of e-books and determining what amounts to impact substantially higher than the one caused by the secondary market of printed books. The third is evaluating the economic equivalency of printed and electronic copies detached from the dissemination rationale of the exclusive rights and the appropriate reward to the authors. The question that arises is, hence, whether the conclusion reached in the *Tom Kabinet* case would equally apply to any case concerning the transfer of access to lawfully acquired content, whether or not enabled or supported by a third party.

- 23 Having dealt with the exhaustion principle, the Court proceeded to examine the communication to the public right. Here, the CJEU switched from the perspective of the right holder distributing electronic copies and the possible interference of the secondary market of such copies to examining the conduct of the Tom Kabinet platform facilitating secondary market. Hence, the question of what consequences dissemination of intangible copies has or ought to have on the extent of exclusive control remained unanswered, as well as the possible justifications for placing the boundaries similar to exhaustion.
- 24 The Court had no problem concluding that providing access to digital copies of a work to the registered users of the platform constituted an act of communication to the public.<sup>35</sup> Nowhere did the CJEU consider the significance of these copies being lawfully sold by the right holder or that access to these “used” copies actually required a payment of a fee. The Court reasoned that the public criterion had likewise been met. As there were no technical measures to ensure that only one copy may be downloaded and that after a transaction a copy is removed from a respective device, such communication reached a substantial number of persons.<sup>36</sup>
- 25 The assessment of the public appears to blend together two essential but separate issues in this case. First is whether (re)distribution of copies on an individual basis against a fee falls under the communication to the public right. Second is whether the lawfulness of such communication depends on the possible piracy implications. The former would call for considering whether a platform facilitating exchange between the individual users in lawful possession of a copy is breaching the communication to the public right. The latter would be a follow-up

question, exploring essentially whether other concerns, such as potential piracy, influence the conclusion in respect of the former question.

- 26 The CJEU’s reference to the new public is no less troublesome in this context. Although not explicitly, the Court acknowledged that the communication by the Tom Kabinet platform is taking place using the same technical means and proceeded to examine the possible new public reached by such communication. Surprisingly, it concluded that Tom Kabinet communicates e-books to the new public not taken into account by the right holder, because this public is not the same as the one that concluded the user license agreements.<sup>37</sup> Notwithstanding the general confusion over the application of the new public criterion, it must be noted that the assessment performed in *Tom Kabinet*, without a doubt, represents the most narrow view of the public taken into account by initial authorisation.<sup>38</sup>
- 27 Confining the intended public to users who concluded a user license agreement overlooks that the right of communication covers providing access to a work, including through making it available, irrespective of whether the public avails itself of such opportunity.<sup>39</sup> Hence, to state that the intended public comprises only of the persons who have acted upon an opportunity to conclude a user license agreement is flawed. The right holder offering e-books freely through its distributors cannot possibly know in advance who of the targeted audience will actually use an opportunity; the offer is confined to anybody willing to pay for access. Whereas subsequent upload of a copy acquired for private use onto a publicly accessible webpage would ultimately reach a public not taken into account, mere passing on of access to a copy to another user is not that straightforward. The important question is whether the first acquirer is allowed to transfer access to a work, which, from the copyright perspective, ought to be detached from mere provisions of an end-user license agreement.

37 *ibid* para 71.

38 This is somehow in line with the Court’s definition of the new public in the *Renckhoff* case, where it established that a new public was reached where a work has been posted on a different website because the original posting only intended to make it available to the users of that particular first webpage. Case C-161/17 *Land Nordrhein-Westfalen v Dirk Renckhoff* [2018] EU:C:2018:634, para 35. For the need to distinguish between a primary act such as upload and secondary act for the new public criterion, see Oprysk (n 9) 242–258; Ohly (n 9) 1003–1004.

39 Case C-610/15 *Stichting Brein v Ziggo BV and XS4All Internet BV* [2017] EU:C:2017:456, para 31.

‘Intellectual Property as an End in Itself?’ (2011) 33 EIPR 67, 67–68; Stef van Gompel, ‘Copyright, Doctrine and Evidence-Based Reform’ (2017) 8 JIPITEC 304, 307.

35 *Tom Kabinet* (n 4) para 65.

36 *ibid* paras 68–69.

28 Henceforth, the Court has performed a rather dissimilar analysis in the cases concerning essentially the same question: can the first acquirer transfer his or her access to an acquired copy of a work? Ultimately, the situations at stake were different, both given the subject matter, circumstances of such transfer, the role of an intermediary, and the possible interference of resale with the right holder's interests. However, the little emphasis on the qualifying *UsedSoft*'s conduct under the right of distribution in *UsedSoft* and the elaborate discussion of the *Tom Kabinet* platform could unlikely be explained solely by the different Directives the cases concerned.

## II. Placing limits on the reach of the communication to the public right

29 Communication to the public right developed into a broad access-like right, covering a wide variety of acts in connection with the presentation of a work, especially in the online context.<sup>40</sup> It encompasses virtually any new way of communicating a work's content to the public, as well as some traditional uses, previously regulated by different instruments, such as retransmissions and rebroadcast. No formal distinction is drawn between primary and secondary communication, although the jurisprudence of the CJEU might be interpreted as *de facto* taking the nature of communication into account.<sup>41</sup>

30 Unlike the right of distribution accompanied by the inherent boundary in the form of the exhaustion principle, the communication to the public right is not subject to exhaustion, pursuant to Article 3(3) of the InfoSoc Directive. The history of the provision is complex, and the meaning is ambiguous. Whereas it is often interpreted as ruling out any general limits on the reach of the right (e.g. exempting secondary communication),<sup>42</sup> it has also been suggested that the provision ought to be interpreted as concerning the mere resale of tangible copies.<sup>43</sup> The CJEU in *Tom Kabinet* similarly appears to have taken a narrow

view of Article 3(3), as it considers that provision to merely clarify whether the supply of copies falls within or outside the rule of exhaustion under Article 4(2).<sup>44</sup>

31 The CJEU refers to Article 3(3) only occasionally, despite the fact that it sometimes restricts exclusive control over subsequent communication. The latest judgment in *Tom Kabinet* presented a wonderful opportunity to explore the implications of Article 3(3) and the preceding case law of the Court on the extent of permissible control over secondary communication. The opportunity has not been used. The main criticism of the decision must be reiterated here: nowhere were the implications of the exercise of the right on the extent of further control over communication explored. For, if Article 3(3) clarifies nothing more than the non-application of exhaustion in the sense of exempting the resale of tangible copies, it does not automatically provide a rationale for conferring on the right holder total control over a work's communication.

32 The jurisprudence of the Court challenges the "borderless" picture of the exclusive communication to the public right by introducing the criteria that might exempt the acts from the exclusive control. Contrary to what is suggested by the literal reading of the Directive, the right of communication to the public is not so "borderless" under the jurisprudence. Setting aside delimiting the right's scope from the fundamental rights perspective,<sup>45</sup> the Court has, on several occasions, allowed uses which otherwise are captured by the broad right of communication to the public. The following sections will summarise the main leitmotifs under the jurisprudence exploring secondary communication: the exercise of the right, obtaining appropriate remuneration, and interference of secondary communication with the exploitation of a work.<sup>46</sup>

40 Jane C Ginsburg, 'Essay: From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law' (2002) 50 U.S. Intellectual Property: Law and Policy 113.

41 For instance, in the *Renckhoff* case, the Court clearly had to find a new public where a new upload of a work took place, following the previous jurisprudence on the new public in the context of hyperlinking. *Renckhoff* (n 38).

42 On Article 3(3) unnecessarily complicating the discussion on digital exhaustion see Ohly (n 1) 237.

43 Hilty (n 20) 867.

44 *Tom Kabinet* (n 4) para 33.

45 The judgments in *Funke Medien*, *Pelham* and *Spiegel Online*, see analysis by Christophe Geiger and Elena Izyumenko, 'The Constitutionalization of Intellectual Property Law in the EU and the *Funke Medien*, *Pelham* and *Spiegel Online* Decisions of the CJEU: Progress, but Still Some Way to Go!' (2020) 51 IIC 282.

46 For a more elaborate analysis of these tendencies, see Oprysk (n 9) 267–279, 301–313.

## 1. Exercise of the right through authorising initial communication

- 33 The specific subject matter of Intellectual Property (IP) is to enable exploitation of a work commercially, by marketing copies or making a work available, including through granting licenses.<sup>47</sup> Whereas the authorisation of public disclosure of a work is reserved to the right holders and no limits on the reach of the right of communication to the public are placed under the EU Directives, the CJEU has on few occasions exempted particular secondary communication from the reach of the exclusive right. Importantly, the Court has done so while emphasising the fact that the initial communication was authorised. For instance, in the *FAPL* case, where exclusive control over the importation of decoding devices was denied, the Court stressed the fact that the primary broadcast in question was authorised by the right holders.<sup>48</sup> On the other hand, in the *Coditel I* case, where control over cross-border retransmission was upheld, the entity retransmitting a signal did not have authorisation in the Member State where the broadcast originated.<sup>49</sup>
- 34 Traditionally, the fact of exercising the right is important for the application of the right of distribution, as it influences the ability to exercise further control over distributed copies. However, the Court seems to accord the authorisation no less attention in cases concerning the right of communication to the public. The CJEU has repeatedly emphasised the preventive nature of the rights and the right holder's consent to a particular communication.<sup>50</sup> In the *Renckhoff* case, for instance, the Court held from the outset that, subject to exceptions and limitations, any use of a work (communication to the public in that specific case) without the prior consent of the right holder infringes copyright.<sup>51</sup>
- 35 The fact of authorisation is closely connected to the notion of consent, i.e. to the fact that the right holder approved particular communication of a work, its circumstances, and particular parameters. Significance of consent and what can be implied from it is particularly prominent in cases where the Court

assesses the new public criterion. For instance, in the landmark *Svensson* case, the Court devoted very little attention to the fact of authorisation. Rather, the CJEU relied on the fact that the right holder contemplated access by the users in question when authorising the initial communication.<sup>52</sup> Hence, it could be inferred from the initial communication that its authorisation intended to make a work available to all the potential users. Likewise, the Court relied on the fact of consent to the initial communication where the secondary communication targeted the same circle of persons in the *AKM* case.<sup>53</sup>

- 36 These cases suggest that the right holders might have to accept some limits on the exercise of the right once communication is authorised. The limits are, of course, not absolute, but depend on a variety of considerations, the most important of which seems to be the reach of a new public as a new target audience. The new public appears as essentially an economic consideration, examining whether a new (and potentially paying) public is reached, which has not been contemplated by the initial authorisation. Furthermore, the jurisprudence suggests that any change in the way of exploitation renders the secondary act of communication infringing, even if the public covered by such secondary act has been taken into account by the right holder.<sup>54</sup> Hence, it appears that the logic behind the new public criterion is very much related to the idea that every use of a work shall be remunerated. Therefore, if a third party communicates a work through an act of secondary communication to the public which has not been contemplated by the initial communication, whether or not against any fee, it inevitably interferes with the exercise of the exclusive right to exploit and obtain remuneration for each use of a work.
- 37 Examining the new public criterion in the cases which do not concern secondary communication (i.e. not relying on the initial authorised communication) is, however, troublesome, as it leads to counterintuitive conclusions. Independent communication, such as upload of a work online for public access, ought to require the authorisation of the right holder in order to provide the latter with the means to control the availability of a work as well as the parameters of communication. Applying the new public criterion

47 See Case C-403/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* and C-429/08 *Karen Murphy v Media Protection Services Ltd* [2011] EU:C:2011:631, para 107.

48 *ibid* para 120.

49 *ibid* para 119.

50 *Renckhoff* (n 38) para 44. Also, Case C-527/15 *Stichting Brein v Jack Frederik Wullems* [2016] EU:C:2017:300, para 25.

51 *Renckhoff* (n 38) para 16.

52 Case C-466/12 *Nils Svensson and Others v Retriever Sverige AB* [2014] EU:C:2014:76, paras 26–27.

53 Case C-138/16 *Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger registrierte Genossenschaft mbH (AKM) v Zürs.net Betriebs GmbH* [2017] EU:C:2017:218, paras 28–29.

54 Case C-607/11 *ITV Broadcasting Ltd and Others v TVCatchUp Ltd* [2013] EU:C:2013:147, paras 38–39.



in cases concerning a separate communication has led the Court to conclude that posting a work online enabling free access contemplates solely the users of that particular webpage, even in the absence of any technological measures to confine the access to the visitors of that webpage.<sup>55</sup> This, in turn, has led the Court to conclude in *Tom Kabinet* that, by distributing e-books the right holder only intended to communicate a work to the users who concluded a user license agreement, and that any other user accessing a particular copy constitutes a new public. This is a rather narrow understanding of the intended public and a broad understanding of the new public, which suggests that the right holder retains perpetual control over any communication taking place on the basis of individual licensing.

## 2. Appropriate remuneration obtained through authorisation

38 Another prominent consideration under the Court's jurisprudence is obtaining remuneration through authorising communication, as the specific subject matter of IP is enabling its commercial exploitation.<sup>56</sup> As the Court suggested in the *Coditel I* case, the essential function of copyright in enabling a work's exploitation depends on the type of work in question.<sup>57</sup> The development of technology and the online environment has to a certain extent removed the differences between the exploitation of various types of works, but they nevertheless persist and often determine the business model designed to obtain remuneration for the use of a work.

39 Similarly to the cases on the right of distribution and also in accordance with Recital 10 of the InfoSoc Directive, the Court has held in the context of the right of communication to the public that, although the aim of exclusive rights is to enable obtaining remuneration, the Directive does not guarantee the highest possible remuneration, but only an appropriate one.<sup>58</sup> Furthermore, the remuneration must be reasonable in relation to the service provided, i.e. to the estimated public and the parameters of communication.<sup>59</sup> The right holder is

free to negotiate the remuneration corresponding to the potential audience at the time of negotiating authorisation.<sup>60</sup>

40 This does not mean, however, that the remuneration obtained through the authorisation of primary communication is automatically appropriate and that any secondary communication relying on initial communication could be exempted from the right holder's exclusive control. For instance, if secondary communication relying on the initially authorised one is deemed to constitute a new use of a work, it may require separate authorisation even though it is directed to the same circle of persons. New use would mean a new way of exploiting a work; hence, the interests of the right holder in taking advantage of new opportunities would have to be safeguarded.<sup>61</sup> On the other hand, requesting additional remuneration for secondary communication not amounting to a new use nor targeting any new audience could be denied. For instance, the Court found that paying a premium based on territoriality went beyond what was necessary to safeguard the subject matter.<sup>62</sup> Similarly, in the *AKM* case, the request for additional remuneration for cable retransmission of broadcast to the same audience was denied on the basis that the right holder authorised broadcasting in that particular territory.<sup>63</sup>

41 The relevance of already obtained remuneration has not directly been examined in the *Tom Kabinet* case, where the referring Court has in fact specifically enquired about the consequence of the right holder distributing copies of e-books at a price by means of which the copyright holder receives remuneration equivalent to the economic value of the work belonging to him.<sup>64</sup> Safeguarding the right holder's control over resale of e-books seems to have been motivated exactly by securing the right holder's interest in obtaining an appropriate reward.<sup>65</sup> However, the Court could have elaborated further on the ability of the right holder to ask for appropriate remuneration at the time of sale of e-books and the justifications for sanctioning claims for additional remuneration. The Court has been rather brief in

55 *Renckhoff* (n 38) paras 34–35.

56 *FAPL* (n 47) para 107.

57 For films it would be every showing of a work, also with the view of broadcasting of a film. See Case C-62/79 *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others* [1980] EU:C:1980:84, para 14.

58 *APL* (n 47) paras 107–108.

59 *ibid* paras 109–110.

60 *ibid* para 112.

61 On new use as requiring authorisation, see *TVCatchup* (n 54) paras 23–24.

62 *FAPL* (n 47) paras 115–116.

63 *AKM* (n 53) paras 28–29.

64 *Tom Kabinet* (n 4) para 30.

65 *ibid* para 58.

reaching a conclusion that, compared to the resale of tangible copies, transfer of electronic copies is likely to affect the right holder's interests much more.

### 3. Interference of secondary communication with the exploitation of a work

- 42 Whereas the CJEU has at times placed great weight on the fact of authorisation and remuneration obtained by the right holder, the potential interference of secondary communication with a work's exploitation has not explicitly been a part of the assessment. Nevertheless, many considerations which are taken into account by the Court essentially boil down to the presence of substantial interference. Reaching a new public or communicating a work through different technical means could be considered as interfering with the right holder's exploitation opportunities and the ability to obtain remuneration from a particular audience or through a particular dissemination channel.<sup>66</sup>
- 43 Secondary communication is likely to interfere with the exploitation of a work if it directly exploits a new market, such as rental of lawfully distributed copies. Such secondary dissemination would deprive the right holder of remuneration that could have been obtained from each copy if it were rented instead of being offered for sale, and possibly also undermine demand for copies distributed by the right holder on the primary market.<sup>67</sup> This would be equally relevant in the case of retransmission of broadcast on the Internet. In *TVCatchup*, for instance, even if retransmission reached no new audience beyond the same intended public in possession of a license, it interfered with exploitation by the unauthorised new use of a work.<sup>68</sup>
- 44 On the other hand, where the Court exempted the particular secondary communication from the exclusive control, there appeared to be no substantial interference with the work's exploitation. For instance, in the *Svensson* case, the CJEU concluded that providing links to a work made available on the Internet did not require an authorisation, if the links did not interfere with the intended public, i.e. where they did not circumvent access restrictions

(if any).<sup>69</sup> Similarly, in the *AKM* case, the Court allowed the Austrian law to exempt small cable installations from requiring authorisation under the communication to the public right, given that the authorisation of the initial broadcast covered the national territory and, hence, no new public was reached by the installation.<sup>70</sup>

- 45 In the *Tom Kabinet* case, the Court has also touched upon the interference with exploitation, even if indirectly. Namely, in the all-encompassing paragraph 58 of the judgment, the CJEU held that a secondary market of digital copies would likely affect the right holder's interests much more than a secondary market of printed books. The fact that the Court considered the actual effect of a secondary act on the work's exploitation is certainly welcomed. However, the analysis once again fell short of an in-depth assessment of factual interference, especially in the context of examining the conduct of *Tom Kabinet* under the communication to the public right. In particular, the referred questions could have been examined in the context of the *FAPL* judgment, where the Court denied control over cross-border trade of decoding devices necessary to access a broadcast on the grounds that it went beyond what is necessary to ensure the appropriate remuneration of the right holder.<sup>71</sup>

### D. Tom Kabinet and secondary communication: the need for intervention

- 46 The judgment in *Tom Kabinet* has further blurred the boundaries of the communication to the public and distribution rights. The issue at stake has been narrowed down by the Court to a mere question of whether the exhaustion principle applies. Whereas the CJEU commenced the assessment with the literal and contextual interpretation, pointing towards the conclusion that the right of distribution applies only to tangible copies,<sup>72</sup> the teleological interpretation only briefly explored the actual question at stake, namely the boundaries of exclusive control over authorised communication.<sup>73</sup>

<sup>66</sup> On constructing the limits of the rights through the notion of consuming control as illustrated by the new public criterion, see Westkamp (n 24) 46.

