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Virtues and Perils of Anonymity

Should Intermediaries Bear the Burden?

by **Nicolo Zingales**,* Assistant Professor, Tilburg Law School. Fellow, Center for Technology and Society, Getulio Vargas Foundation.

Abstract: On October 10, 2013, the Chamber of the European Court of Human Rights (ECtHR) handed down a judgment (*Delfi v. Estonia*) condoning Estonia for a law which, as interpreted, held a news portal liable for the defamatory comments of its users. Amongst the considerations that led the Court to find no violation of freedom of expression in this particular case were, above all, the inadequacy of the automatic screening system adopted by the website and the users' option to post their comments anonymously (i.e. without need for prior registration

via email), which in the Court's view rendered the protection conferred to the injured party via direct legal action against the authors of the comments ineffective. Drawing on the implications of this (not yet final) ruling, this paper discusses a few questions that the tension between the risk of wrongful use of information and the right to anonymity generates for the development of Internet communication, and examines the role that intermediary liability legislation can play to manage this tension.

Keywords: Internet intermediary liability, anonymity on the Internet, defamation, technological rights adjudication

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A. Introduction: recognizing different types of anonymity

- 1 Anonymity is a feature, not a bug, of the Internet. As Larry Lessig explained when commenting on the clash between the technical and the social architecture of the net, "the *Internet* protocol doesn't require that [...] you credential who you are before you use the Internet."¹ In other words, it is only because of the *social* protocol that we are pushed towards identification².
- 2 At the same time, however, anonymity is also a fundamental feature in the social architecture for it gives individuals the ability to speak in a variety of circumstances where the revelation of their identity would compromise it. Peter Steiner effectively illustrated the centrality of anonymity to our understanding of the Internet in a cartoon published in *The New Yorker* in July 1993, which birthed the

famous adage "On the Internet, nobody knows you're a dog"³. The cartoon featured a dog sitting in front of a computer and (presumably) inserting his preferences and generalities into a virtual profile, sharing the insight of the adage to a fellow dog. That sentence reflected an essential property of Internet communication: individuals engaged in such communication can mask the real identity to *their audience*. The "masking" can be accomplished by two different means: online anonymity and pseudonymity. While both are manifestations of the broader concept of anonymity - the latter being an attenuated version of the former - it is important to make clear in what respect the two differ, and the extent to which they relate to "real world" anonymity.

- 3 The most direct form of online anonymity for a user is, when permitted by the platform where communication takes place, to avoid giving his or

her generalities altogether. In this case, any message or action by the user is labeled as originating from “anonymous” or, alternatively, with some kind of serial number following the word “user.” A similar type of online anonymity can be attained if, in a system of mandatory user registration, there is no requirement to provide information which will make him or her actually identifiable as pre-condition to accede to or actively engage in the platform. Although there is no agreed-upon definition of the exact type of information that would trigger a loss of online anonymity⁴, it is generally understood that authentication via email address to “join the community” would suffice for that purpose. In contrast, pseudonymity does not exclude long-term relationship with the community of the platform, but presupposes the creation of a user profile that identifies him or her within that community as the holder of a particular pseudonym. However, the system of registration does not guarantee that the online “persona” chosen by the user represents, in any way, his or her real identity. In fact, pseudonymity not only enables people to maintain several online identities but also allows multiple individuals to manage a unique persona.

- 4 The “mask” provided by online anonymity and pseudonymity is not a peculiarity of Internet communication; the possibility of corresponding anonymously was long established prior to the invention of the Internet, and pseudonyms had been used throughout history by a number of literary figures, musicians and authors of political articles⁵. What is different in the context of the Internet is the ease with which the digitalization of communication and the advancement of tracking technologies have made it possible for a real identity to be uncovered. Not only are the logs of every communication originating from our devices systematically recorded by internet service providers or the servers through which we connect, but the use of cookies and other tracking mechanisms has significantly affected our ability to keep anonymity *vis a vis* the websites that we visit; in addition, the tools available to infer real identity from network analysis, patterns of behavior, and data mining have minimized the extent to which pseudonymity can be considered an effective anonymization technique *vis a vis* not only the other users of that particular website, but more crucially the State and private entities offering their services online. In fact, extensive literature points out the failure of the conventional mechanisms currently used to secure anonymity⁶; in other words, “real world” anonymity has simply become much more difficult to accomplish today, in a society that is increasingly based on online interactions.
- 5 Furthermore, new technologies have emerged that afford platforms the opportunity to authenticate the identity of users in an increasingly reliable manner:

for example, certain platforms have started using software to verify identities by scanning national ID cards⁷, and asking security questions- the answer to which must match the one contained in the credit file linked to a particular person’s bank account⁸. Soon, we might be confronted with widespread use of facial recognition technologies for ID verification, which have already become available on the market⁹. Currently, these advanced verification technologies are used on an opt-in basis, in exchange for access to special privileges or simply to promote a higher trust with the other members of the community. Yet, it is not hard to imagine a future in which the gap between basic and premium services is so significant as to make the anonymous use of Internet inconceivable as a practical matter. It is precisely to warn against this danger that this paper aims to offer a critique of a judgment of the European Court of Human Rights which, if confirmed on appeal, would likely lead to the realization of this gloomy picture.

- 6 Before plunging into the specifics of the judgment, however, it is important to clarify that a discussion on anonymity cannot abstract from the questions “against whom” and “in what circumstances”, both of which qualify as different subtypes of anonymity. The first question departs from the assumption that anonymity is to be seen as an absolute quality –i.e., *erga omnes*- and recognizes that an individual might just aspire to achieve anonymity *vis a vis* the other users of the platform, as opposed to an internet service provider, or the public authority. In this respect, one should differentiate between: (1) platform anonymity; (2) customer anonymity; and (3) citizen anonymity¹⁰.
- 7 (3) (Citizen anonymity) is invariably the most protected type, one with constitutional rules in place in different countries to guard citizens from arbitrary interferences, yet one which tends to be most easily abridged for law enforcement purposes, and probably the hardest to ensure at the technological level¹¹. (2) (Customer anonymity) refers to the identity given to the provider of the Internet connection –which can only be hidden in very limited circumstances; for example, from a public wifi not requiring registration, or another online service –in which case, anonymity can be ensured through the use of VPNs, web proxies or anonymity networks¹², along with decentralized and anonymized payment systems. What remains under (1) (Platform anonymity) then is just a thin version of anonymity, which can be achieved *inter alia* under some form of pseudonymity. It is clear that escaping identification by the three target audiences at the same time can be very challenging and can, occasionally, be an impossible task to accomplish.
- 8 The second important clarification concerns the circumstances in which anonymity should be

protected. In practice, this depends on the weight of the respective interests of the two sets of stakeholders: those claiming or exerting anonymity privileges and those who invoke identity disclosure. For example, in the case of threat of serious criminal offences, the public authority will have broader powers of investigation under (3); likewise, the discretion of a prosecutor or a judicial authority to curb anonymity under (1) and (2) will be significantly broader¹³. On the other hand, the need to protect (who?) from an imminent threat of violence or other seriously adverse consequences will enhance the weight of anonymity interests, possibly even at the expense of legitimate law enforcement operations. In short, the protection of anonymity can hardly be seen as a monolithic concept: anonymity has different breadth depending on the target group against which it operates, and a balancing between conflicting interests is often necessary to understand the contours of its protection.

- 9 The following section puts platform anonymity into context by describing the facts and the issues at stake in the case of *Delfi v. Estonia*¹⁴, where the European Court of Human Rights attributed the anonymous character of the comments a role of trigger for a special responsibility of host providers. After an introduction to the facts of the case and the domestic proceedings, the second section will highlight the problematic aspects of the reasoning followed by the Court to reach that conclusion. Subsequently, the third section will provide an assessment of the adverse implications that a similar judgment would have on the creation of user-generated content on the Internet. Finally, the fourth section will conclude by suggesting which principles should be followed to promote an intermediary liability regime that ensures prompt and effective remedies while respecting the fundamental right to anonymity.