<sup>67</sup> Case C-158/86 *Warner Brothers Inc. and Metronome Video ApS v Erik Viuff Christiansen* [1988] EU:C:1988:242.

<sup>68</sup> *TVCatchup* (n 54) paras 23-24.

<sup>69</sup> *Svensson* (n 52) paras 25-32.

<sup>70</sup> *AKM* (n 53) paras 26-29.

<sup>71</sup> *FAPL* (n 47) paras 116-117.

<sup>72</sup> *Tom Kabinet* (n 4) paras 34-45.

<sup>73</sup> See also Kaiser on the real question of how far the exclusive rights should extend, Ansgar Kaiser, 'Exhaustion, Distribution and Communication to the Public – The CJEU's

47 It appeared clear to the CJEU that the sale of e-books could fall under the scope of the distribution right.<sup>74</sup> Hence, the Court examined the legislative intent and the differences between the tangible and electronic distribution of copies and arrived at the conclusion that the distribution in question did not fall under the distribution right but under the communication to the public right. The Court's reluctance to extend the application of the exhaustion principle under the InfoSoc Directive to e-books resold through the Tom Kabinet platform is understandable in the light of the principle's overreaching nature. At the same time, the decision paves the way for the legislator to step in and solve the arising incoherency under the *acquis*, which could potentially jeopardise harmonisation efforts in other areas, such as consumer protection.<sup>75</sup>

48 The judgment further emphasises a need for a comprehensive approach to the scope of control over subsequent dissemination, which would take into account the actual (or potential) interference of secondary communication with the work's exploitation. In *Tom Kabinet*, the Court concluded that the interference of the secondary market facilitated by the platform was greater than it would be in the case of printed copies. This suggests that the outcome of the assessment might be different, should the resale of electronic copies be organised in a way which does not differ substantially from a conventional secondary market of printed copies.<sup>76</sup> The question of qualifying the resale of digital copies of a work under Article 4(2) of the InfoSoc Directive might not have been settled for good.

49 Although rather mechanical, the CJEU's assessment of Tom Kabinet's conduct is fairly in line with the overall development, as briefly outlined in Part C of this paper. The crux of the Court's argumentation appears to lie in the impact of the resale of electronic copies on the right holder's (economic) interests.

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Decision C-263/18 – *Tom Kabinet* on E-Books and Beyond' (2020) 69 GRUR International, 489, 495.

74 *Tom Kabinet* (n 4) para 37.

75 On the inconsistencies under the *acquis*, see Sganga (n 5) 228–230.; the need for legislator's intervention *ibid* 232–234. The incoherent framework could disrupt the efforts in the field of consumer contract law. Digital Content Directive adopted in 2019 provides that, where restrictions that prevent or limit use in accordance with these reasonable expectations stem from intellectual property rights, a consumer is entitled to the remedies for lack of conformity from a trader. Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L 136/1, art 10.

76 See also part C.I. of this paper.

At the same time, the question of the significance of obtaining remuneration equivalent to the economic value through the first sale of the copies, as well as the fact of initial authorised distribution of the copies in question, remained unexamined. These were, however, in this author's opinion, the principal matters to be examined, in line with the referring court's questions.

50 As the exhaustion principle does not apply to copies which were sold without the right holder's authorisation, it is essential to emphasise the initial lawful putting of copies into circulation in the case of the Tom Kabinet platform.<sup>77</sup> Furthermore, the reference to the impact of the resale of digital copies on the right holder's economic interests with reference to obtaining an appropriate reward remains sterile without also assessing the significance of remuneration obtained through the initial sale of those copies.<sup>78</sup>

51 The CJEU jurisprudence indicates that, given that the right holder has exercised their right, whether or not with a view of obtaining remuneration, any insignificant interference ought not to necessarily be subject to further exclusive control.<sup>79</sup> The threshold of acceptable interference is by no means established, which is to the detriment of the legal certainty and potential secondary uses of a work which do not unreasonably prejudice the interests of the right holders. What has been confirmed once more in *Tom Kabinet* is that the economic considerations play an increasingly important role in the assessment. This shifts the discussion from qualifying an act under a particular right, which essentially determines the scope of control, to assessing the economic significance of secondary communication and its potential impact on the right holder's interests in exploiting a work.

52 However, taking into account the potential interference of secondary communication calls for differentiating between primary and secondary communication. For instance, the cases where communication is taking place on the conditions outside the right holder's control (unauthorised upload) must be distinguished from the cases where communication follows an authorisation and does not deprive the right holder of a new market.<sup>80</sup>

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77 Not only in the context of the distribution right, but also the communication to the public right, see part C.II.1. of this paper.

78 *Tom Kabinet* (n 4) paras 58, with reference to para 48.

79 See previous part C.II.3.

80 For instance, unauthorised upload of a copy of a work must be distinguished from a mere link to authorised

In *Tom Kabinet*, the Court did not distinguish the circumstances of the case from the cases concerning secondary communication relying on initially infringing communication, i.e. contributory infringement cases.

- 53 So far, intermediaries have been subject to scrutiny mainly in the cases of clearly infringing uses either by them or by their users.<sup>81</sup> However, with platforms such as *Tom Kabinet*, intermediaries enter the field of facilitating less obviously infringing acts. This necessitates the distinction between the acts to which the lawful acquirers of content are entitled, and the acts potentially facilitated by intermediaries. The failure to clearly distinguish between them is well illustrated in *Tom Kabinet*. Whereas the national court asks about the consequences of the right holder exercising the right, which then potentially sanctions the resale of electronic copies by the acquirers as private persons, the CJEU instead goes on to examine the conduct of the platform itself when assessing the communication to the public right.
- 54 These are, however, two separate questions. The first is whether the right holder is entitled to prevent an acquirer of a lawful copy from transferring access to it. The second is whether the conduct of a particular platform facilitating such user acts is of such nature as to infringe the exclusive rights. Besides a potential hint in paragraph 58 of the judgment, no clear answer to the first question has been given. One could only speculate that the transfer of access to a copy between private persons, in theory, could still be admissible under the copyright *acquis*, whereas the model of *Tom Kabinet* facilitating such transfer is not. This is important because, unlike in a world of tangible copies, a transfer of access to a work in the digital environment in most cases would require an intermediary – either for facilitating finding a party to a transaction or actually providing technical means to do so, be it for transfer of the copies between the devices or transfer of access between the user accounts within a single centralised system.<sup>82</sup>

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copy. Furthermore, a link to authorised copy, making it accessible in circumvention of any restrictions placed on its availability, must be distinguished from a link which does not in any way interfere with the intended public.

81 Namely, the following cases: *Wullems* (n 50); *Ziggo* (n 4); *Case C-160/15 GS Media BV v Sanoma Media Netherlands BV and Others* [2016] EU:C:2016:644.

82 On the organisational and technical challenges for facilitating a secondary market for electronic copies, see Liliia Oprysk, Raimundas Matulevicius, and Aleksei Kelli, 'The Development of a Secondary Market for E-Books: The Case of Amazon' (2017) 8 JIPITEC 128, 134–137.

- 55 In a sense, the issue with the operation of the *Tom Kabinet* platform is much broader than the mere classifying of the conduct under one of the exclusive rights. Neither was the CJEU asked the questions designed to obtain a clear picture of what is permissible, nor did the Court attempt to provide one. It is regrettable though that the Court has not given further thought to the notion of the right holder obtaining remuneration corresponding to the economic value of a copy emphasised in *UsedSoft*, which the referring court has been relying on. If not providing a comprehensive answer to the admissibility of the *Tom Kabinet* business model, the judgment could have at least systematised the approach to the extent of exclusive control over authorised communication, whether falling under the distribution or communication to the public right.
- 56 It is obvious that the exclusive rights under copyright come into conflict with the individual consumption of works to a greater extent when the latter is disseminated in electronic form.<sup>83</sup> Copyright law-making is unlikely to be able to withstand adapting the framework, and solutions similar to exhaustion might be necessary to resolve the conflict of interests. For instance, the adoption of the Digital Content Directive aimed at traders of the digital content, whether or not actual copyright holders, presents one example.<sup>84</sup> The Directive appears to attempt bypassing the need to streamline copyright law by compelling the traders of digital content to conclude appropriate licensing agreements with the right holders to offer digital content on terms corresponding to reasonable consumer expectations.<sup>85</sup>
- 57 If anything, the judgment in *Tom Kabinet* further complicates the legal landscape of online content distribution by holding that the public to which communication of a work through the sale of copies was intended comprises solely of users who concluded user licensing agreements.<sup>86</sup> Plausible as it sounds in the everyday language, the widely criticised new public criterion has (at least so far) concerned the interference with economic

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83 See, for instance, *Hilty* (n 20) 874.

84 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L 136/1, art 10.

85 For a comment, see Liliia Oprysk and Karin Sein, 'Limitations in the End-user Licensing Agreements: Is There a Lack of Conformity under the New Digital Content Directive?' (2020) 51 IIC 594.

86 *Tom Kabinet* (n 4) para 71.



exploitation of a work by interfering with the intended public confined to a particular territory or circle of persons.<sup>87</sup> In the realm of “individual” but standardised end-user licensing agreements, such reasoning appears to suggest that a license is not transferable, mandating the licensor to unilaterally enforce the conditions.<sup>88</sup> Simply put, the idea that the intended public comprises solely of users that accepted a standardised license agreement is flawed when an offer to conclude a license agreement is directed to any member of public (possibly territorially or otherwise restricted) willing to pay for access.

- 58 In sum, the judgment raises more questions than it answers. Having taken a narrow view of Article 3(3), the CJEU is likely to be asked to deal with the question of the relationship between the article and the construed on the go boundaries of the communication to the public right.<sup>89</sup> Furthermore, the full implication of taking such a narrow view on the intended public and such a wide view of the new public to which communication is addressed remains to be seen. In turn, the need to systematise the approach to primary and secondary communication becomes more urgent, as well as the need to elaborate on the notion of the interference with the work’s exploitation and its role in allowing certain uses of a work which do not unreasonably influence the right holder’s interests.

## E. Conclusion

- 59 The boundaries of exclusive rights under copyright have been subject to a lively academic and political debate in the last decades. With the online environment constantly driving innovation in terms of business models and commodification of copyright-protected works, the fundamental questions of under- as well as over-protection arise. These considerations have led to the early

EU harmonisation of a broad access-like right of communication to the public, seemingly covering any known or yet to come ways of disseminating a work not involving tangible copies. The corresponding mechanisms of keeping the extent of protection in check did not follow.

- 60 The CJEU has constantly been dealing with requests for interpretation of the broad right of communication to the public, in particular in respect of secondary communication relying on the initially authorised one. Whereas Article 3(3) of the InfoSoc Directive suggests no boundaries of exclusive control over authorised communication, the Court has at times exempted certain secondary acts from authorisation, relying on a variety of economic considerations. This has led to the disparities between the provisions of secondary law and the interpretations provided by the Court.
- 61 The judgment in *Tom Kabinet* is a continuation of the case law exploring the potential of the exhaustion principle developed in the analogue era to provide a boundary of exclusive control online, where the broadly construed rights conflict with the individual consumption of a work, disposal of acquired copy, and a third party’s ability to provide additional services. The CJEU’s decision to refrain from the blank extension of the exhaustion principle to electronic copies is comprehensible, given the yes-or-no nature of the principle, which appears outdated in the digital realm. However, the judgment must not obscure the overreaching question, which is the appropriate limits on the exclusive control over authorised communication.
- 62 The article has placed the decision in *Tom Kabinet* in the broader context of the secondary communication under the copyright *acquis*. It has illustrated that the decision is in line with the developments under the jurisprudence. The Court has continuously emphasised the right holder’s prerogative in exploiting a work, determining the parameters of authorised communication, and obtaining an appropriate reward through authorisation. Furthermore, the (potential) interference of secondary communication with a work’s exploitation has inexplicitly become a part of the assessment, as the Court on few occasions exempted secondary acts from authorisation despite the seemingly clear language of Article 3(3) of the InfoSoc Directive.
- 63 The developments indicate that a broad access-like right of communication capturing the variety of acts in (in)direct connection to a work’s dissemination necessitates appropriate mechanisms to confine protection to what is necessary. Secondary communication relying on an authorised one, which was at the heart of the *Tom Kabinet* case, in particular, presents a case for reconsidering the assumptions

87 For the criticism of the new public criterion, see P Bernt Hugenholtz and Sam van Velze, ‘Communication to a New Public? Three Reasons Why EU Copyright Law Can Do without a “New Public”’ (2016) 47 IIC 797. For the economic character of new public criterion, see Oprysk (n 9) 314–316.

88 On the position of a consumer acquiring digital content subject to individual licenses, see Lucie Guibault, ‘Individual Licensing Models and Consumer Protection’ in Kung-Chung Liu and Reto M Hilty (eds), *Remuneration of Copyright Owners: Regulatory Challenges of New Business Models* (Springer 2017) 208–213.

89 For the view that Article 3(3) of the InfoSoc should be revised in the light of development and the need to confine protection to what is necessary, see Oprysk (n 9) 325–328.

under the secondary EU law. Whereas a yes-or-no approach of the exhaustion principle might be too rigid for a careful balancing of the interests, the need for developing similar mechanisms is by no means excluded.

- 64 The decision in *Tom Kabinet* emphasises the need to systematise the approach to examine the acts which potentially fall under the communication to the public right, in particular, depending on whether primary or secondary acts of communication are concerned. As has been elaborated, a case-by-case approach which takes into account the initial authorisation of communication, remuneration obtained by the right holder, and the (potential) interference with a work's exploitation would be appropriate. Whereas the *Tom Kabinet* judgment points towards the direction of a casuistic approach, it also raises new questions. Further narrowing down the understanding of the intended public and expanding the notion of the new public conceal the issues at stake. The extent to which the right holder could exercise exclusive control over authorised communication will have to be revised if the copyright framework is to contemplate the appropriate boundaries of protection. The decision invites the legislator to step in and review the current framework in order to adapt it to the digital age and provide legal certainty for the market participants.

# Conceptualizations of the controller in permissionless blockchains

by **Maurice Schellekens\***

**Abstract:** The relationship between blockchain and the General Data Protection Regulation (hereinafter GDPR) is often described as problematic. This article addresses one of the problems blockchain faces: who is/are the controller(s) in a blockchain context? This article demonstrates that it is particularly difficult to identify the controller in blockchain applications that are integrated in the core code of a permissionless blockchain. The P2P character of blockchains, with its broad distribution of responsibilities, makes it difficult to ascertain who is able to determine purposes and means of the processing of data. In order to structure the discussion, this article develops three conceptualizations of cooperation within a

blockchain. These conceptualizations give different perspectives on the relations between the actors in a blockchain that are potential controllers. The article identifies who is most likely to be the controller in the different conceptualizations and gives indications about the extent to which the controllers are able to exercise their responsibilities. A problem is that an adequate exercise of responsibility requires coordination within the blockchain. However, the system that normally takes care of coordination in a permissionless blockchain – the crypto-economic incentive system – is at present not able to provide adequate data protection.

**Keywords:** Controller; Blockchain; permissionsless Blockchain; GDPR

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## A. Introduction

- 1 Blockchain is a distributed ledger that introduces a new way of processing data. Data on a blockchain are immutable and storage is independent from the intermediaries, involved in managing the blockchain. There is a – currently unproven – promise of new business models and innovation.
- 2 Blockchain's relationship with the GDPR is tense, not least because it is difficult to establish accountability in a blockchain. Blockchain's horizontal character is laid out to minimize the influence of individual administrators within the blockchain.
- 3 The dilution of influence makes it difficult to pinpoint who determines purposes and means of data processing, in other words, who is the controller.
- 4 This article seeks to bring the discussion regarding accountability a step further by discerning three ways of conceptualizing the relations or cooperation between the actors in a blockchain context.
- 5 This article proceeds as follows. In the next section, blockchain technology will be explained for the purposes of this article. The following section analyses controllership and presents the conceptualizations of the relations amongst relevant actors. The fourth section is the conclusion.

## B. Blockchain technology

### I. Distributed database

- 6 A blockchain is in essence a distributed database, i.e. a database of which multiple copies exist. Every copy is stored on a computer within a network (a node) and each node has an administrator. If new data or transactions are added to the blockchain, they are first collected in a so-called block and are then en bloc appended to the end of the existing blockchain. The newly added block has a pointer (a hash) linking it to the last block in the existing chain.
- 7 The Bitcoin blockchain is the archetype blockchain and this has shaped how we see a blockchain. The basic processes of the Bitcoin blockchain are adopted in other blockchains, such as Ethereum. The Bitcoin blockchain was first described in Satoshi Nakamoto's paper of 2008, entitled: "Bitcoin: A Peer-to-Peer Electronic Cash System".<sup>1</sup> In his paper, Nakamoto identifies the immutability of the data that the blockchain contains as its core characteristic. Here, "immutability" means that once data has been added to the blockchain, it can no longer be changed or deleted from the blockchain, not even by the administrator of a node who added the data to the block. The reason Nakamoto strives for immutability is to obviate trust in the administrator or any other actor that may persuade the administrator to alter or remove data from the database. Nakamoto's paper appeared during the financial crisis of 2008 when trust in banks was at a low point. Bitcoin, which is a crypto-currency, was meant to create internet money that could function without an intermediary, like a bank. All previous attempts at creating internet money needed an intermediary to prevent double spending. The Bitcoin blockchain claims to have made trust in intermediaries redundant. The questions regarding whether a blockchain really succeeds in doing so and whether that is a useful property at all, will not be addressed here. This section of the article focuses on the question of how immutability of the contents of the database is realized.
- 8 A first means to create immutability is redundancy. As stated above, there exist multiple copies of the database under the control of various administrators. Redundancy reduces the dependence on each individual node administrator. In ways that will

become apparent below, an alteration or deletion of data on the blockchain by one administrator will not affect what is seen as the valid blockchain.

- 9 A second means to create immutability is reliance on crypto-economic incentives. There are positive and negative incentives to make the administrators of nodes play by the rules of the game (i.e. the protocol). A positive incentive is that an administrator can earn bitcoins by playing by the rules. A negative incentive is that an administrator first has to invest (for example in computer equipment and electricity) in order to be able to earn bitcoins. If the administrator does not adhere to the protocol, his investment will be in vain.
- 10 The redundancy and crypto-economic incentives work towards immutability of the contents of the blockchain in ways that will become apparent below. At the same time, the existence of multiple copies (or perhaps better versions) of the database creates a new problem, namely the risk that they will exhibit differences in the data they register. In other words, there is a need to sync the versions. This requires coordination within the blockchain. A traditional way to create such coordination is to designate one database as the master and all other databases as the slaves that have to follow the master at all times. This would however re-introduce centralization, dependence on the master database, and trust in its administrator, which Nakamoto deems undesirable. So the challenge is to create coordination while maintaining decentralization. A first step in creating coordination is the definition of what counts as the valid blockchain; this is defined as the longest chain consisting purely of valid blocks. How a valid block is defined will become apparent below.
- 11 The way in which new blocks are added to the blockchain elucidates how the coordination can be achieved while maintaining decentralization.<sup>2</sup> During a period of about ten minutes, each node collects new transactions (new data to be added to the blockchain) and places them in a candidate-block. Each node prepares his own candidate block. He checks all incoming transactions on double spending by comparing the transactions to the contents of the blockchain. The node includes in his candidate-block a reference to the last block of what he thinks is the longest existing chain. At the end of the ten-minute-period, the candidate blocks are finalized and the nodes start solving a cryptographic puzzle based on their candidate blocks. They compete against each other to be the first to solve their puzzle. The first node to solve his cryptographic puzzle, sends his Proof-of-Work (i.e. the proof he solved his puzzle) to all the other nodes, who then verify that our node

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1 Satoshi Nakamoto, 'Bitcoin: A Peer-to-Peer Electronic Cash System' [2008] 1 <<https://bitcoin.org/bitcoin.pdf>> accessed 6 June 2019.

2 Andreas M Antonopoulos, *Mastering Bitcoin: Programming the Open Blockchain* (O'Reilly Media 2017) ch 2.



solved his cryptographic puzzle. If they are satisfied that he did so, they accept the candidate block of the winner as the new block that they add to the blockchain. An administrator does so by including a reference to this block in his new candidate block. In other words, an administrator indicates what the valid chain is by building on it. The duration of the ten minute period derives from the time it costs with the most advanced computers to solve the cryptographic puzzle. So, while a node is solving the cryptographic puzzle based on his candidate for the  $n$ -th block (costing about ten minutes), he is already collecting new transactions for his  $(n+1)$ th block during the same ten minutes. Once some node has found proof-of-work for the  $n$ -th block, immediately a new competition starts for proof-of-work of the  $(n+1)$ th block. A valid block is a block for which proof-of-work exists and that contains only valid transactions. Each node has written a sort of cheque to itself into its candidate block and only the winning node can cash in on this cheque, since only its own block is added to the blockchain that is considered valid.

- 12 This all creates a blockchain that is immutable in the sense described above. This can be seen as follows. Suppose that a node changes the contents of an old block somewhere in the middle of the chain. Then, the proof-of-work of this block is no longer valid and also the reference in the subsequent block to the modified block is no longer correct. This means that the chain of our node is broken. It is no longer the longest chain and will be ignored by the other nodes: they can only earn bitcoins by building on the longest chain. So, changing data in an old block is strongly discouraged. It disqualifies the administrator for meaningful participation in the blockchain.
- 13 The above describes how the bitcoin blockchain works. The Bitcoin blockchain is a so-called permissionless blockchain. This means that everybody can become a node mining for a reward. Nobody needs “admission” to become a node. Permissionless blockchains work with crypto-economic incentives of which the above are an

example.<sup>3</sup> A node is not bound by contract or another legal instrument. Another example of a blockchain with miners is Ethereum 1.0.

## II. Proof-of Stake

- 14 Although the Bitcoin blockchain is sometimes seen as an outlier in its rejection of legal instruments as sources of trust, other more mainstream or business oriented blockchains, such as Ethereum, work with the same technical concept.<sup>4</sup> Ethereum has until now relied on Proof-of-Work, just as Bitcoin. However, Proof-of-Work exhibits certain shortcomings in terms scalability and sustainability. Therefore, Ethereum seeks to switch to an alternative technical concept, Proof-of-Stake. Where miners commit computer equipment and electricity, validators in Ethereum 2.0 commit Ether, i.e. the cryptocurrency of Ethereum. Under the envisaged Proof-of-Stake mechanism, the next block to add is chosen through voting. The vote of a validator is weighed according to the amount of Ether he has committed (the stake). Since the validators cannot trust each other and since they communicate over an unsafe network (the internet), fraud is a problem.<sup>5</sup> This requires Ethereum to take measures to prevent fraud, to detect it and to redress it, e.g. by finding ways to automatically “slash” the stake of fraudulent validators. Even though Ethereum has often announced dates at which the switch to Proof-of-Stake would take place,

3 There are also so-called permissioned blockchains. In order to become a node in a permissioned blockchain a person needs to be admitted. Sometimes a central party is charged with admissions. It can also be that the collective of existing node administrators decides about new admissions. A permissioned blockchain can also work with crypto-economic incentives. It may however be that such a blockchain works with a simpler coordination mechanism, such as a round-robin system; each node in turn delivers a new block (BitFury Group in collaboration with Jeff Garzik, ‘Public versus Private Blockchains. Part 1: Permissioned Blockchains’, White Paper, 20 October 2015 (Version 1.0), 5). In the latter case, it is also easy to accommodate a procedure to modify the contents of old blocks. This is the reason that some do not consider these permissioned blockchains to be blockchains at all.

4 Alyssa Hertig, ‘How Ethereum mining works’ (*Ethereum 101*) <<https://www.coindesk.com/learn/ethereum-101/ethereum-smart-contracts-work>> accessed 4 May 2020.

5 In this context, inter alia the nothing-at-stake attack, the long range attack and an attack by a cartel can be mentioned. See Vlad Zamfir, ‘The history of Casper’ (*Ethereum blog*, 6 December 2016) ch 1,2 and 5. <<https://blog.ethereum.org/2016/12/06/history-casper-chapter-1/>> accessed 4 May 2020.

the switch has – at the moment of writing – not materialized and Proof-of-Work remains relevant for the time being.

### III. Smart contracts

- 15 Above we considered that data (e.g. bitcoin transactions) are stored on a blockchain. In the (permissionless) blockchain Ethereum, users can place code on the blockchain. The code placed on the blockchain is immutable in the same way that data on the blockchain are immutable.<sup>6</sup> Moreover, the code can be executed by the nodes if some (other) user seeks to do so. For example, a hotel may place code on a blockchain that opens an IoT hotel room door after the code has checked that the hotel guest has paid for the night.<sup>7</sup> Such code is called a smart contract.<sup>8</sup> One must however bear in mind that a smart contract is simply code. It is not said that the code forms a contract in the legal sense, even though many applications, such as the example above, are in a domain that is reminiscent of contracts. It is also not said that a smart contract is smart in the sense that it uses artificial intelligence or something along the same lines. The example above is illustrative again. The smart contract may typically function as a trusted middle man.

### IV. ICOs

- 16 A popular application of permissionless blockchains is an Initial Coin Offering (hereinafter ICO). It is a means of crowdfunding whereby newly issued tokens are sold to investors or speculators in

exchange for legal tender or cryptocurrencies.<sup>9</sup> Most ICOs are built on the Ethereum platform. This platform is popular, since an ICO can easily be programmed as an Ethereum smart contract and the standardization of certain aspects of tokens within Ethereum allows for the tradability of the tokens.<sup>10</sup> There are various types of tokens that can be issued. Usually a distinction is made between utility tokens and equity tokens.<sup>11</sup> A utility token gives the holder the right to buy in the future certain products or services from the issuer. This is typically the product or service developed with the capital that the ICO yields. An equity token gives the holder certain rights that can be exercised against the issuing company, such as a right to profits generated or a share in the residual value if and when the company is liquidated. Although this article is not the place to discuss whether an ICO is subject to financial regulations, it can be said that some ICOs will indeed

6 In order to address concerns about the immutability of smart contracts, the function ‘delegatecall’ has been developed. A call of an undesired smart contract can be relayed to another contract. Merunas Grincalaitis, ‘Can a Smart Contract be upgraded/modified? Is CPU mining even worth the Ether? The Top questions answered here...’, (Medium, 6 February 2018) <www.medium.com> accessed 6 June 2019.

7 Vitalik Buterin, ‘DAOs, DACs, DAs and More: An Incomplete Terminology Guide’ (Ethereum Blog, 6 May 2014) <https://blog.ethereum.org/2014/05/06/daos-dacs-das-and-more-an-incomplete-terminology-guide/> accessed 21 October 2019.

8 Term coined by Szabo in: Nick Szabo, ‘Smart Contracts: Building Blocks for Digital Markets’, 1996 <http://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart\_contracts\_2.html> accessed 6 June 2019. It predates blockchain.

9 Patrick Schueffel, ‘The Concise Fintech Compendium’, (School of Management Fribourg (HEG-FR)), <https://web.archive.org/web/20180425130029/http://www.heg-fr.ch/FR/HEG-FR/Communication-et-evenements/evenements/Documents/Schueffel2017\_The-Concise-FINTECH-COMPENDIUM.PDF> accessed 4 May 2020, gives a more restrictive definition: ‘An ICO is an unregulated means of crowdfunding applied by cryptocurrency businesses as an alternative to the rigorous and regulated capital-raising process required by venture capitalists, banks, or stock exchanges. In an ICO a percentage of the newly issued cryptocurrency is sold to investors in exchange for legal tender or other cryptocurrencies such as Bitcoin.’

10 Almost 57% of ICOs builds on Ethereum smart contracts. Almost 30% of the ICOs works with a dedicated blockchain for the ICO. Source: <https://web.archive.org/web/20171230074510/https://icowatchlist.com/blog/ico-market-research-leading-blockchain-platforms-2017/> accessed 4 May 2020. Gianni Fenu, Lodovica Marchesi, Michele Marchesi and Roberto Tonelli, ‘The ICO Phenomenon and Its Relationships with Ethereum Smart Contract Environment’ [2018] IEEE <https://www.researchgate.net/publication/324099008\_The\_ICO\_phenomenon\_and\_its\_relationships\_with\_ethereum\_smart\_contract\_environment/link/5db84e6ca6fdcc2128eb86e1/download> accessed 3 May 2020. Romi Kher, Siri Terjesen and Chen Liu, ‘Blockchain, Bitcoin, and ICOs: a review and research agenda’ [2019] Small Bus Econ, Springer <https://doi.org/10.1007/s11187-019-00286-y> accessed 3 May 2020.

11 J. Baukema, ‘Initial Coin Offerings (ICO’s): crowdfunding 2.0?’ (2018) (3) Tijdschrift voor financieel recht, 113 <https://www.vandoorne.com/globalassets/documenten--bijlagen/publicaties/2018/j.-baukema---icos.pdf> accessed 4 May 2020.

be caught by such regulation.<sup>12</sup> This is relevant for the discussion about data protection below, since it can trigger KYC and AML obligations.<sup>13</sup>

## V. Actors in a blockchain

- 17 Many actors are involved in blockchains. For the purpose of this article the following are discerned. The core developers develop the code that constitutes the blockchain. There are administrators of nodes. In the description above they solve cryptographic puzzles, they store a version of the entire blockchain and check transactions. Often these tasks are however divided over two types of node administrators. On the one hand, there are miners who solve cryptographic puzzles or validators who vote, and on the other hand, there are administrators of so-called full nodes: they store an entire copy of the blockchain and check transactions. Users are the actors that place transactions or smart contracts on the blockchain. Finally, there are so-called oracles. They provide information that is not yet readily available in the blockchain. For example, if two parties bet via a blockchain on the temperature in London tomorrow the blockchain may derive information about the temperature from the website of the British Broadcasting Corporation (BBC). The BBC then acts as an oracle for the blockchain.
- 18 A distinction can be made between the infrastructure level and the application level. At the infrastructure level, you find the core code that constitutes the blockchain. At the application level you find smart contracts, i.e. user inserted code. However, this distinction is marred somewhat by the fact that a cryptocurrency is infrastructure level (coded by the core developers and needed to make the consent mechanism function), but it feels like an application as well. For those making payments with Bitcoin, it clearly functions as an application. A permissionless blockchain is always public. This means that everybody can read the data or smart contracts stored on the blockchain.

## C. Blockchain and the GDPR

- 19 The GDPR is applicable to the processing of personal data. For an analysis of blockchains, this implies that relevant instances of processing of personal data need to be identified and asked whether the data

involved are personal data for the actors who are potential controllers. Subsection C.I below addresses these questions.

- 20 In literature, it is argued that the GDPR is unfit for application to blockchains.<sup>14</sup> Blockchain's peer-to-peer character would not sit well with the conceptual idea about processing of data underlying the GDPR, namely the idea of a centralized database with a clear administrator. Hereinafter in subsections C.II and C.III, this article will investigate how blockchain's P2P character relates to who should be considered data controller and data processor.

## I. Personal data

- 21 Participation in the Bitcoin blockchain happens via digital signatures, a pair of private and public keys. The public keys of those participating in a transaction are stored in the public blockchain. To prevent more than two transactions being linked together, participants change their digital signature as often as possible.<sup>15</sup> This should make it difficult for a party to be singled out in the blockchain and identified by combination with other information. This may even be effective, unless a party seeking identification has very powerful analysis tools. Typically, only law enforcement and security services would be in a position where motive, and analytical capacity come together to engage in such an identification endeavor. Nonetheless, it cannot be excluded that also other parties, and especially potential controllers such as users and full nodes, can arrive at an identification.
- 22 First, a user who engages in a transaction with another party may know the identity of the other party or at least have background information that makes identification more likely. After all, transactions do not take place in complete social vacuum.
- 23 Second, full nodes do receive the transactions via the internet. This gives access to IP addresses from which transactions are sent. Usually a full node will not be able to infer an identity from an IP address. Since the decision of the CJEU in the Breyer case, it is clear that information available to a third party may come in the ambit of means reasonably likely to be used, unless the effort needed to access it would be disproportionate and "the risk of identification

12 Baukema (n 12) 119-120.

13 Baukema (n 12) 120 mentions the example of an issuer of tokens that can be found to be an investment institution.

14 Meyer (n 1). Finck (n 1) 88.

15 The transaction in which a 'bitcoin' is received is linked to the transaction in which it is spent again.

appears in reality to be insignificant”.<sup>16</sup> Given that illegal content may be stored on a blockchain e.g. via a bitcoin transaction,<sup>17</sup> a full node can have an interest in knowing who placed illegal information on the full node’s system. This would require cooperation from an internet provider who can link the IP address to an identity legally. A claim to obtain personally identifying information of the person who placed the content on the blockchain from the pertinent Internet Provider has a good chance of being found proportional.<sup>18</sup> The immutability of the blockchain makes removal of content from the blockchain extremely costly for the full node. Therefore, being able to address the uploader is an important means to prevent or discourage illegal content upload from re-occurring in the future.

- 24 Above, it was indicated that an issuing company in an ICO may be required to collect KYC-information and in practice, KYC information is indeed collected.<sup>19</sup> KYC obligations require identification of the customer or its beneficial owner.<sup>20</sup> Given the smaller amounts that can be paid into an ICO, the customer or the beneficial owner will often be a natural person. Therefore, KYC information will often consist of personal data.

16 Case C-582/14, Patrick Breyer v Bundesrepublik Deutschland, ECLI:EU:C:2016:779, para 46.

17 Roman Matzutt, Jens Hiller, Martin Henze, Jan Henrik Ziegeldorf, Dirk Mullmann, Oliver Hohlfeld, and Klaus Wehrle, ‘A Quantitative Analysis of the Impact of Arbitrary Blockchain Content on Bitcoin’, to appear in Proc. 22nd International Conference on Financial Cryptography and Data Security 2018. Proceedings to be published via Springer LNCS: <<http://www.springer.de/comp/lncs/index.html>>, <[https://www.comsys.rwth-aachen.de/fileadmin/papers/2018/2018\\_matzutt\\_bitcoin-contents\\_preproceedings-version.pdf](https://www.comsys.rwth-aachen.de/fileadmin/papers/2018/2018_matzutt_bitcoin-contents_preproceedings-version.pdf)> accessed 4 May 2020.

18 Case C275/06, Productores de Música de España (Promusicae) v Telefónica de España SAU, ECLI:EU:C:2008:54, para 70.

19 See <[www.topicolist.com](http://www.topicolist.com)> accessed 7 May 2020.

20 Art. 13 Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L156/43.

## II. The data controller

- 25 The GDPR defines the controller as the person who “determines the purpose of and means for processing personal data”.<sup>21</sup> In a blockchain context, often a central party can be distinguished who is responsible for offering a service. This party will also be considered to be the controller within the meaning of the GDPR, assuming that the service includes the processing of personal data. This party chooses the purpose (the service) and the means (e.g. a smart contract). For example, if a company collecting capital via an ICO uses a smart contract to code the ICO, it can itself be regarded as the controller since it determines purpose (ICO) and means (blockchain-based smart contract). If KYC obligations apply to the ICO, the issuing company processes the data that need to be collected. If a custom made blockchain is used for the ICO (which is rather the exception) in essence the same holds. Another example is an insurer that offers a form to claim for damages through a smart contract.<sup>22</sup> The insurer is responsible for the processing of personal data in the completed forms. An oracle that provides personal data to a smart contract will generally also be considered responsible for the delivery of personal data. Whoever offers a service will usually be apparent from the service on offer. For example, the person who presents himself as a service provider in a smart contract. If a service is offered anonymously, the identification of who is offering the service needs to look at other elements. Whoever has placed the smart contract on the blockchain could be an indication of this. Although blockchain considers decentralization to be of paramount importance, it is often possible to identify a central party that can function as a controller, in particular where the application is coded in Ethereum smart contracts.

### 1. More challenging cases

- 26 If the “application” is part of the core code, it is more challenging to find out who the controller is. Who is the controller of bitcoin transactions for example? The core developers are responsible for the code that constitutes the blockchain and its native

21 Art. 4 sub 7 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

22 Example borrowed from CNIL, *Blockchain. Premiers éléments d’analyse de la CNIL* (Sept. 2018).



cryptocurrency. They are however not involved in the day-to-day running of the blockchain. We will consider their role below.