B. The Delfi judgment

I. Domestic proceedings

- 10 Delfi is an internet news portal operating in Estonian, Latvia and Lithuania, which publishes up to 330 news articles per day. Delfi enables user comments in a blank space at the bottom of each article, next to another blank space for the commenter's name and (optional) email address. On January 24, 2006, Delfi published an article entitled "*SLK Destroyed Planned Ice Road*", which described the incident whereby the SLK public ferry, which offers transportation between the mainland and some islands, decided to change its route and, as a result, ended up destroying so-called "iced roads" -- built each winter on parts of the frozen Baltic Sea, offering an alternative connection to some of those islands. Destroyed ice roads were

in direct competition with the ferry, whose majority shareholder was Mr. L. For this reason, some (20) of the several (186) comments received contained personal threats or offensive language against L. These comments were not detected by the automatic deletion system, which is based on certain stems of obscene words, and were not flagged as offensive by any user through the "notice and take-down" framework provided by the portal.

- 11 On March 9, 2006, approximately six weeks after the publication of the article, L.'s lawyers requested the removal of the comments and claimed damages for compensation against Delfi. While Delfi complied with the request by removing the comments the same day, it refused compensation. As a result, L.'s lawyers brought a civil suit against Delfi to the Harju County Court. The County Court initially dismissed the claim citing that content hosts were granted safe harbor under the Information Society Act (the Estonian implementation of the EU Electronic Commerce Directive), according to which:

Section 10 – Restricted liability upon provision of information storage service

"(1) Where a service is provided that consists of the storage of information provided by a recipient of the service, the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

- 1) the provider does not have actual knowledge of the contents of the information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent;
- 2) the provider, upon obtaining knowledge or awareness of the facts specified in subparagraph 1 of this paragraph, acts expeditiously to remove or to disable access to the information.

(2) Paragraph 1 of this section shall not apply when the recipient of the service is acting under the authority or the control of the provider."

Section 11 – No obligation to monitor

"(1) A service provider specified in sections 8 to 10 of this Act is not obliged to monitor information upon the mere transmission thereof or provision of access thereto, temporary storage thereof in cache memory or storage thereof at the request of the recipient of the service, nor is the service provider obliged to actively seek information or circumstances indicating illegal activity.

- 12 However, on October 22, 2007, the Tallin Court of Appeal quashed the judgment, finding the Information Society Services Act was inapplicable, and remanded to the County Court. In the subsequent judgment, the County Court on June 27, 2008, found in favor of the claimant, qualifying Delfi as a "publisher" of the comments (and not only of the news article) and awarded the equivalent of 320 Euros of damages compensation. The Court of Appeal upheld the judgment on December 16, 2008, on the basis of the consideration that Delfi should have created an effective system ensuring rapid

removal of unlawful comments, and that imposing the burden of monitoring on the potential victims runs against the principle of good faith. Finally, the Supreme Court on June 10, 2009, dismissed Delfi's further appeal, clarifying that in contrast with the hypothesis of service provider falling under the safe harbor of sections 10 and 11, a provider of content services "govern[s] the content of information that [i]s being stored". It went on to explain that the company has to be considered a publisher because:

"The number of comments had an effect on the number of visits to the portal and on [Delfi]'s revenue from advertisements published on the portal. Thus, [Delfi] had an economic interest in the comments."

- 13 In addition, Delfi was deemed to have control over the publishing of comments because:

"It enacted the rules of comment and removed comments if the rules were breached. The users, on the contrary, could not change or delete the comments they had posted; they could merely report obscene comments."

- 14 Finally, the Court concluded that Delfi, on the basis of the general *neminem laedere* obligation, should have prevented clearly unlawful comments from being published, and removed such comments of its own volition whenever published. As a result of this judgment, Delfi lodged an application to the European Court of Human Rights on December 4, 2009, alleging a violation of its freedom of expression by Estonia. On October 10, 2013, the First Section of the Court released its long-awaited verdict, finding no violation of article 10 (freedom of expression). The judgment was appealed and, subsequently, referred to the Grand Chamber -- an avenue that is reserved for a very limited number of cases upon the discretion of the Court. In the following subsection, I sketch the relevant passages of the First Section's reasoning and offer a critical appraisal about its interpretation of the intermediary liability provisions.

as interpreted by the case-law and in consistence with the evolution of technologies, established the principle of media responsibility for publication of defamatory comments with sufficient clarity¹⁷.