- 27 That leaves us with the users and the administrators of nodes as potential data controllers in permissionless blockchains. However, it is not so easy to see who amongst them is a data controller and why. It depends very much on how their roles and mutual relations are perceived. Hereinafter, we discern three conceptualizations that represent three alternative views on permissionless blockchains and on the relationships amongst the main actors involved in the operation of the blockchain. The conceptualizations help to unravel some of the confusion that exist around permissionless blockchains and controllership under the GDPR. In a first conceptualization, the emphasis is on the users that together form a P2P network. In a second conceptualization, the full nodes together offer a service, and in the third conceptualization each full node is seen as an individual service provider.

#### a) The users form a P2P network with each other

##### (aa) What is the conceptualization?

- 28 This conceptualization closely follows the argumentation of Nakamoto. Users deal with each other without reliance on potentially untrustworthy intermediaries. If A pays bitcoins to B, A and B deal with each other directly. The administrators of automated nodes in between are discarded from the picture. The system of crypto-economic incentives ensures that the administrators individually cannot influence the global state of the blockchain. Their involvement is of a passive nature. They provide technical support to the functioning of the blockchain. They blindly execute the protocols of the blockchain.

##### (bb) How does it map to the GDPR?

- 29 A user sends data to the blockchain that are then further processed within the blockchain. The user instigates the initial sending of the data and is therewith controller of this initial transmission.<sup>23</sup>

23 Compare Case C40/17, *Fashion ID GmbH & Co. KG v Verbraucherzentrale NRW e.V.* [2018] ECLI:EU:C:2018:1039. The Fashion ID case concerns a Facebook like-button on a webpage, causing data about visitors to the website to be sent to and further processed by Facebook, irrespective of whether the visitors pressed the button. The question was

An interesting question is whether there are circumstances under which the GDPR considers the user (A in the example above) also as the controller of processing that occurs subsequent to transmission, i.e. when the data are with the administrators? The strongest argument for the user as a controller is that he chooses to use a certain blockchain or blockchain application. Therewith he also chooses the processing of data that flows from his choice. This is in line with the conclusion of AG Bot in the *Wirtschaftsakademie* case. Bot indicates that a Facebook fan page administrator should be seen as a controller, because he makes the processing possible by creating and operating the fan page,<sup>24</sup> even though he may foremost be seen as a user of Facebook.<sup>25</sup> It is also in line with the guidance document of the French CNIL where it says: “les participants, qui ont un droit d’écriture sur la chaîne et qui décident de soumettre une donnée à la validation des mineurs peuvent être considérés comme responsables de traitement.”<sup>26</sup> The CNIL seems to have thought in this context primarily of a user acting in a commercial or professional capacity. An example may be a public notary performing a payment for a client. The CNIL shirks back from the implications controllership has for a private user. It states that a user acting in a private capacity falls under the household exception. It is however unclear whether a private person placing a transaction on a public blockchain can also shelter under the household exception.<sup>27</sup> The Bitcoin blockchain is a public blockchain and the personal data of a Bitcoin payment’s recipient (B’s pseudonym in the example) become available to anybody. A private user would thus become a controller after all.<sup>28</sup>

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whether the manager of the webpage who placed the Like-button on the page, was a controller together with Facebook for the collection of the visitors’ data and their disclosure by transmission. The CJEU found the manager’s determination of means contingent on 1. his awareness of collection and disclosure of personal data to Facebook and 2. his decisive influence over collection and transmission which would not have occurred without the plug-in (C-40/17, paras 77-78). His purpose was commercial advantage (C-40/17, para 80).

24 Case C-210/16 *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH*, Opinion of AG Bot, [2018] ECLI:EU:C:2017:796, para 56.

25 Case C-210/16 *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH*, Opinion of AG Bot, [2018] ECLI:EU:C:2017:796, para 53.

26 CNIL (n 23) 2.

27 CNIL (n 23) 3. CNIL does not indicate whether this also holds if the personal data are placed on a public blockchain.

28 According to the old Lindquist-ruling of the CJEU, decided

30 Even though much points in the direction of the user as controller, some doubt can be derived from the ruling of the EUCJ in the *Wirtschaftsakademie* case. Even though the court decided that the fan page administrator was a controller, it did not rely on the argument that AG Bot brought forward. The court rather made the argument that a fan page administrator defines the parameters for the data processing and therewith influences the processing of the data itself.<sup>29</sup> That is much less the case with Bitcoin transactions. Bar a few small things (conditional payments), the blockchain protocol determines the parameters for Bitcoin payments. For other blockchain applications, such would need to be assessed on a case-by-case basis.

31 Where proponents of blockchain tend to present the blockchain as an environment in which users interact directly with each other, without reliance on intermediaries, the GDPR will not look away from the administrators of full nodes. They are likely seen as data processors (see section III.2) or even joint controllers (see below).

### (cc) How to assess its mapping to the GDPR?

32 Assuming that the user is either individually or jointly a controller, is he able to fulfil his responsibilities as a controller? For fulfilling his responsibility, the user is dependent on the administrators of full nodes who perform the actual processing. The user as a data controller needs to make binding contracts with the full nodes who act as data processors or arrive at an arrangement where they are joint controllers.<sup>30</sup> In practice, it is not very well possible to conclude contracts with full nodes, because in a permissionless blockchain, there are many administrators, their identities may be unknown, new administrators may join anytime, just as old nodes may leave. In practice, no contracts are concluded at all. Even if a contract would come about, it is not at all certain that the

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under directive 95/46/EC, an internet publication falls outside the household exception (source: Case C-101/01 *Sweden v Bodil Lindqvist* [2003] ECR I-12971, para 47). See also Vonne Laan 'Privacy en blockchain: wanneer is er voor wie privacywerk aan de winkel?' (2018) (1)(4) *Tijdschrift voor Internetrecht* section 3.2. Recital 18 GDPR seems to draw the boundaries of the household exception wider: "Personal or household activities could include correspondence and the holding of addresses, or social networking and online activity undertaken within the context of such activities."

29 Case C-210/16 *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH*, [2018] ECLI:EU:C:2018:388, para 36.

30 Art. 28 lid 3 GDPR.

user as a controller can exercise the necessary control over the full nodes. They will for example most probably be unable to delete data from the blockchain, to fulfil a request based on the right to be forgotten. Such deletion would render their participation in the blockchain pointless, as was described in section B above.

33 In practice, the main instrument of the user/controller to exert influence is to vote with his feet: the user/controller can compare various blockchains and if they exhibit relevant privacy-differences, choose the blockchain that best suits his data protection needs. In practice, this may come down to a user/controller having to opt for a permissioned blockchain that does not rely on crypto-economic incentives alone.

### b) The administrators of nodes collectively offer a service

#### (aa) What is the conceptualization?

34 The administrators of full nodes together offer a service, such as enabling payments with a cryptocurrency. It perceives the blockchain administrators as a collective middleman. This conceptualization does not sit well with how proponents of blockchains usually portray them. The nodes forming the network in a permissionless blockchain never agreed amongst each other to form a network offering such service. Nodes can join or leave a permissionless blockchain at will. The coordination of their actions rests on a system of crypto-economic incentives, not on an agreement. The participation of nodes is motivated by their self-interest and they are indifferent to the result their participation gives rise to. Nevertheless, the conceptualization is worth exploring. Even though proponents of blockchains do not see the collective administrators as an intermediary, they do see the blockchain as a substitute for a traditional intermediary, such as a bank. Not seeing the collective administrators as a middleman, is to a large extent a form of framing to sell the idea that the blockchain is a technology that makes trust in middlemen superfluous.

#### (bb) How does it map to the GDPR?

35 Can the administrators of full nodes be joint controllers as meant in art. 26(1) GDPR? Thereto, it is required that two or more controllers jointly determine the purposes and means of processing. The CJEU ruled in the *Wirtschaftsakademie* case

that a Facebook fan page administrator “by its definition of parameters depending in particular on its target audience and the objectives of managing and promoting its activities”, contributed its part in setting means and purpose.<sup>31</sup> In the context of a permissionless blockchain, the full nodes cannot individually set the parameters of the core implementation, but together they can strongly influence the way the blockchain processes data. Core developers who can change the software are dependent on the administrators to adopt updated software. Without the administrators’ adoption a change in the software will have no material effect. That is a strong argument for the administrators’ controllership, in fact their joint controllership.

- 36 In the literature it has been argued that full nodes do not jointly determine purpose and means, because they do not conclude an agreement with each other:<sup>32</sup> a new administrator does not accede to an agreement, but he enters in a system ruled by crypto-economic incentives and involving certain data processing that he understands. Could the lack of a pre-existing agreement bar the finding of a “joint determination”? The GDPR does not require in so many words an agreement for finding a joint determination of purposes and means.<sup>33</sup> AG Bot in his conclusion in the *Wirtschaftsakademie* case stated that controllership is a functional concept. It is more about where the factual influence lies and relies much less on a formal analysis.<sup>34</sup> This underlines that even if there would be a contract, that the contract is not automatically determinative for controllership.<sup>35</sup>

31 Case C-210/16 *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH*, [2018] ECLI:EU:C:2018:388, para 39.

32 Rainer Böhme and Paulina Pesch, ‘Technische Grundlagen und datenschutzrechtliche Fragen der Blockchain-Technologie’ [2017] DuD 473, 479.

33 Art. 26(1) GDPR. Finck (n 1) 100, however seems to see an arrangement as a condition for joint controllership.

34 Case C-210/16 *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH*, Opinion of AG Bot, [2018] ECLI:EU:C:2017:796, para 46.

35 This is in line with how the art. 29 WP approaches the term ‘determine’ (admittedly in the context of a single controller) in Opinion 1/2010 on the concepts of “controller” and “processor”, WP 169, 16 February 2010, 8. In the same vein also Christian Wirth and Michael Kolain, *Privacy by Blockchain Design: A Blockchain-enabled GDPR-compliant Approach for Handling Personal Data* (Reports of the European Society for Socially Embedded Technologies, 2018) <[dx.doi.org/10.18420/blockchain2018\\_03](https://doi.org/10.18420/blockchain2018_03)> accessed 21 October 2019, 5 and R Mahieu, J van Hoboken and H. Asghari, ‘Responsibility for Data Protection in a Networked

The argument that the administrators of nodes never agree amongst each other is thus not determinative under the GDPR.

- 37 Obviously, once parties have been found to be joint controllers, they need to determine their respective responsibilities by means of an arrangement.<sup>36</sup> That is however the legal consequence of being joint controllers, rather than a requirement for finding joint controllership in the first place.
- 38 The administrators of full nodes will usually not have actual knowledge of the personal data their computer systems process. Theoretically, they could know since permissionless blockchains are always public, but the volumes of data are usually too big for an administrator to obtain actual knowledge. Nevertheless, their lack of actual knowledge is not an objection against a finding of joint controllership. The CJEU decided in the *Google Spain* case, that a search engine can be a controller even though it does not have control over the personal data third parties publish on their websites.<sup>37</sup> In the *Jehovan* case, the CJEU decided that joint controllership does not require that each controller has access to the personal data.<sup>38</sup>
- 39 In the STOA report of 2019, it is remarked that the GDPR rules about joint controllership are unclear.<sup>39</sup> Each joint controller is fully responsible towards data subjects, but at the same time it is observed that there may be controllers amongst the “joint controllers” that are factually unable to take the measures that are needed to discharge themselves

World: On the Question of the Controller, “Effective and Complete Protection” and its Application to Data Access Rights in Europe’, (2019) 10 *Jipitec* 39, 44, para 21. CNIL does not directly address this issue: “Lorsqu’un groupe de participants décide de mettre en oeuvre un traitement ayant une finalité commune, [ ... ] tous les participants pourraient être considérés comme ayant une responsabilité conjointe, conformément à l’article 26 du RGPD [ ... ].” CNIL (n 23) 3.

36 Art. 26(1) GDPR.

37 Case C131/12 *Google Spain SL, Google Inc v Agencia Espanola de Proteccion de Datos (AEPD) and Maria Costeja Gonzalez* [2014] ECLI:EU:C:2014:317, 34.

38 Case C-25/17, *Tietosuojavaltuutettu and Jehovan todistajat – uskonnollinen yhdyskunta* [2018] ECLI:EU:C:2018:551, 69.

39 European Parliament, ‘Blockchain and the General Data Protection Regulation. Can distributed ledgers be squared with European data protection law?’ (STOA) 54-55, <[https://www.europarl.europa.eu/RegData/etudes/STUD/2019/634445/EPRS\\_STU\(2019\)634445\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/634445/EPRS_STU(2019)634445_EN.pdf)> accessed 25 May 2020.

of their responsibility. In my view that is not so much an issue of lack of clarity. The GDPR leaves it rather to the parties (the joint controllers) to resolve this. The controllers who are not able to take the measures themselves, must make sure there is an arrangement in place that allows them to require other controllers to take the necessary measures. That this is hard to achieve in the context of permissionless blockchains in their current form is something else and does not necessarily mean that rules need to be relaxed for systems that do not very well allow responsibility to be attributed.

that cannot be solved by placing controllership with another party. However an agreement would be part of a nascent governance structure for a blockchain. A further developed governance structure may be able to resolve issues that go beyond merely fulfilling the duties of a controller and allow a blockchain to adapt to any changing circumstances in the environment in which it functions.

### c) Each full node is an individual controller only for his own processing operations

#### (cc) How to assess the mapping to the GDPR?

- 40 To exercise certain responsibilities (such as the duty to correct data, to erase data or certain transparency obligations) the administrators within the blockchain need to cooperate with each other. However, the blockchain coordinates only a (payment) transaction service, and there are no crypto-economic incentives to coordinate compliance with the GDPR. Theoretically, somebody may devise a crypto-economic system of incentives to comply with the GDPR. However, for the time being it is unclear how such system could be made.
- 41 The only practical way for nodes to realise joint control is to ensure that the nodes arrive at an arrangement in the form of a traditional agreement amongst each other. The current practice is not that nodes in a permissionless blockchain make an agreement.
- 42 If they would, this brings compliance with the GDPR much closer. Data subjects would know whom to address. Additional technical and organisational measures in the context of security, privacy-by-design and privacy-by-default could be realised. The administrators of nodes would collectively be able to influence what personal data for what purposes would be collected and processed. The nodes together would be a strong countervailing force against the core developers. However not all problems may prove solvable, such as deletion of old data from the blockchain.<sup>40</sup> That is something

#### (aa) What is the conceptualization?

- 43 In this conceptualization, the administrator of a full node provides an individual service, for example consisting in verification of transactions. This conceptualization strongly builds on the idea that no contracts exist between administrators of nodes. Each node is an individual entrepreneur who participates in the blockchain and adheres to its protocol strictly from a well-understood self-interest. The activities of full nodes are purely coordinated via the core code of the blockchain and the incentives it creates. This is a technical and economic orchestration.

#### (bb) How does the conceptualisation map to the GDPR?

- 44 Each administrator is only a controller for the processing of personal data he performs.<sup>41</sup> He determines purpose and means by choosing which blockchain to participate in. An administrator has two roles: on the one hand the role of full node, on the other hand the role of miner (in Bitcoin and Ethereum 1.0) or validator (in Ethereum 2.0). The roles can also be divided over separate actors. The task of the full node is to check whether transactions conform to the protocol and to store a copy of the blockchain. His purpose is to select or reject transactions for inclusion in a block and the means is a check of a transaction against data present in the blockchain. His activity is directly involved with the

<sup>40</sup> There are academic explorations seeking to create a permissionless blockchain from which data can be deleted. For example: Martin Florian, Sophie Beaucamp, Sebastian Henningsen, Björn Scheuermann 'Erasing Data from Blockchain Nodes' 2019 Humboldt Universität zu Berlin / Weizenbaum Institute. <<https://arxiv.org/pdf/1904.08901.pdf>> accessed 22 October 2019. They present a system that allows some nodes to erase data as long as there are other nodes that maintain the entire chain. Another example: Dominic Deuber, Bernardo Magri and Sri Aravinda Krishnan Thyagarajan 'Redactable Blockchain in the Permissionless

Setting' December 4, 2018 <[https://bernardomagri.eu/wp-content/uploads/2018/12/redactable\\_permissionless.pdf](https://bernardomagri.eu/wp-content/uploads/2018/12/redactable_permissionless.pdf)> accessed 22 October 2019. They developed a system in which administrators can vote about deletions. These solutions are theoretical and have not been proven in practice.

<sup>41</sup> Luis-Daniel Ibáñez, Kieron O'Hara, and Elena Simperl, *On Blockchains and the General Data Protection Regulation* (University of Southampton 2018) pt 3, 4. Laan (n 29) classifies this as differentiated controllership.



personal data in a transaction and has a function that is relevant in society (prevention of double spending for example). The task of the miner or validator is to contribute to a decision about what block to include in the canonical blockchain and make sure the versions or copies of the blockchain stay in sync with each other. This is a more technical task and its first focus is a block, not an individual transaction or the personal data contained therein. This also makes it difficult to formulate what the purpose of a miner or validator in relation to the personal data is. A miner is not a controller. In this light, it can be understood that a miner is often compared with an administrator of an email server.<sup>42</sup> Such an administrator is not a controller of the personal data contained in the body of an e-mail message.<sup>43</sup> What holds for the miner, also holds for the validator. He performs the same function. That a validator does not perform calculations is not relevant. A miner is a controller because of the role he fulfils. The precise activities (calculations) are not so relevant, rather the function the activities play. That said, it must be borne in mind that the term validator is somewhat misleading because it might suggest that in Ethereum 2.0 no distinction is made between a validator and a full node.

### (cc) How to assess the mapping to the GDPR?

- 45 For the data subject exercising his rights, it is of little interest to obtain the cooperation of a single node. Unlike the WWW, where it may be useful to have one's personal data removed from a website – even though the same data may be present on another website – exercising one's rights affecting one copy or version of the blockchain has markedly less effect. The different copies or versions of a blockchain stand in much closer rapport. The versions are compared frequently to know which versions represent the valid chain. Exercising one's rights vis-à-vis one version has no effect if other versions remain unaffected. Moreover, removing data from a version of the blockchain almost certainly disqualifies this version from meaningful participation in the blockchain.

42 M. Martini & Q. Weinzierl, 'Die Blockchain-Technologie und das Recht auf Vergessenwerden' [2017] *Neue Zeitschrift für Verwaltungsrecht* 1251, section II(2)(a). Also European Union blockchain observatory and forum, *Blockchain and the GDPR*, 2018, 18. European Parliament (n 40) 46 <[https://www.europarl.europa.eu/RegData/etudes/STUD/2019/634445/EPRS\\_STU\(2019\)634445\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/634445/EPRS_STU(2019)634445_EN.pdf)> accessed 5 May 2020.

43 Recital 47 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

- 46 A data subject exercising his rights needs coordination within the blockchain, so that effect is given to his rights in many or even all versions of the blockchain. As we have seen above, a permissionless blockchain does not support such coordination. In fact, with each administrator of a full node being a separate controller for only his own data processing, the task (and cost) of coordination is shifted to the data subject. He would need to address many individual nodes separately. This makes it practically impossible for the data subject to exercise his rights. In other words, the cost of the coordination problem, is laid at the doorstep of the data subject. In terms of the GDPR, the data processing is not transparent for the data subject.<sup>44</sup>

### d) The core developers

- 47 Could the core developers be seen as joint controllers together with the actor(s) that have above been identified as potential controllers? The core developers write the code that when run by nodes constitutes the blockchain and its native cryptocurrency. As code-writers they initially set many parameters. For example they code how a user performing a payment with the crypto-currency authenticates him or herself. They also set the purpose initially. For example, they build a system for payments with a crypto-currency or an ICO. However, code alone is not a blockchain. It only becomes a blockchain if administrators decide to adopt the code. For decisions on the development of the code, a governance structure is usually in place. Even though the core-developers surely have a say, the goal of the governance structure is usually to give other stakeholders, such as the administrators, influence as well. Furthermore, actual personal data do not flow through the computer systems of the core-developers. They only provide the technology. That does not necessarily mean that they cannot be a joint-controller. In the Jehovah case, the CJEU decided that not every joint controller needs to have access to the personal data.<sup>45</sup> Hence, the law does not preclude that core developers are joint-controllers. However, a strong argument to see these technology providers as controllers does not exist either.

44 Laan (n 29) pt 3.3.

45 Case C-25/17, *Tietosuojavaltuutettu and Jehovan todistajat – uskonnollinen yhdyskunta* [2018] ECLI:EU:C:2018:551, 69.

### III. The processor of personal data

- 48 The “processor” is a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller (art. 4(8) GDPR). For an actor to be a processor, it needs to be on the one hand a “separate legal entity with respect to the controller and on the other hand processing personal data on his behalf”.<sup>46</sup>
- 49 In a permissionless blockchain where an application is embedded in the core code, it depends on the factual relationship between a full node and a miner whether the latter can be said to act on behalf of the former. Full node and miner may even be roles that are united in one entity (in which case the miner obviously is not a processor), but it may also be separate entities that have tighter or closer relations towards each other. The qualification of a miner as processor would then come to depend on the peculiarities of the individual case. Could a miner be a processor acting on behalf of a user/controller?<sup>47</sup> This appears to be rather unlikely. Users do not know the miners and do not have contractual relations with them.

### D. Conclusion

- 50 Who is or are the controller(s) in permissionless blockchains? This article has approached this question by asking where to place the prime responsibility: with the user, with the administrators of full nodes collectively or with the administrators of full nodes individually? In the *Wirtschaftsakademie* case and *Fashion ID* case, the CJEU took a broad approach in order ensure complete and effective protection of the data subject.<sup>48</sup> When examining who sets purposes and means of data processing, the court took a functional approach, asking who set(s) the parameters for the data processing.

46 Art. 29 WP, Opinion 1/2010 on the concepts of “controller” and “processor”, WP 169, 25.

47 This is also relevant in cases where the application for which personal data are processed is a user-defined smart contract.

48 Concept of complete and effective protection mentioned in Case C-210/16 *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH*, [2018] ECLI:EU:C:2018:388, para 28 and in Case EUCJ, 29 July 2019, C40/17, *Fashion ID GmbH & Co. KG v Verbraucherzentrale NRW e.V.* [2018] ECLI:EU:C:2018:1039, para 66.

- 51 Turning to our case of a permissionless blockchain and the three conceptualizations of the relations between actors in a permissionless blockchain, the following picture emerges.
- 52 First, could the user be a controller? Where the user does not place the code of a smart contract on the blockchain (but for example uses an application embedded in the core code), the user has only limited possibilities to set the parameters of data processing. Nonetheless, it can be desirable to designate the user who is a professional party as a joint controller together with the administrators, because it creates a clear addressing point for a data subject seeking to exercise his or her rights. Especially from the perspective that the choice of controller(s) should ensure a complete and effective protection, this approach is beneficial.
- 53 Seeing the administrators of full nodes as individual controllers strictly for their own data processing on their servers sits well with the way in which proponents of blockchains see them: downplaying the role of administrators as individual actors that have little influence on the blockchain overall. From a GDPR perspective this is not acceptable. Complete and effective protection of the data subject requires coordination within the blockchain. In this conceptualization, the problem of achieving coordination is completely laid at the doorstep of the data subject. He needs to approach sufficiently many administrators to get the global state of the blockchain changed, if he or she succeeds at all. This does not give complete and effective protection.
- 54 Seeing the administrators as joint controllers together with the core developers is the strongest argument. They have the largest influence on the data processing that takes place. Currently, a joint controllership of administrators in a permissionless blockchain may not function very well. De facto administrators may be individual entrepreneurs that do not conclude an arrangement amongst each other as required by art. 26 GDPR. However, it is questionable whether that is a situation that will last. In the end, a blockchain is a living phenomenon that adapts and grows with changing needs. From a broader governance perspective, administrators will want to have influence on the further development of their blockchain and not leave it completely to a select group of core developers. The practical demands on a system that has to function in a changing environment will drive administrators to collective arrangements on the governance of their blockchain. This lays the basis for joint controller arrangements.
- 55 Those that see blockchain as the ultimate means to make intermediaries superfluous, might have preferred the view that no controller at all could

be identified. That is however a possibility that the law seeks to prevent. The CJEU defines the concept broadly to ensure effective and complete protection of the data subject.<sup>49</sup> It is indeed difficult to imagine how data protection could be realized without any actor having to take responsibility and for the data subject no address to turn to when exercising his or her rights.

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<sup>49</sup> Case EUCJ, 29 July 2019, C40/17, *Fashion ID GmbH & Co. KG v Verbraucherzentrale NRW e.V.* [2018] ECLI:EU:C:2018:1039, paras 65, 66 & 70. Case C-210/16 *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH*, [2018] ECLI:EU:C:2018:388, paras 26-28 & 42.

# „Datenzugang, Verbraucherinteressen und Gemeinwohl“

Bericht über die Verbraucherrechtstage 2019 des Bundesministeriums der Justiz und für Verbraucherschutz in Berlin, 12. und 13. Dezember 2019

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**Abstract:** This report summarizes the conference “Verbraucherrechtstage 2019” (“Consumer Law Days 2019”), organised by the German Federal Ministry of Justice and Consumer Protection on 12 and 13 December 2019 in Berlin. This year’s topic was data access with a special emphasis on consumer interests and public welfare. Leading legal and economic scholars as well as public servants and politicians came together to engage in fruitful discussions on designing the regulatory framework for data access

in the digital economy. The conference was divided into four academic panels covering the wider economic and legal framework for data access, existing data access regimes and potential need for amendments. It additionally featured keynote speeches on current political developments and a concluding, policy-oriented panel discussion. An English language conference volume is expected to be published in the course of 2020.

## A. Hintergrund der Konferenz

- 1 Am 12. und 13. Dezember 2019 fanden die diesjährigen Verbraucherrechtstage des Bundesministeriums der Justiz und für Verbraucherschutz (BMJV) zum Thema „Datenzugang, Verbraucherinteressen und Gemeinwohl“ in Berlin statt. Die wissenschaftliche Konzeption der Tagung erfolgte durch das Max-Planck-Institut für Innovation und Wettbewerb in München unter Leitung von Prof. Dr. *Josef Drexl*, Direktor des Instituts und Honorarprofessor an der Ludwig-Maximilians-Universität München, der auch im Wesentlichen die Moderation übernahm. Gegenstand der Veranstaltung war die Analyse des rechts- und wirtschaftswissenschaftlichen Rahmens für die Ausgestaltung aktueller und künftiger Daten Zugangsregime in der digitalen Wirtschaft.

## B. Tag 1: Grundlagen und bestehender Ordnungsrahmen für den Datenzugang

### I. Eröffnung, Begrüßung und Einführung

- 2 Die Eröffnung und Begrüßung erfolgte durch Frau Parlamentarische Staatssekretärin *Rita Hagl-Kehl*, MdB, BMJV. Sie betonte die Wichtigkeit des Zugangs zu Daten als Grundlage und „Treibstoff“ der Digitalisierung in verschiedensten Bereichen, vom Gesundheitssektor bis hin zu intelligenten Transportsystemen. Sodann stellte *Hagl-Kehl* die Bedeutung der Verbraucherinteressen und des Datenschutzes gegenüber rein ökonomisch basierten Regulierungsperspektiven heraus.



Abschließend gab Hagl-Kehl einen Überblick über aktuelle rechtspolitische Initiativen wie den „Daten für alle“-Vorschlag eines SPD-Positionspapiers,<sup>1</sup> die Datenstrategie der Bundesregierung,<sup>2</sup> die 10. GWB-Novelle<sup>3</sup> und die Empfehlungen der Kommission Wettbewerbsrecht 4.0<sup>4</sup> und der Datenethikkommission<sup>5</sup>.

- 3 Sodann führte Drexel in den wissenschaftlichen Rahmen der Tagung ein. Er betonte die durch eine funktionierende Wirtschaft gewährleistete Wohlfahrtsförderung als zentrales Gemeinwohlinteresse. Zwischen kollektiven Verbraucherinteressen und wettbewerbsrechtlichen Zielsetzungen bestehe traditionell kein Konflikt. In der Digitalwirtschaft könnten individuelle Verbraucherinteressen an Datenschutz aber sehr wohl mit dem Kollektivinteresse an der Förderung sozialer Wohlfahrt kollidieren. Dabei sei indes zu berücksichtigen, dass der (insbesondere technische) Datenschutz auch als Innovationsmotor wirken könne und ihm überdies eine wichtige Rolle für das Funktionieren demokratischer Prozesse zukomme. In diesem Kontext sei auch die anthropologische Gefahr der Digitalisierung im Blick zu behalten, dass die zunehmende Abnahme selbstbestimmter Entscheidungen durch digitale Assistenten wie Alexa die menschliche Fähigkeit zum Handeln als verantwortungsvoller Staatsbürger beeinflusse. Drexel begrüßte, dass, entsprechend

Forschungsergebnissen des Max-Planck-Instituts,<sup>6</sup> die juristische Datendebatte sich von der Eigentums- auf die Zugangsfrage verlagert habe. Allerdings sei das Recht, insbesondere das Zivilrecht, für die Umsetzung von Zugangsregeln schlecht vorbereitet. Eine weitere Herausforderung liege in der zunehmenden Vernetzung ehemals isolierter Rechtsgebiete. Die zentrale Ausgangsfrage gehe allerdings dahin, ob es überhaupt neuer Regeln bedürfe – sei es zur Korrektur eines Marktversagens, sei es zur Förderung nicht ökonomischer Gemeinwohlbelange – oder ob nicht die Märkte selbst in der Lage seien, hinreichenden Datenzugang sicherzustellen. Bei der Ausgestaltung etwaiger Zugangsrechte werde es wohl darum gehen, einen angemessenen Mittelweg zwischen den denkbaren Extremen „access by default“ und „exclusivity by default“ zu finden, wobei festzustellen sei, dass Ausschließlichkeit bis zu einem gewissen Grade schon aufgrund faktischer Datenkontrolle bestehen könne.

## II. Panel 1: Bedarf es eines besseren Zugangs zu Daten?

### 1. Vorträge

- 1 Andrea Nahles, Digitaler Fortschritt durch ein Daten-für-Alle-Gesetz, 12.2.2019, <<https://www.spd.de/aktuelles/daten-fuer-alle-gesetz/>> (zuletzt aufgerufen am 25.2.2020).
- 2 Eckpunkte einer Datenstrategie der Bundesregierung, 18.11.2019, <<https://www.bundesregierung.de/resource/blob/997532/1693626/e617eb58f3464ed13b8ded65c7d3d5a1/2019-11-18-pdf-datenstrategie-data.pdf>> (zuletzt aufgerufen am 25.2.2020).
- 3 Entwurf eines Zehnten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 (GWB-Digitalisierungsgesetz), 24.1.2020 <<https://www.bmwi.de/Redaktion/DE/Downloads/G/gwb-digitalisierungsgesetz-referentenentwurf.html>> (zuletzt aufgerufen am 25.2.2020).
- 4 Bericht der Kommission Wettbewerbsrecht 4.0, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, 9.9.2019, <<https://www.bmwi.de/Redaktion/DE/Publikationen/Wirtschaft/bericht-der-kommission-wettbewerbsrecht-4-0.html>> (zuletzt aufgerufen am 25.2.2020).
- 5 Gutachten der Datenethikkommission, 23.10.2019, <<https://www.bmi.bund.de/DE/themen/it-und-digitalpolitik/datenethikkommission/arbeitsergebnisse-der-dek/arbeitsergebnisse-der-dek-node.html>> (zuletzt aufgerufen am 25.2.2020).

- 4 Christian Reimsbach-Kounatze, M.Sc., Internet-Ökonom und Politikanalyst beim OECD-Direktorat für Wissenschaft, Technologie und Innovation (STI), eröffnete das Panel mit einer Vorstellung des wirtschaftlichen Rahmens datengetriebener Innovation. Daten sollten wegen ihrer ökonomischen Merkmale, nämlich Nicht-Rivalität im Konsum und „general purpose input“, als Infrastruktur betrachtet werden und seien unter anderem zentral für Systeminteroperabilität z.B. in „smart cities“ und für künstliche Intelligenz. Die Datennutzung durch Unternehmen habe stark zugenommen, vor allem in großen Unternehmen, nicht jeder Sektor sei aber gleich datenintensiv. Eine wichtige Möglichkeit, den Datenzugang zu sichern, sei der Aufkauf kleiner durch große Unternehmen. Datenzugang biete nicht nur erhebliche gesellschaftliche Vorteile,

- 6 Positionspapier des Max-Planck-Instituts für Innovation und Wettbewerb „Ausschließlichkeits- und Zugangsrechte an Daten“ vom 16.8.2016, <[https://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/MPI-Stellungnahme\\_Daten\\_2016\\_08\\_16\\_final.pdf](https://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/MPI-Stellungnahme_Daten_2016_08_16_final.pdf)>; Position Statement of the Max Planck Institute for Innovation and Competition of 26 April 2017 on the European Commission’s “Public consultation on Building the European Data Economy”, <[https://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/MPI\\_Statement\\_Public\\_consultation\\_on\\_Building\\_the\\_EU\\_Data\\_Eco\\_28042017.pdf](https://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/MPI_Statement_Public_consultation_on_Building_the_EU_Data_Eco_28042017.pdf)> (beide zuletzt aufgerufen am 25.2.2020).

sondern gehe auch mit Kosten, insbesondere Opportunitätskosten, und Missbrauchsrisiken im Hinblick auf Individuen einher. Die entsprechenden Spannungsverhältnisse gelte es aufzulösen, wobei die richtige Balance aus „Openness“ und „Closeness“ zu finden sei und drei potentiell konfligierende Sphären zu berücksichtigen seien, nämlich Persönlichkeitsrechte, Eigentumsrechte und öffentliche Interessen. Rechtsansprüche auf Daten seien nach Art und Herkunft der Daten zu differenzieren, etwa ob diese vom Nutzer freiwillig zur Verfügung gestellt oder aus eigener Unternehmensleistung abgeleitet seien. Zu berücksichtigen sei auch, dass ein Großteil der Bevölkerung zur tatsächlichen Geltendmachung etwaiger Rechte nicht hinreichend in der Lage sei. Die OECD arbeite derzeit nach dem Vorbild der Privacy Guidelines aus den 1980er Jahren an allgemeinen Prinzipien und Empfehlungen für den Datenzugang.<sup>7</sup>

- 5 Bertin Martens, Ph.D., leitender Ökonom bei der Gemeinsamen Forschungsstelle (Joint Research Centre, JRC) der Europäischen Kommission in Sevilla, erläuterte sodann die ökonomischen Grundlagen des Datenzugangs. Quellen für Wohlfahrtsgewinne seien die charakteristische Nicht-Rivalität in der Nutzung und die Aggregation komplementärer Datensets. Die Notwendigkeit regulatorischer Intervention hänge vornehmlich vom Vorliegen eines Marktversagens ab, ökonomisches Ziel sei die Maximierung sozialer Wohlfahrt, das Teilen von Daten ein grundsätzlich geeignetes Instrument hierzu, dagegen kein Selbstzweck. Ein Marktversagen könne sich im vorliegenden Kontext aus Monopolstellungen, externen Effekten (etwa Zugang zu Gesundheits-Datenbanken), Transaktionskosten, Risiken bei Datentransaktionen (adressierbar durch Intermediäre) sowie asymmetrischer Information (etwa überlegene Position von Plattformen) ergeben, aber auch aus staatlicher Regulierung („regulatory failure“). Daneben könne aber auch zu Verteilungszwecken in den Markt eingegriffen werden, etwa in Diskriminierungskontexten, wo sich unter anderem die Frage nach der Übertragbarkeit der FRAND-Debatte auf Datenmärkte stelle. Zur Korrektur eines festgestellten Marktversagens könnten sektorale oder horizontale regulatorische Eingriffe, aber auch marktbasierende Lösungen dienen, wobei ein binäres Denken in Kategorien des Öffentlichen und des Privaten zu vermeiden und insbesondere das Potential von Dritt-Intermediären zur Reduktion von Risiken und Transaktionskosten zu nutzen sei.

<sup>7</sup> Bisherige Studien der OECD zur Daten-Governance finden sich auf [www.oecd.org/internet/ieconomy/enhanced-data-access.htm](http://www.oecd.org/internet/ieconomy/enhanced-data-access.htm) (zuletzt aufgerufen am 25.2.2020).