- 16 While I have no knowledge of the developments of the case-law alluded to by the Court -- according to which anyone who disc

II. ECtHR proceedings

- 15 The first legal question at hand in this proceeding was not whether or not there was an interference with Delfi's freedom of expression (which was an undisputed fact) but whether or not such interference was "prescribed by law" in accordance with article 10 of the European Convention of Human Rights (ECHR)¹⁵. In this regard, the Court emphasized the importance that the law be formulated with sufficient precision to enable a citizen to regulate its conduct, yet specific enough that the degree of foreseeability depends on the content of its text, the field it is designed to cover, and the number and status of those to whom it is addressed¹⁶. In this case, the Court found that the pertinent legislative and constitutional provisions,

- 17 loses defamatory information to third parties could be found liable, even if he or she was not the publisher of the article¹⁸ -- it seems hard to miss that the Supreme Court's interpretation is in direct conflict with the principles laid out in the EU Electronic Commerce Directive¹⁹, which are, specifically, meant to foreclose *any* possibility of secondary liability for damages by a content host who does not play an active role giving him knowledge or control of the data stored²⁰. This is an unavoidable conclusion if one considers that, following the interpretation of the Court of Justice of the European Union [CJEU] in the *Google France* case²¹, conduct that is merely technical, automatic and passive is shielded from liability under article 14 of the Directive -- and that the involvement of Delfi in content regulation was just that: an automatic screening of offensive content.
- 18 The second, more intricate question that the Court had to entertain was whether or not the interference with freedom of expression was necessary in a democratic society, in particular to protect the reputation of others. The Court addressed the question focusing on four factors: the context of the comments; the measures applied by the applicant company (Delfi) to prevent or remove them; the alternate liability of the authors of those comments; and the consequences of the domestic proceedings for the applicant. The remainder of this section will focus on the three most salient factors, which are dense with legal considerations, and will leave the fourth with mostly factual considerations made by the court²².
- 19 The first factor -- the context of the comments -- offered the court an opportunity to depart from the standard treatment of intermediary liability; what was somewhat unusual in this case is that the intermediary was also a publisher for the content that provoked the comments it hosted. However, from this circumstance alone, the Court seemed to take a jump to conclude that the controversial subject of the published article determined a higher standard of care for the applicant company (Delfi). According to the Court, this was justified for three main reasons: because the article dealt with matters that affected negatively a large number of people; because it attracted an above average number of comments; and because Delfi had a reputation of publishing defaming and degrading comments -- being one of the websites about which the editorial board of the weekly newspaper *Eesti Ekspress* complained in a letter sent in 2005 to high-level government officials.
- 20 However, it should be noted in this regard that, while Delfi had no reason to know or to take into account the concerns expressed in the letter, the remaining two grounds appear insufficient in themselves to raise the standard of care -- in order to benefit from the safe harbor, a content host simply needs to follow the rule that content must be removed only upon existence of actual knowledge or awareness of the illegality of the content -- both of which were missing before L.'s lawyers submitted their requests. Constructive awareness of illegality can be found, according to the ECJ, when a "diligent economic operator should have identified the illegality in question"²³. Although no further clarification has been given by the ECJ concerning the notion of "diligent economic operator," one can find a valid comparator in the test devised by US courts to interpret the analogous "awareness" contained in 17 U.S.C. § 512(c)(1)(A) for content hosts in the copyright infringement context: the so-called "red flag doctrine." The doctrine has been recently clarified by two judgments of the US Court of Appeals for the Ninth Circuit and the Second Circuit²⁴, in the sense that for constructive knowledge to have been inferred, a court had to have established that a defendant was subjectively aware of facts that would have made the specific infringement "objectively" obvious to a reasonable person. None of the elements cited by the court appear to indicate such awareness -- although, it is true that, differently from the "classic scenario" of content hosts, the applicant company was also publisher of the news article, in the first place, which puts it into a privileged position of subjective awareness of the circumstances cited by the court. The mere fact that the article was on a controversial subject and attracted more comments than usual do not make "obvious" that it would trigger defamatory comments. Likewise, jurisprudence concerning the liability limitations established by 47 U.S.C. § 230 for offensive content would shield a website from liability as a provider or a user of an interactive computer service²⁵, and only an active type of hosting that materially contributes to the alleged unlawfulness would disqualify it by turning it into an information content provider²⁶.
- 21 The second factor considered was the set of measures taken by the applicant company to prevent or remove the illegal comments. Here, the Court acknowledged the convenience and easy accessibility for users of the system in place for takedown requests; however, it lamented that this was only an *ex-post facto* system which, in combination with the (weak) prior filtering adopted by the company, did not ensure sufficient protection for the rights of third persons. This is another crucial passage of the judgment which, largely because of the case-specific nature of ECtHR rulings, leaves us with a certain degree of uncertainty going forward. The ECtHR seemed content with the system of notice and takedown, thus implying that the deficiencies were in the other means of protection against defamatory comments -- the word-based filtering. But, can an automatic screening system ever confer sufficient