- 6 Prof. Dr. Heike Schweitzer, Humboldt-Universität Berlin, behandelte sodann den Datenzugang aus wettbewerbspolitischer und kartellrechtlicher Sicht. Private Vereinbarungen von Unternehmen über Datenzugang in Gestalt von Sharing- und Pooling-Modellen fänden praktisch in erheblichem Umfang bereits statt, insbesondere in Vertikalbeziehungen, und seien im Ausgangspunkt pro-kompetitiv, da innovationsfördernd. Sie könnten aber auch wettbewerbsrechtlich problematisch sein, wenn etwa Dritten nicht oder nur zu unangemessenen Konditionen Zugang zum Pool gewährt werde. Der in Ansehung fehlender Fallpraxis für Unternehmen fehlenden Rechtssicherheit hinsichtlich der kartellrechtlichen Zulässigkeit solcher Arrangements könnte durch ein neues Anmeldeverfahren bei der Europäischen Kommission begegnet werden. Dort, wo eine privatautonome Daten Zugangsvereinbarung scheitere, seien drei Szenarien von Daten Zugangsbegehren zu unterscheiden: Während der Zugang des Maschinennutzers zu den bei der Nutzung erzeugten, aber vom Maschinenhersteller kontrollierten Daten eher vertragsrechtlich als kartellrechtlich zu lösen sei, bilde der Zugang eines Anbieters von Komplementärdiensten zu Daten, die bei der Nutzung des Primärproduktes anfallen, den Schwerpunkt der wettbewerbsrechtlichen Debatte. Der Zugang zu großen Datenpools marktmächtiger Akteure zum Zwecke des Trainings von (selbstlernenden) Algorithmen sei wettbewerbsrechtlich – auch auf der Basis der „essential facilities“-Doktrin – nur schwer in den Griff zu bekommen. Zuletzt ging Schweitzer auf die Änderungen der 10. GWB-Novelle, insbesondere Datenabhängigkeit im Rahmen relativer Marktmacht nach § 20 GWB, besonders wichtig in „Aftermarket“-Fällen, und die neue Kategorie der Unternehmen mit „überragender marktübergreifender Bedeutung für den Wettbewerb“ nach § 19a GWB, ein. Insgesamt könne das durch Einzelfallanalyse und lange Verfahrensdauer charakterisierte Wettbewerbsrecht das systemische Problem des Datenzugangs allein nicht bewältigen, jedoch die übergreifenden Prinzipien und das analytische Fundament zur Verfügung stellen, auf denen sektorspezifische Regulierung aufbauen könne.

## 2. Diskussion

- 7 In der anschließenden Diskussion erklärte Martens, dass Intermediäre einige der Erscheinungsformen von Marktversagen beheben könnten, die durch Transaktionskosten und Risiken bei Datentransaktionen verursacht würden. Sie könnten jedoch das Fehlen klar definierter Erstzugriffsrechte auf Industriedaten nicht ersetzen. Diese Erstzugriffsrechte festzulegen, unterliege den Verhandlungsbefugnissen auf dem Datenmarkt.

Lock-Ins auf Datenmärkten würden durch die Expansionstendenzen des patentrechtlichen Software-Schutzes auf durch die Software generierte Daten verstärkt. Der ökonomische Wert von Privatheit sei wirtschaftswissenschaftlich unzureichend erforscht, sodass die Ökonomie zur Abwägung mit Datenschutzbelangen nichts beizutragen wisse.

- 8 Schweitzer erklärte, international betrachtet spiele Deutschland in dem Versuch, den Datenzugang kartellrechtlich zu erfassen, eine Vorreiterrolle. Allerdings seien auch die USA derzeit recht regulierungsfreudig und hätten das Verteilungsproblem wiederentdeckt – auch in Bezug auf die Digitalwirtschaft. Ein Export des § 20 GWB auf europäische Ebene sei indes schwierig, da das Konzept der relativen Marktmacht unionsrechtlich keine Verankerung habe. § 19a GWB werde für traditionelle Industrien eher keine Relevanz erlangen, da es dort regelmäßig an der marktübergreifenden „leveraging“-Position fehle.
- 9 Reimsbach-Kounatze merkte an, im rechtlichen Denken sei die Grundannahme privaten Eigentums von Daten sehr verbreitet. Die Idee der Datenportabilität sei, ohne Beschränkung auf personenbezogene Daten, von Ländern wie Australien und Japan aufgenommen worden und solle weiterverfolgt werden. Drexel schloss mit dem Gedanken, das mit dem Fehlen von Eigentum an Daten korrespondierende Fehlen von Schranken der Datennutzung stelle ein über das Kartellrecht hinausreichendes Problem dar, diesem könne aber (statt durch Eigentumsrechte) gerade durch sachgerecht ausgestaltete Zugangsregime abgeholfen werden.

### III. Panel 2: Der bestehende Ordnungsrahmen für Datenzugang

#### 1. Vorträge

- 10 Das zweite Panel befasste sich mit der Analyse des bestehenden Ordnungsrahmens für Datenzugang. Zunächst widmete sich Prof. Dr. Thomas Fetzer von der Universität Mannheim den verfassungsrechtlichen Aspekten des Datenzugangs. Er betonte, dass sich aus Art. 5 Abs. 1 Grundgesetz keine verfassungsunmittelbaren Datenzugangsrechte gegenüber dem Staat ergeben. Auch gebe es keine verfassungsrechtliche Gesetzgebungspflicht zur Schaffung von solchen Zugangsansprüchen. Der Gesetzgeber genieße bei der Schaffung von Zugangsansprüchen aber zugleich einen weiten Gestaltungsspielraum. So seien in

letzter Zeit eine Reihe von einfachgesetzlichen Zugangsansprüchen geschaffen worden, bspw. im Umweltinformationsgesetz oder im Informationsfreiheitsgesetz. Diese seien nicht durch das Grundgesetz vorgegeben worden, wohl aber in einigen Fällen durch das EU-Recht. Einmal geschaffene Zugangsansprüche könnten allerdings dem Schutz der Informationsfreiheit des Art. 5 Abs. 1 S. 1 Grundgesetz unterfallen, so dass sie nicht mehr ohne weiteres wieder aufgehoben werden könnten, selbst wenn keine Pflicht zu ihrer Schaffung bestanden habe. Soweit es um Zugangsansprüche des Staates zu Daten Privater gehe, genüge allein die Tatsache, dass es aufwendig und kostenintensiv sei, Daten zu duplizieren, nicht als verfassungsrechtlicher Rechtfertigungsgrund. Bei der Schaffung von Datenzugangsrechten Privater zu Daten Privater gelte dies auch, hier könne aber der Schutz des Wettbewerbs ein legitimer Zweck von Zugangsansprüchen sein. In Ausnahmesituationen sei es dabei auch denkbar, dass sich dieser Schutzauftrag zu einer Gesetzgebungspflicht verdichte. Bei der Schaffung jeglicher Datenzugangsrechte seien aber stets die (nationalen und europäischen) Grundrechte von möglichen Zugangsverpflichteten angemessen zu berücksichtigen. Gegebenenfalls bedürfe es hierzu finanzieller Kompensationsregelungen.

- 11 Sodann behandelte Prof. Dr. Indra Spiecker genannt Döhmann von der Goethe-Universität Frankfurt am Main den datenschutzrechtlichen Rechtsrahmen für Zugangsrechte. Einleitend unterstrich sie das Ziel des Datenschutzrechts, auf Verarbeitung von personenbezogenen Daten durch Einschränkung der Verarbeitungsbefugnisse einzuwirken – ohne dabei zu entscheiden, wem die Wertschöpfung aus der Datenverarbeitung zugewiesen wird –, sowie dessen Bürgerorientierung. Da Daten lebenslang an die Person gebunden seien, sei es nicht möglich, diese zu veräußern oder abzutrennen. Dennoch würden, da Menschen soziale Wesen seien, zwangsläufig große Mengen an Daten geteilt, und dies denke das Datenschutzrecht auch mit: Datenschutzrecht regele, was mit diesen Daten dann geschehen dürfe. Bei der Frage des Datenzugangs sei zu unterscheiden, ob das Datensubjekt selbst oder ein Dritter Zugang zu Daten begehrt. Das Datensubjekt könne entweder sein Recht auf Auskunft gemäß Art. 15 DSGVO<sup>8</sup> oder sein Recht auf Datenportabilität nach Art. 20 DSGVO geltend machen. Anders als das Recht auf Datenportabilität umfasse das Auskunftsrecht auch Informationen über die Verarbeitungsaktivitäten sowie Herausgabe von verarbeiteten Daten, der

8 Verordnung 2016/679 des Europäischen Parlaments und des Rates vom 27.4.2016 zum Schutz natürlicher Personen bei der Verarbeitung personenbezogener Daten, zum freien Datenverkehr und zur Aufhebung der Richtlinie 95/46/EG (Datenschutz-Grundverordnung), ABL. EU 2016 Nr. L 119, S. 1 (im Folgenden: DSGVO).

Verantwortliche könne das Datensubjekt jedoch daran hindern, diese Daten weiterzuverwerten. Dritte würden den Zugang zu Daten entweder mithilfe des Datensubjekts über Art. 20 DSGVO oder gemäß Art. 6 Abs. 1 bzw. Art. 9 DSGVO erlangen, denn Datenzugang sei eine bestimmte Art der Datenverarbeitung, weshalb die allgemeinen Regeln griffen. Bei der Entscheidung über den Zugang müsse man stets die spätere Verwertung im Blick haben, weil die spätere Zweckbestimmung über die Rechtmäßigkeit des Datenzugangs befinde. Somit schiebe die DSGVO einem generellen Pooling von personenbezogenen Daten, bei dem der Zweck erst später einseitig durch den Datenverwender festgelegt werde, einen Riegel vor.

- 12 Als Nächster untersuchte Prof. Dr. *Matthias Leistner* von der Ludwig-Maximilians-Universität München das Bestehen von Rechten an Daten nach geltendem Recht. Während der urheberrechtliche Schutz von Sammelwerken wegen sinnvoller Rechtsprechung des EuGH geringes Störpotenzial aufweise, könne der Sui-generis-Schutz von Datenbanken erhebliche Probleme verursachen. Der Begriff der Datenbank sei nämlich sehr breit; außerdem könne die Begrenzung der Schranken auf „wesentliche Teile“ von Datenbanken im Bereich der künstlichen Intelligenz, in dem für das Training von Algorithmen gesamte Datenbanken benötigt würden, erhebliche Probleme bereiten. Auch im IoT-Bereich sei die Bedeutung des Sui-generis-Schutzes von Datenbanken größer als von der Europäischen Kommission gedacht. Die (allerdings verfassungsrechtlich problematische) Abschaffung des Schutzes oder die Einführung von Zwangslizenzen könne dem Problem abhelfen. Realistischer sei jedoch eine Einschränkung bzw. Flexibilisierung des Schutzes durch Fallgruppenbildung unter Berücksichtigung der faktischen Möglichkeit, unabhängig vom Datenbankhersteller an die Daten zu gelangen. Andererseits könnte ein angemessener Schutz von KI-Trainingsdaten möglicherweise ausnahmsweise sinnvoll sein, um mithilfe von dessen Voraussetzungen, Ausnahmen und Einschränkungen die Offenlegung von Trainingsdaten in hinreichender Qualität zu fördern. Ferner müsse der systematisch ungelöste Konflikt zwischen dem Sui-generis-Schutz von Datenbanken und unterschiedlichen Zugangsregeln wie der Datenportabilität nach Art. 20 DSGVO zügig gelöst werden. Demgegenüber sei die Richtlinie zum Schutz von Geschäftsgeheimnissen<sup>9</sup> ein flexibleres und insgesamt „moderneres“ Schutzinstrument. Die problematischen Definitionen

<sup>9</sup> Richtlinie 2016/943 des Europäischen Parlaments und des Rates vom 8.6.2016 über den Schutz vertraulichen Know-hows und vertraulicher Geschäftsinformationen (Geschäftsgeheimnisse) vor rechtswidrigem Erwerb sowie rechtswidriger Nutzung und Offenlegung, ABl. EU 2016 Nr. L 157, S. 1.

des Schutzgegenstandes und der Schranken seien vage formuliert und ließen sich daher im Detail nachjustieren, bspw. durch Soft Law oder Best Practices.

- 13 Schließlich behandelte Prof. Dr. *Michael Grünberger* von der Universität Bayreuth den vertragsrechtlichen Datenzugang und die Bedeutung der AGB-Kontrolle. Dem Recht komme insoweit die Aufgabe zu, der faktischen Kontrolle über Daten und deren vertragsrechtlicher Ausnutzung Schranken zu setzen. Die AGB-Kontrolle sei insoweit bereits *de lege lata* ein geeignetes Regulierungsinstrument, um prozedurale Zugangsregeln in multilateralen Vertragsnetzwerken herauszubilden und die daraus resultierenden Zugangsrechte effektiv durchzusetzen. Ihr Vorteil bestehe darin, dass sie Platz für nötige Differenzierungen biete. So könne das Risiko eines Marktversagens minimiert werden. Wo keine direkte Vertragsbeziehung bestehe, könne man den Zugangsanspruch abtreten. Da ein gesetzliches Leitbild für die Klauselkontrolle für Verträge über Datenzugang und -nutzung bislang jedoch fehle, könnte man angemessene Modellverträge („best practices“) heranziehen, für die eine widerlegliche Vermutung angenommen werden könnte, dass sie nicht unangemessen seien. Dabei müsse sichergestellt werden, dass sich in den Modellverträgen tatsächlich eine hinreichend verbreitete und angemessene soziale Praxis niederschläge. Bei unangemessenen zugangsbeschränkenden Klauseln solle den Verwender eine (einfache) Zugangsermöglichungspflicht treffen. Ein verbleibendes Problem sei die Möglichkeit der Rechtswahl, denn kollisionsrechtlich könne ein Rechtssystem gewählt werden, das keine AGB-Kontrolle im B2B-Bereich vorsehe.

## 2. Diskussion

- 14 In der anschließenden Diskussion erläuterte *Grünberger*, dass nicht in jedem Fall ein Zugangsrecht vonnöten sei, weshalb lieber Zugangsregeln statt Zugangsrechte eingeführt werden sollten. Man müsse in jedem Einzelfall separat betrachten, was das geeignete Instrument sei. Bezüglich der fehlenden AGB-Kontrolle im B2B-Bereich auf EU-Ebene merkte *Grünberger* an, dies sei in der Tat die größte Schwäche des Modells. Jedoch könne dieses mit anderen Instrumenten wie bspw. sektorspezifischen Zugangsrechten *de lege ferenda* kombiniert werden; auch wäre eine auf den Datenbereich beschränkte B2B-Klauselkontrolle auf EU-Ebene durchaus vorstellbar. Hier könnte die neue Plattformverordnung<sup>10</sup> als Vorbild dienen. Auf die

<sup>10</sup> Verordnung 2019/1150 des Europäischen Parlaments und des Rates vom 20.6.2019 zur Förderung von Fairness



transnationale Dimension angesprochen ergänzte er, dass Regulierung auf EU-Ebene durchaus Referenzcharakter auch für andere Jurisdiktionen entwickeln und diese beeinflussen könne, wie die DSGVO zeige.

- 15 *Leistner* machte in Bezug auf die Schaffung von Zugangsrechten auf die Unterscheidung zwischen Registerrechten und Nichtregisterrechten aufmerksam. Bei Registerrechten sei gegebenenfalls schon im Rahmen der Erteilungsvoraussetzungen und des Erteilungsprozesses zu bedenken, dass für eine funktionale Ausgestaltung des immaterialgüterrechtlichen Schutzes eine entsprechende ausführbare Offenbarung (z.B. einschließlich bestimmten technischen Lösungen zugrundeliegenden Trainingsdaten etc.) notwendig sein könne; dies bleibe insbesondere in der Praxis der Patenterteilung – wie schon zuvor bei den computerprogrammbezogenen Patenten im Hinblick auf den Code – bisher in der Regel reine Theorie. Diese zusätzliche „Stellschraube“ biete sich demgegenüber bei den Nichtregisterrechten nicht, so dass es sich in diesem letztgenannten Bereich deutlicher anbiete, den Zugangsanspruch von der Einbettung in die jeweiligen immaterialgüterrechtlichen Regelungen zu emanzipieren und eigenständig zu etablieren, um dadurch – wo notwendig und angemessen – die Offenlegung von Daten zu fördern. *Grünberger* fügte hinzu, dass sich aktuell der Akteur mit dem größten technischen Know-How und wirtschaftlicher Macht Daten primär faktisch zuweisen könne. Deshalb sei es wichtig, Anforderungen an Transparenz und technisches Systemdesign aufzustellen, bevor ein neues Zugangsregime auf technischer Ebene implementiert werde, um dadurch dessen Wirksamkeit zu erhöhen. *Spiecker genannt Döhmann* unterstrich die Wichtigkeit des Verfahrensrechts und ergänzte, dass bereits die Anpassung des gerichtlichen Verfahrensrechts manche Probleme zu lösen vermöge.

- 16 Angesprochen auf die Justierung der Abwägung von legitimen Interessen bei der Prüfung der Rechtmäßigkeit der Datenverarbeitung nach Art. 6 Abs. 1 UAbs. 1 lit. f) DSGVO erklärte *Spiecker genannt Döhmann*, dies sei eine normative Abwägung. Die Bestimmung und Bewertung der Interessen stütze sich vorrangig auf EuGH-Rechtsprechung und Auslegung der DSGVO, in Grenzen auch auf bereits bekannte Einschätzungen noch zur alten Rechtslage. Für den Datenzugang sei das überwiegend wirtschaftliche Interesse des Verantwortlichen präzise zu umschreiben; ferner sei einzubeziehen, wie schwerwiegend ein mögliches Verbot bzw. eine Einschränkung der Datenverarbeitung für das Geschäftsmodell wäre. Ferner – und das werde

oftmals nicht gesehen – seien auch die externen Effekte der Datenverarbeitung auf die Gesellschaft in ihrer Gesamtheit zu berücksichtigen. Denn Datenschutz diene nicht nur dem einzelnen Betroffenen, sondern im Zeitalter von Big Data-Auswertungen auch dem Wohl aller. Art. 6 Abs. 1 UAbs. 1 lit. f) DSGVO ermögliche, wenn die Abwägung richtig durchgeführt worden sei, eine rechtssichere Datenverarbeitung.

- 17 In Bezug auf die möglichen datenschutzrechtlichen Probleme der Abtretung von Datenzugangsansprüchen in multilateralen Netzen teilte *Grünberger* die Auffassung, dass das Datenschutzrecht eine zusätzliche Ebene zum Vertragsrecht sei und von diesem nicht beschränkt werden könne oder ausgehöhlt werden sollte. Dabei betonte er auch die sozialen Kosten etwa der Einwilligung gemäß Art. 6 Abs. 1 UAbs. 1 lit. a) DSGVO, die gemeinhin als Ausdruck der Freiheit und der Autonomie von Datensubjekten gepriesen werde, deren Ausübung *de facto* aber die Freiheitsausübung anderer Datensubjekte beschränke („unraveling effect“).