protection for the right of third parties? Also, how much does the foreclosure of the possibility for users to modify or delete their own comments count for the purposes of attaining sufficient protection? The Court concluded precisely for this particular aspect that Delfi “exercised a substantial degree of control over the comments of its portal, even if it did not use the control to the full extent as it could have”²⁷. This is inextricably linked to the fact that commenters were not registered users of the community, i.e. that the website allowed online anonymity for commenters.

- 22 This brings us to the third and most important factor for purposes of this analysis: was the attribution of secondary liability necessary simply because it would have been excessively difficult for the victim to recover by bringing a claim against the actual actors of the comments? On this point, the Court relied on a three-fold argument: first, it recalled its judgment in *Krone Verlage (no.4)*²⁸, in which it found that shifting the defamed person’s risk to obtain redress to the for defamation media company, usually in a better financial position than the defamer, did not amount to a disproportionate interference with the company’s freedom of expression. The argument advanced here is a sensible one, but what the court did not make explicit is that by relying on it, it extends a narrow precedent of media law into the broader universe of content hosting, where the circumstances might be widely different. For example, it is not always clear that the degree of solvency of an owner of a small blog or platform would be superior to that of an author of a comment. Second, the Court pointed out that, as submitted by the government, it is very difficult to establish the identity of the alleged infringer for the purposes of bringing a civil claim. This argument has merits, too, as disclosure of identity does present serious technical and legal difficulties: from a technical perspective, even admitting that the website retains (at the time of discovery of the defaming statement) the logs regarding activity of its users, it is not to be taken for granted that the internet service provider still has the data regarding the assignment of IP addresses at that particular time –not to mention that the user might have resorted to some of the anonymization techniques described *supra*²⁹. From a legal perspective, it is true that many countries do not establish a procedure for the disclosure of connection and traffic data for the purpose of civil proceedings, and the *Promusicae* case clarified that European law does not require it³⁰. However, it is also true that registration via email or other information is not a panacea for the identification difficulties: ill-intentioned users will always be able to circumvent the formalities imposed, in this particular case, simply by creating an email address associated to a fake name and address, and possibly using a secured connection away from their actual residence. Thus,

the argument of “difficulty” on its face could be used to support a general principle of civil liability of intermediaries for the speech that they enable, and that is precisely against the wisdom that underlies the safe harbors contained in the E-commerce Directive and other intermediary liability legislations around the world. Third, and this is the argument that has been most critically received, the Court asserted that “it was the company’s choice to allow comments by non-registered users and, [...] by doing so, it must be considered to have assumed a certain responsibility for their comments”. What does this newly established concept of responsibility for anonymous comments imply? The hint given by the Court in the following passage, in acknowledging the tension between “the importance of the wishes of Internet users not to disclose their identity in exercising their freedom of expression” and “the spread of the Internet and the possibility – or, for some purposes, the danger – that information once made public will remain public and circulate forever,” that the imposition of such responsibility would be necessary because intermediaries constitute the nevralgic point where this tension is most aptly managed. In other words, it would be up to intermediaries to decide how to structure their services in such a way as to ensure proper balancing between freedom of expression and anonymity on the one hand, and protection of dignity and informational self-determination on the other. Most importantly, intermediaries can be held responsible whenever such balance swings too heavily in favor of one of these two conflicting interests. This is based on the assumption that it is both less costly and more effective to impose such responsibility on them than relying entirely on private citizens to detect illegal material and enforce the law against alleged infringers. Yet, what this assumption fails to properly acknowledge is the different role played by intermediaries in detection and enforcement: due to the imperfection of identification technologies, which are prone to errors of type I (overinclusion)³¹ and type II (underinclusion)³² – the deployment of machines for the detection of illegal content must be combined with a certain extent of human interaction. However, it is argued that because of the ease of disclosure and the amount of information available on the Internet, the legal system cannot expect that such human interaction occur on a systematic basis prior to making such information available; that would clearly impose an excessive burden on the intermediary, as it would weigh significantly on the shoulders of small and medium-sized intermediaries, and thus limit the amount of competition in the market for content hosts, thereby increasing market concentration and, potentially, the ability of the remaining players to restrict speech on their platform. For this reason, the new concept of responsibility established by the ECtHR not only appears in conflict with the explicit exclusion of

monitoring obligations in the E-Commerce Directive and its national implementations, but it is also likely to endanger competition in the market for content platforms. The following section will elaborate more on this and other issues that this judgment has brought to the forefront.