#### IV. Keynote: Ergebnisse der Datenethikkommission der Bundesregierung

- 18 Als Abschluss des ersten Tages stellte Prof. Dr. *Christiane Wendehorst*, Universität Wien, Co-Sprecherin der Datenethikkommission, in einem Keynote-Vortrag die Ergebnisse der Datenethikkommission der Bundesregierung vor.<sup>11</sup> Von den zwei Säulen des Gutachtens, Datenrechte und Datenpflichten einerseits sowie Anforderungen an algorithmische Systeme andererseits, beschränkte sie sich auf erstere. Für die Verbesserung des kontrollierten Zugangs zu personenbezogenen Daten könnten Datentreuhandmodelle sowie sektorspezifische asymmetrische Pflichten zu Interoperabilität bzw. Interkonnektivität sinnvoll sein, während eine pauschale horizontale Erweiterung des Portabilitätsrechts nicht voreilig erfolgen dürfe, sondern zunächst der Analyse der Marktauswirkungen von Art. 20 DSGVO bedürfe. Jenseits des Personenbezugs könnten Modellverträge und beschränkte Drittwirkung vertraglicher Beschränkungen nach dem Modell der Geschäftsgeheimnisrichtlinie erwogen werden. Die Notwendigkeit der Gewährleistung von Datenzugang müsse aus verschiedenen Perspektiven, nämlich der Verbraucher, der KMU sowie der deutschen Wirtschaft und Forschung allgemein, durchdacht werden. Es handele sich um eine Aufgabe für die

und Transparenz für gewerbliche Nutzer von Online-Vermittlungsdiensten, ABl. EU 2019 Nr. L 186, S. 57.

11 Vgl. oben Fn. 5.

gesamte Rechtsordnung. Unter anderem habe die Datenethikkommission datenspezifische Neuregelungen im Vertrags- und Deliktsrecht vorgeschlagen. Ein missbrauchssensitives Zivilrecht und ein vertragsnahes Wettbewerbsrecht könnten als „kommunizierende Röhren“ betrachtet werden. Neben spezifischen Regelungen sei auch eine Rückbesinnung auf Generalklauseln angezeigt, indes unter besonderer Beachtung ihrer Konkretisierungsbedürftigkeit. Europäische Regulierung aufgrund europäischer Werte könne auch globaler Innovationsmotor sein.

## C. Tag 2: Instrumente des Datenzugangs und Reformüberlegungen

### I. Panel 3: Instrumente des Datenzugangs – Grundlagen und bisherige Erfahrungen

#### 1. Vorträge

- 19 Das erste Panel des zweiten Tages widmete sich den konkreten Instrumenten des Datenzugangs. Es wurde eröffnet durch Prof. Dr. *Wolfgang Kerber*, Universität Marburg, mit einem Vortrag über sektorale Daten-Governance-Systeme und horizontale Datenzugangsregeln. Daten-Governance bedeute viel mehr als nur Datenzugang, es gehe u.a. auch um die Zuweisung der Ausgangskontrolle über Daten, Privatsphäre und Cybersicherheit. Daten-Governance-Lösungen seien immer eng verknüpft mit dem technologischen Design, das die konkrete Ausgestaltung des Datenzugangs mitbestimme. Ferner setzten regulatorische Lösungen stets ein Marktversagen voraus, das auch bei technologischen Standards (fehlende Interoperabilität) bestehen könne. Es gebe bereits horizontale Datenzugangsregeln, bspw. im Kartell- und Datenschutzrecht. Diese seien grundsätzlich vorzugswürdig, sie ermöglichten jedoch kaum Differenzierung. Möglicherweise könne hier Fallgruppenbildung Abhilfe schaffen. Auch die Festlegung der Datenformate und die konkrete Ausgestaltung des Zugangs seien bei horizontalen Lösungen nicht einfach. Folglich habe sich ein Grundkonsens etabliert, es solle mit sektorspezifischen Lösungen angefangen werden. Ein Beispiel dafür sei die Zahlungsdiensterichtlinie (PSD2),<sup>12</sup> die zugleich zeige, dass für die Umsetzung

des Datenzugangs eine ziemlich aufwendige Regulierung vonnöten sei. Der Hauptvorteil sektorspezifischer Regulierung bestehe darin, dass diese maßgeschneiderte *ex ante* Lösungen ermögliche, in deren Rahmen alle Details integriert geregelt werden könnten. Letzteres könnten unter Umständen auch spezialisierte Agenturen übernehmen. Jedoch könne man nicht für jeden Bereich eine gesonderte Regelung erlassen, weshalb eine Kombination von horizontalen und sektorspezifischen Lösungen sinnvoll sei. Neben der Governance von Daten sei auch die Governance von Technologie von großer Bedeutung, die sich aus drei Ebenen zusammensetze: Zugang und Standardisierung von Datenformaten, Standardisierung von Schnittstellen (Interoperabilität) und Mindeststandards für Cybersicherheit. Schließlich sprach sich *Kerber* für eine vorausschauende Analyse aus, die Probleme antizipiere und die Entstehung von „data bottlenecks“ verhindere.

- 20 Im nächsten Vortrag widmete sich Prof. Dr. *Louisa Specht-Riemenschneider*, Universität Bonn, einer rechtsvergleichenden Analyse von Datenzugangsrechten. Diese seien bislang entweder spezifisch für einzelne Sektoren oder nach Datenarten differenziert (und dabei sektorenübergreifend) eingeführt worden.

Die meisten Rechtsordnungen enthielten datenartenspezifische sektorenübergreifende Regelungen, die sich häufig an der DSGVO orientierten. Frankreich habe dagegen zunächst einen sektorenübergreifenden und datenartenübergreifenden Portabilitätsanspruch eingeführt, der sämtliche vom Verbraucher online gestellten, erzeugten oder mit seinem Account in Verbindung stehenden (auch nicht-personenbezogenen) Daten umfasst habe. Dieser Anspruch sei allerdings nach Inkrafttreten der DSGVO wieder abgeschafft worden. Australien habe zunächst einen datenartenübergreifenden sektorenspezifischen Zugangsanspruch im Bankensektor eingeführt. Dieser gelte zunächst aber nur für die vier großen Banken; kleinere Banken erhielten mehr Zeit für die Umsetzung. Der Anspruch umfasse Produkt- sowie Verbraucherdaten inkl. abgeleiteter Daten. Er gehe mit einer Vereinheitlichung von Datenstandards einher. Der Anspruch könne auch von einer akkreditierten Person geltend gemacht werden. Dem Bankensektor würden der Telekommunikations- und Energiesektor folgen. Dies seien laut *Specht-Riemenschneider* die Sektoren, die rechtsvergleichend am umfassendsten reguliert würden. Die Besonderheiten der neuseeländischen

12 Richtlinie 2015/2366 des Europäischen Parlaments und des Rates vom 25.11.2015 über Zahlungsdienste im

Binnenmarkt, zur Änderung der Richtlinien 2002/65/EG, 2009/110/EG und 2013/36/EU und der Verordnung Nr. 1093/2010 sowie zur Aufhebung der Richtlinie 2007/64/EG, ABL. EU 2015 Nr. L 337, S. 35.

Regelung, die den Regelungen der DSGVO ähnele, seien die Möglichkeit der Priorisierung von Anfragen nach Dringlichkeit sowie ein weiterer Katalog der Ausschlussgründe. Ferner könne eine Datenbeauskunftung an Auflagen bzw. Bedingungen geknüpft werden; es sei jedoch fraglich, wie diese durchzusetzen seien. Die Besonderheit der ebenfalls DSGVO-ähnlichen philippinischen Regelung bestehe hingegen darin, dass Betroffenenrechte übertragbar seien. Die rechtsvergleichende Analyse zeige, dass die DSGVO häufig eine Vorbildfunktion habe, wie z.B. in Japan und Australien, wobei die Abweichungen von der DSGVO i.d.R. zulasten des Datensubjekts gingen und deshalb zur Orientierung nicht empfohlen würden. Vorzugswürdig sei ein Nachdenken über datenartenübergreifende sektorenspezifische Regelungen, die freilich durch das Datenschutzrecht beschränkt würden. Auch sollte auf EU-Ebene die Einführung akkreditierter Subjekte zur Durchsetzung von Zugangsrechten erörtert werden, sowie einer Regelung entsprechend der Vorgabe des California Consumer Privacy Act (CCPA),<sup>13</sup> die die Diskriminierung bzw. Benachteiligung aufgrund der Geltendmachung von Betroffenenrechten verbiete („anti-retaliation provision“).

- 21 Sodann ging Prof. Dr. *Ruth Janal* von der Universität Bayreuth der Frage nach, ob Datenportabilität nach Art. 20 DSGVO als „Blaupause“ für Zugangsrechte dienen könne. Einleitend unterstrich *Janal* die unter anderem wettbewerbsrechtliche Zielsetzung von Art. 20 DSGVO. Hinsichtlich des Umfangs des Rechts auf Datenportabilität erklärte *Janal*, es sei sinnvoll, in Art. 20 DSGVO das Prinzip der Verhältnismäßigkeit hineinzulesen. An der Übertragung bestimmter Daten habe das Datensubjekt regelmäßig kein Interesse, so dass nur diejenigen Daten portiert werden sollten, die für die Verringerung des Lock-in-Effekts notwendig seien. Die direkte Übertragung der auf Art. 20 DSGVO bezogenen Überlegungen in den B2B-Bereich sei nicht angezeigt, denn die Interessenslage sei oftmals eine andere. Bspw. umfasse der Anspruch nach Art. 20 DSGVO keine abgeleiteten Daten, wohingegen im B2B-Bereich gerade die Analyseergebnisse oft eine Schlüsselrolle spielten. Jedenfalls wenn die Analyse entgeltlich erbracht werde, müsse der Anspruch auf Portierung auch die dadurch entstandenen Daten umfassen. Die Übertragung von Überlegungen werde zusätzlich erschwert durch die Tatsache, dass es im Kontext des Art. 20 DSGVO eine klare Zuordnung von Daten gebe, nämlich zum Datensubjekt, wohingegen es in typisch multipolaren B2B-Verhältnissen schwieriger sei, eine Zuordnung durchzuführen. Im Datenschutzbereich gebe es ferner ein strukturelles Ungleichgewicht mit dem Zugangspetenten als der typisch schwächeren Partei, wohingegen dies für B2B-

Verhältnisse nicht immer gelte und gegebenenfalls auch der Datenverarbeiter die schwächere Partei sein könne. Eine Kompensationspflicht für Datenportierung könne angemessen sein, denn mit der Datenportierung gehe auch eine Prüfpflicht einher, ferner verursache bereits die Datenspeicherung Kosten. Zusammenfassend sei es wesentlich, sich zunächst der Zielsetzung eines angedachten Portabilitätsrechts im B2B-Bereich zu widmen, da diese wesentlichen Einfluss auf die konkrete Ausgestaltung des Portabilitätsrechts habe.

- 22 Schließlich widmete sich *Jörg Hoffmann* vom Max-Planck-Institut für Innovation und Wettbewerb sektorspezifischen Zugangsansprüchen von Wettbewerbern. Zunächst unterstrich er die Rolle der faktischen Datenexklusivität und deren Bedeutung für die Förderung datengetriebener Innovationen, die neben den positiven ökonomischen Effekten des Datenzugangs berücksichtigt werden müsse. Faktische Exklusivität stelle wirtschaftlich betrachtet – ähnlich wie der Immaterialgüterrechtsschutz – einen Anreizmechanismus für Investitionen in hochwertige Daten dar. Auch käme ein freier Datenzugang dem Verlust einer Marktoption gleich, was den Unternehmen Amortisierungsmöglichkeiten nehme und Innovationsanreize senken könne. Ein weiterer Aspekt, der Berücksichtigung finden müsse, sei die durch freien Datenzugang erhöhte Markttransparenz. Diese stehe in einem gewissen Widerspruch zu dem „Unwissen“ als Voraussetzung für Wettbewerb und (folgende) Innovationen. Deshalb sei es laut *Hoffmann* unerlässlich, das Verhältnis zwischen Datenexklusivität und Zugang zur Förderung datengetriebener Innovationen differenziert zu betrachten.

Auch könne die Multifunktionalität von Daten zur Folge haben, dass Daten marktübergreifend genutzt werden könnten, was gekoppelt mit plattformspezifischen Netzwerkeffekten zu wettbewerbspolitisch unerwünschten Marktabschottungen durch digitale Konglomerate führen könne. Hierentstehe ein Widerspruch zwischen (sektorspezifischer) Datenzugangsregulierung und der beabsichtigten kartellrechtlichen Regulierung von „Unternehmen mit überragender marktübergreifender Bedeutung für den Wettbewerb“ gemäß § 19a GWB (10. GWB-Novelle). Demnach solle eine potentielle Erweiterung der Marktmacht durch Vergrößerung des Datenzugangs bereits präventiv durch Unterlassungsanordnung seitens des Bundeskartellamtes unterbunden werden können. So sei im Falle der Umsetzung von § 19a GWB jedenfalls eine Anpassung des umgesetzten PSD2-Zugangsregimes in diesem Punkt insoweit erstrebenswert, als dass eine Aktivlegitimation dieser Unternehmen zunächst ausgeschlossen und unter Erlaubnisvorbehalt gestellt werden sollte. Daran anschließend widmete sich *Hoffmann*

13 California Consumer Privacy Act of 2018, Cal. Civ. Code 1798.100 ff.

den Einzelheiten der beiden differenziert zu betrachtenden Zugangsregime nach der PSD2. Die PSD2 ermögliche umfangreiche Weitergabe von wettbewerbsrelevanten Transaktionsdaten an Kontoinformationsdienstleister sowie geringe Weitergabe von sensiblen Zahlungsdaten an Zahlungsauslösedienstleister. Um allerdings Investitionsanreize besser zu schützen und die Regulierung verhältnismäßig zu machen, wäre es laut *Hoffmann* sinnvoll, jedenfalls für das Zugangsregime bei Kontoinformationsdienstleistungen über eine Vertragslösung mit Kontrahierungszwang und einer direkten Vergütungsmöglichkeit zu diskutieren. Zumindest müsse aber – insbesondere im Fall mangelnder Marktanreize – Qualitätsstandardregulierung, gerade auf semantischer Ebene der Daten (semantische Interoperabilität), eingeführt werden.

## 2. Diskussion

- 23 Auf die Frage, ob sektorspezifische Regulierung nicht einen Wettbewerbsnachteil für die regulierten Sektoren darstelle und somit das „level playing field“ verzerre, antwortete *Specht-Riemenschneider*, dass es durchaus horizontale Zugangsregime wie bspw. im Datenschutz- und Kartellrecht gebe, dass man aber darüber hinaus sehr genau abwägen müsse, in welchen Bereichen Ansprüche geschaffen werden sollten. Regulierung müsse verfassungsrechtlich zulässig und interessengerecht sein; außerdem müsse man die konkreten Investitionsanreize im Blick behalten und die Rechte der Zugangsverpflichteten respektieren und schützen. *Kerber* fügte hinzu, dass es auch nicht immer um Sektoren gehe, sondern oft nur um Teile von Sektoren bzw. um Lösungen von konkreten Problemen, wie die PSD2 zeige. Es sei illusorisch zu erwarten, dass horizontale Regulierung gleich alle Probleme lösen könne; vielmehr solle man schrittweise vorgehen und zunächst mit sektoraler Regulierung Erfahrungen sammeln, um sodann horizontale Regeln einzuführen. Auf die Gefahr von möglichen Konflikten zwischen verschiedenen sektoralen Zugangsregimen angesprochen erläuterte *Kerber*, es bedürfe allgemeiner Prinzipien zur Leitung sektorspezifischer Regulierung. Auch sei es denkbar, diesbezüglich eine Rahmenrichtlinie mit allgemeinen Regeln zu verabschieden.
- 24 Auf die Frage, ob vorausschauende Regulierung mit dem Postulat vereinbar sei, man müsse ein Marktversagen feststellen, antwortete *Kerber*, Ökonomie sei auf diese Aufgabe vorbereitet, denn sie verfüge in einigen Bereichen, wie z.B. im Automobilsektor, über jahrzehntelange Erfahrung, die dabei helfen könne, festzustellen, wo gefährliche Wettbewerbs- bzw. Innovationsprobleme auftreten könnten. Zugegebenermaßen besitze man solche Kenntnisse aber nicht in jedem Bereich.
- 25 Hinsichtlich der Sorge, die Ausübung des Datenportabilitätsrechts könne zu noch größerer Marktkonzentration führen, merkte *Janal* an, dass dies grundsätzlich stimme, jedoch sei es nicht die Aufgabe eines jeden Datensubjekts, für das Funktionieren der Märkte zu sorgen und deshalb seine Daten statt zum Marktbeherrscher lieber zu einem kleineren Wettbewerber zu portieren. In Bezug auf die schwierige Durchsetzung der in der CCPA vorgesehenen „anti-retaliation provision“ erläuterte *Specht-Riemenschneider*, dass es in der Tat nicht einfach sei, dies zu überwachen. Jedoch gebe die DSGVO Mechanismen an die Hand, die dies erleichtern würden. So gebe es Dokumentationspflichten für Unternehmen; auch kontrollierten Datenschutzbehörden die Einhaltung der gesetzlichen Vorgaben.
- 26 Die Diskussion befasste sich außerdem mit der Frage, inwieweit ein Vergütungssystem für den Datenzugang vorgesehen werden sollte und ob es sinnvoll wäre, FRAND-Lizenzierungsprinzipien aus dem Standardisierungskontext in den Datenbereich zu übertragen. Im Hinblick auf die Frage der Vergütung meinte *Hoffmann*, dass es bereits schwer einzuschätzen sei, wie hoch das Investitionsaufkommen in Daten und die notwendige Infrastruktur sei. Dieses könne auch stark von sektorspezifischen „Data Governance“-Vorschriften abhängen. Da mit dieser Frage allerdings auch die durch Vergütungsmöglichkeiten geschaffene Aufrechterhaltung der Innovationsanreize zusammenhänge, sei eine Einzelfallbetrachtung unerlässlich und jedenfalls ein sektorspezifischer Ansatz erstrebenswert. Im Hinblick auf die Frage, inwieweit im Rahmen der Lizenzierung auch die FRAND-Prinzipien Anwendung finden müssten, erörterte *Hoffmann*, dass es bereits (ungelöste) Problemstellungen bezüglich FRAND im Standardisierungskontext gebe. Wichtig sei in diesem Kontext allerdings zunächst die Frage, was konkret FRAND-Prinzipien im Datenkontext darstellen sollten und inwieweit diese wirklich einen Mehrwert im Hinblick auf die bereits existierende kartellrechtliche Kasuistik bringen könnten. Jedenfalls biete die Zunahme von Datenhandel in der Digitalwirtschaft und eine damit einhergehende zunehmende Anzahl von Datenlizenzierungsverträgen künftig einen besseren Vergleichsmaßstab für eine Kontrolle.



## II. Panel 4: Instrumente des Datenzugangs – Reformüberlegungen

### 1. Vorträge

- 27 Im Rahmen der Reformüberlegungen hinsichtlich Instrumenten des Datenzugangs widmete sich zuerst *Drexl* der Frage nach Ansprüchen von Nutzern von „smart products“ auf Datenzugang. Er knüpfte insoweit an die Ergebnisse seiner 2018 für den europäischen Verbraucherschutzverband BEUC angefertigten Studie an.<sup>14</sup> Es seien, ohne ersichtliche Relevanz von Immaterialgüterrechten, erhebliche wettbewerbsgetriebene Innovationen und Investitionen auf den Märkten für vernetzte Geräte zu beobachten und „smart products“ böten Kunden vielerlei Vorteile wie „predictive maintenance“. Geschäftsmodelle und ihre rechtliche Abbildung veränderten sich vom Kauf hin zum Dienstleistungs-Dauerschuldverhältnis (etwa PKW-Hersteller als Transportdienstleister, Pharmaunternehmen als Gesundheitsdienstleister).
- 28 Bestehende Lösungsansätze für wettbewerbliche Probleme wie insbesondere Lock-in-Effekte seien unter anderem das (zu kurz greifende) Portabilitätsrecht nach Art. 20 DSGVO, verbrauchervertragsrechtliche Ansätze in zwei neuen Richtlinien<sup>15</sup> sowie der nach den Vorschlägen für die 10. GWB-Novelle nicht mehr auf KMU beschränkte, auf die europäische Ebene konzeptionell wohl nicht exportierbare § 20 Abs. 1 GWB. Etwaige neue Zugangsansprüche *de lege ferenda* könnten rechtssystematisch im Lauterkeitsrecht verortet werden, da es ähnlich wie bei Werberegeln um den Schutz der Abnehmerinteressen gehe, und sollten in der Sache an die Notwendigkeit bestimmter

Daten für die optimale Nutzung eines vernetzten Gerätes anknüpfen und einen über Portabilität hinausgehenden „Anspruch auf Vernetzung“ begründen. Berechtigte Geheimhaltungsinteressen an Geschäftsgeheimnissen gelte es vertraglich zu wahren. Schließlich sollte der europäische Gesetzgeber bei der Schaffung neuer Zugangsansprüche ausdrücklich den Vorrang solcher Ansprüche gegenüber dem Sui-generis-Schutzrecht für Datenbanken vorsehen. Berechtigte ökonomische Interessen eines Datenbankherstellers könnten im Rahmen der Konkretisierung des Zugangsanspruchs im Einzelfall nach FRAND-Grundsätzen berücksichtigt werden.

- 29 *Heiko Richter* vom Max-Planck-Institut für Innovation und Wettbewerb in München erläuterte sodann die „Reverse PSI“-Konstellation des Anspruchs des Staates auf Zugang zu Daten der Privatwirtschaft.<sup>16</sup> Ein solcher könne sowohl zur Erfüllung bestehender als auch Übernahme neuer Aufgaben vonnöten sein. Neu gegenüber traditionellen Zugriffsbegehren des Staates seien vor allem die technischen Möglichkeiten der Datifizierung, durch die Unternehmen, insbesondere Plattformen, viel mehr Daten, in höherer Qualität und über neue Sachverhalte erhielten. Die Ausgestaltung von Zugangsregeln könne sich an den Fragen „Wofür kann wer von wem was und wie verlangen?“ orientieren, wobei stets der Zweck den verfassungsrechtlichen Spielraum justiere und, auch im Interesse der Sicherstellung der Datenqualität, die Kompensationsfrage zu berücksichtigen sei.

- 30 Als Beispiel bestehender Zugangsregeln nannte *Richter* den Zugang zu Daten von Konzessionsnehmern in Frankreich,<sup>17</sup> den Datenzugang des Statistikamts im Vereinigten Königreich für statistische Zwecke<sup>18</sup> und die Markttransparenzstelle für Kraftstoffe in Deutschland gemäß § 47k GWB. Als Gestaltungsprinzipien für Zugangsansprüche des Staates könne man das Staatlichkeitsprinzip, das Ganzheitlichkeitsprinzip, das Verantwortungsprinzip und das Näheprinzip formulieren. Die abschließenden Empfehlungen *Richters* an den Gesetzgeber enthielten eine Öffnungsklausel für den Sui-generis-Schutz von Datenbanken, die Verbesserung der Anschlussfähigkeit des IWG für Zugangsregelungen des Staates sowie, unter

14 Josef Drexl, Data Access and Control in the Era of Connected Devices – Study on Behalf of the European Consumer Organisation BEUC, 2018, <[http://www.beuc.eu/publications/beuc-x-2018-121\\_data\\_access\\_and\\_control\\_in\\_the\\_area\\_of\\_connected\\_devices.pdf](http://www.beuc.eu/publications/beuc-x-2018-121_data_access_and_control_in_the_area_of_connected_devices.pdf)> [https://www.ip.mpg.de/fileadmin/ipmpg/content/aktuelles/aus\\_der\\_forschung/beuc-x-2018-121\\_data\\_access\\_and\\_control\\_in\\_the\\_area\\_of\\_connected\\_devices.pdf](https://www.ip.mpg.de/fileadmin/ipmpg/content/aktuelles/aus_der_forschung/beuc-x-2018-121_data_access_and_control_in_the_area_of_connected_devices.pdf) (zuletzt aufgerufen am 25.2.2020).

15 Richtlinie 2019/770 des Europäischen Parlaments und des Rates vom 20.5.2019 über bestimmte vertragsrechtliche Aspekte der Bereitstellung digitaler Inhalte und digitaler Dienstleistungen, ABl. EU 2019 Nr. L 136, S. 1 sowie Richtlinie 2019/771 des Europäischen Parlaments und des Rates vom 20.5.2019 über bestimmte vertragsrechtliche Aspekte des Warenkaufs, zur Änderung der Verordnung 2017/2394 und der Richtlinie 2009/22/EG sowie zur Aufhebung der Richtlinie 1999/44/EG, ABl. EU 2019 Nr. L 136, S. 28.

16 Das Vortragsmanuskript findet sich unter *Richter*, ZRP 2020 (im Erscheinen).

17 Art. L-3131 Code de la commande publique (Art. 17 LOI n° 2016-1321 du 7 octobre 2016 pour une République numérique).

18 Sec. 45D Statistics and Registration Service Act 2007 (Art. 80 Digital Economy Act [2017]).

Weitung der Perspektive, die Verankerung eines subjektiven Rechts auf Informationszugang im Grundgesetz als disziplinierende Kraft gegenüber Gefahren staatlichen Datenmissbrauchs.

- 31 Prof. Dr. Axel Metzger, Humboldt-Universität Berlin, befasste sich zuletzt mit der rechtlichen Ausgestaltung des Datenzugangs als Teil eines künftigen Vertragsrechts. Er gab zunächst einen Überblick über das neue B2C-Zugangsrecht nach Vertragsbeendigung gemäß Art. 16 Abs. 4 der Digitale-Inhalte-Richtlinie.<sup>19</sup> Dieses sei sowohl individuell als auch mittels Verbandsklage und über § 3a UWG durchsetzbar, enthalte aber weitreichende unternehmensfreundliche Ausnahmetatbestände und lasse wegen des Vorrangs der DSGVO für personenbezogene Daten nach Art. 16 Abs. 2 der Richtlinie keine praktische Relevanz erwarten.
- 32 Für die Einführung datenzugangsbezogenen zwingenden oder dispositiven Vertragsrechts, wobei die Begründungslast für letzteres nicht geringer sei, im B2B-Bereich fehle es am empirischen Nachweis eines Marktversagens und auch an Modellen der Vertragspraxis. Die Vertragsfreiheit solle der Ausgangspunkt bleiben und Juristen nicht meinen, sie wüssten es besser als die derzeit selbst vielfach im Ungewissen befindlichen Marktakteure. Es bedürfe weiterhin der Klarheit über die Zielsetzung etwaiger Maßnahmen, wobei ein pauschaler Ausgleich jeglicher Ungleichgewichte jenseits des Verbraucherschutz-, Arbeits- und Mietrechts nicht der liberalen Konzeption des BGB entspreche. Lock-In-Effekte in Datenmärkten könnten gegebenenfalls besser wettbewerbsrechtlich adressiert werden als vertragsrechtlich.

## 2. Diskussion

- 33 In der abschließenden Diskussion schloss sich Richter der Kritik am Begriff „Reverse PSI“ an, der eine unzutreffende Bidirektionalität suggeriere und ebenso vermieden werden solle wie der politisch aufgeladene Begriff „open data“ für PSI. Richter bestätigte die Bedeutung des verfassungsrechtlichen Verhältnismäßigkeitsgrundsatzes für Zugangsrechte des Staates und die Notwendigkeit, potentielle Rückkopplungen auf die weitere Begünstigung bereits marktstarker Unternehmen sowie auf Anreize zur Datenherausgabe zu berücksichtigen. Ferner müssten die Realitäten kommerzieller Beziehungen zwischen Staat und Privaten jenseits staatstheoretischer Ideale zur Kenntnis genommen

<sup>19</sup> Richtlinie 2019/770 des Europäischen Parlaments und des Rates vom 20.5.2019 über bestimmte vertragsrechtliche Aspekte der Bereitstellung digitaler Inhalte und digitaler Dienstleistungen, ABl. EU 2019 Nr. L 136, S. 1.

werden. Sowohl Richter als auch Drexel stimmten dem Einwurf zu, man solle wegen Maßgeblichkeit der semantischen Ebene in der Diskussion lieber von „Informationen“ als von „Daten“ sprechen.

- 34 Zum Problem der Passivlegitimation, insbesondere in Ansehung von Durchsetzungsproblemen bei grenzüberschreitenden Sachverhalten, vertrat Drexel eine nicht rein faktische Definition des Dateninhabers, sondern eine Berücksichtigung auch rechtlicher Herrschaftsmöglichkeiten.
- 35 Diskutiert wurde weiterhin die Bedeutung der Einordnung potentieller Zugangsrechte in ein bestimmtes Rechtsgebiet. Metzger verwies auf die Notwendigkeit der Qualifizierung nach internationalem Privatrecht sowie den Wert juristischer Systematik. Drexels Vorschlag, etwaige Ansprüche im UWG zu verorten, wurde auch unter Berücksichtigung der Möglichkeiten einer europäischen Harmonisierung des B2B-Lauterkeitsrechts Sympathie entgegengebracht. Drexel erläuterte, es gehe bei einem solchen Ansatz weniger um die Kategorie der horizontalen Behinderung als darum, dass es „fair“ sei, demjenigen Datenzugang zu gewähren, der zum ökonomisch sinnvollen Einsatz eines Geräts hierauf angewiesen sei.
- 36 Zum Themenkomplex asymmetrischer und diskriminierender Regulierung hielt Drexel die grundsätzliche Möglichkeit der Nutzung des neuen § 20 Abs. 1 GWB auch durch große Akteure wie Google für nicht zu beanstanden.

## III. Keynote: Bericht aus der europäischen Werkstatt

- 37 In seinem Keynote-Vortrag erläuterte Dr. Malte Beyer-Katzenberger von der Generaldirektion Kommunikationsnetze, Inhalte und Technologien (GD Connect) der Europäischen Kommission die aktuellen Entwicklungen auf EU-Ebene. Das Thema Datenteilen sei nicht nur im politischen Diskurs, sondern auch bei Unternehmen angekommen, wie eine von der Europäischen Kommission durchgeführte Befragung zeige. Datenteilen sei ein wünschenswerter Zustand, weil damit die nicht-rivale Ressource Daten besser genutzt würde, insbesondere dann, wenn die Daten teilenden Unternehmen nicht auf denselben Märkten tätig seien und sich daher nicht ins Gehege kämen. Die Vision der Europäischen Kommission sei es, einen einheitlichen europäischen Datenraum zu schaffen, in dem maximale Weiterverwendung von Daten in einer Weise stattfinde, die berechnete Interessen und die Position der europäischen Wirtschaft im internationalen Wettbewerb schütze.

In Datenökosystemen und Wertschöpfungsketten solle fairer Wettbewerb herrschen. Dabei unterstrich *Beyer-Katzenberger* gerade die Bedeutung von Vertrauen zwischen Akteuren für das reibungslose Funktionieren von Datenökosystemen. Die europäische Datenwirtschaft solle humanzentriert sein und eine dauerhafte Sicherstellung des Wettbewerbs ermöglichen. Außerdem solle ein faires Regime für Nutzung von privaten Daten für öffentliche Zwecke etabliert werden. Bezüglich der Nutzung von Daten der öffentlichen Hand betonte er, dass diese oft sensible Informationen beinhalten, weswegen deren volle Öffnung nicht möglich sei. Man könne aber technische Schutzmechanismen einbauen oder geschützte Räume schaffen, in denen Forscher Zugang zu Daten bekämen.

- 38 Einiges sei schon gemacht worden; insb. könne die DSGVO hervorgehoben werden, die Ausstrahlungseffekte in Drittländer entwickelt habe. Datenportabilität nach Art. 20 DSGVO solle jedoch weiter operationalisiert werden. Dabei käme möglicherweise Akteuren wie *personal information management systems* (PIMS) und Datentreuhändern eine bedeutende Rolle zu. Bei Art. 20 DSGVO müsse in dieser Hinsicht nachgesteuert werden. Weitere Nachsteuerungen sollten nicht nur zügigere Datenportierung, sondern auch Echtzeitportierung ermöglichen. Bezüglich möglicher Zugangsrechte betonte *Beyer-Katzenberger*, dass diese sektorspezifisch und antizipativ sein müssten. Ferner werde sich die Europäische Kommission möglicherweise der Nutzung ko-generierter Daten widmen.
- 39 Die Frage nach der Regulierung von Treuhandmodellen beantwortete *Beyer-Katzenberger* dahingehend, an Datentreuhänder müssten zwei Anforderungen gestellt werden: Es solle sich um „zero knowledge“-Plattformen handeln, die also nur Kenntnis von Datenflüssen hätten, nicht aber von deren Inhalt, ferner dürften sie nicht auf einem der datennutzenden Märkte als Datenhalter oder -nutzer tätig sein. Institutionell könne ein Datentreuhänder staatlich, genossenschaftlich oder privatwirtschaftlich organisiert werden.

#### IV. Podiumsgespräch: Perspektiven der Rechtspolitik

- 40 Im abschließenden Podiumsgespräch diskutierten *Wendehorst*, *Beyer-Katzenberger*, Staatssekretär *Gerd Billen*, BMJV, Prof. *Ulrich Kelber*, Bundesbeauftragter für den Datenschutz und die Informationsfreiheit, sowie *Martin Schallbruch*, Ko-Vorsitzender der Kommission Wettbewerbsrecht 4.0, die aus den

vorhandenen Gutachten, Empfehlungen und Tagungserkenntnissen folgenden Perspektiven der Rechtspolitik.

- 41 Intensiv erörtert wurde zunächst der potentielle Rechtsrahmen für Datentreuhandmodelle unter Berücksichtigung von Transnationalität, Standardisierung sowie Pseudo- und Anonymisierung von Daten (gegebenenfalls auch unter strafrechtlicher Sanktionierung von De-Anonymisierung). *Kelber* betonte die Wichtigkeit auch technischer Maßnahmen gegenüber rein rechtlichen und zeigte sich kritisch gegenüber Modellen, bei denen sich die Treuhänder über Transaktionsgebühren finanzieren; vielmehr müsse das Geld aus der Treuhänderschaft fließen. *Beyer-Katzenberger* hob die Notwendigkeit der einfachen und bequemen Handhabung solcher Modelle für den Verbraucher („usability“) hervor, nur dann könnten sie sich durchsetzen. *Schallbruch* betonte die nötige Differenzierung zwischen Datentreuhandmodellen als Angebote im privaten Wettbewerb und solchen im Bereich der Daseinsvorsorge, die Bedeutung einer dadurch gestärkten Konsumentensouveränität im Wettbewerb, die Notwendigkeit harter Regeln für Plattformen und das Erfordernis der Systematisierung paralleler horizontaler Regulierung. Viele Start-ups wünschten sich im Übrigen Zugang zu ordentlichen Datensätzen des Staates, an denen es aber mangle.
- 42 *Wendehorst* verwies auf die faktische Trägheit gesetzgeberischen Handelns und die Notwendigkeit nicht nur eingrenzender, sondern auch ermöglichender Regulierung für neue Geschäftsmodelle wie Datentreuhand. *Billen* gab zu bedenken, es gehe nicht immer ausschließlich um Marktüberlegungen, und stellte Konzepte in den Raum, die ökonomische und sonstige Gemeinwohlinteressen vereinigen könnten. *Beyer-Katzenberger* gab die unvermeidliche Fragmentierung des Rechts sowie faktische Koordinationsgrenzen der Europäischen Kommission und jedes Gesetzgebers zu bedenken.
- 43 Die wünschenswerte Abstimmung von Datenschutz- und Wettbewerbsbehörden wurde sowohl unter institutionellen als auch faktisch-örtlichen Gesichtspunkten erörtert. *Billen* und *Kelber* nahmen ferner Stellung zur nötigen technologischen Ausstattung bzw. Aufrüstung sowohl von Verbrauchern als auch Behörden. Letztlich seien auf verschiedenen Ebenen Lösungen zu suchen, wobei technischen Lösungen neben rechtlichen und institutionellen eine wachsende Bedeutung zukomme.

- 44 *Drexl* bedankte sich schließlich bei allen Vortragenden und Teilnehmenden für die regen und fruchtbaren Diskussionen der vergangenen zwei Tage sowie beim BMJV für die Organisation der Tagung. Er wies zudem darauf hin, dass voraussichtlich im Jahr 2020 ein Tagungsband in englischer Sprache erscheinen werde.

### **reported by:**

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