C. Towards the end of online pseudonymity?

- 23 The previous section explained and criticized the way in which the ECtHR has reached the conclusion that states can impose secondary liability for defamatory comments posted by non-registered users, even if a content host has promptly reacted to a victim's notification. This section takes this conclusion as given, and explores the implications that the enactment of such a policy could have for the governance of content on the Internet.
- 24 Although the judgment did not prescribe any particular procedure that would prevent content hosts from further incurring into liability in Estonia and in other regimes that replicate the same conditions³³, two clear routes seem possible: 1) the most straightforward solution: disabling anonymous commenting and anonymous user content creation, and 2) the most challenging and articulated solution: increasing *ex-ante* control over comments.
- 25 Logically, the vast majority of operators will, for practical reasons, choose n. (1). For this reason, it is important to stress that this move, combined with the recent trend of certain social networks³⁴ and microblogs³⁵ to adopt a "real name" policy, can be a dangerous step towards the establishment of an integrated real-name-based network. While a reading of the *Delfi* judgment suggests that the news portal would probably have been able to escape liability by allowing users to interact under a pseudonym, the underlying rationale for this was -- at its core -- the difficulty of identifying infringing users for purposes of compensation. Now, although a registration via email makes a user somewhat more traceable, it is a far less effective means to that end than registration with a government-issued ID -- as *supra* mentioned, it is not hard for a user to circumvent the requirement in order to avoid recognition of his or her real identity. Thus, the idea that courts will in the near future find the use of pseudonyms insufficient from an enforcement perspective does not seem far-fetched. Registration through government ID is likely to be effective regardless of the procedure chosen to enforce it. Currently, the solutions implemented on the market are of three types: the strictest form of verification is that of scanning the document to ensure it matches the credential in the website, as in the case of Airbnb³⁶; the intermediate form is the one in place
- in China, where people are required to provide their ID number (which may or may not be checked by the relevant authority) before logging in microblogs; and finally, the weakest form of oversight is that of social networks like Facebook and Google Plus, where an ID may only be requested in case of contestation of the self-declared generalities. In all these scenarios, the request for verification is accompanied by the threat of criminal sanctions for use of a fake ID, which in turn may be considered sufficient for obtaining an order to the Internet service provider to disclose connection and traffic data in relation to that particular user. In any case, it is clear that an immediate consequence of this ruling would be a slippery slope towards real-name Internet surfing.
- 26 Fragmentation of cyberspace would be another problem caused by a bias against platform anonymity, at least as long as countries do not adopt a uniform system of legal protection for online anonymity or pseudonymity. For example, Germany's article 13 VI of the Telemedia Act of 2007 requires Internet service providers to "allow the anonymous or pseudonymous use of telemedia services and their payment, insofar as this is technically feasible and reasonable. The user must be informed about this possibility". Even though it has been clarified that this does not mean a right to stay anonymous *vis a vis* the service provider³⁷, which may require his or her real name in their contractual relationship, this provision has led to a court battle between the German data protection authority and Facebook over the possibility to use pseudonyms within the Facebook website³⁸. Although the controversy was not resolved on the merit but with a finding of inapplicability of German data protection law in light of the processing of data occurring in Ireland, the difficulty in ascertaining the actual location of the processing data and the conflict between the application of two different data protection laws (one requiring and the other not requiring pseudonymity) highlighted how concrete the possibility is that multinational providers will be unable to enforce a real-name policy uniformly, across different countries. A similar conflict could occur with the analogous pseudonymity requirement recently introduced into legislation by the Australian Privacy Principles, which went into effect on March 12, 2014³⁹. These inconsistencies may end up motivating several users to utilize VPNs or proxies in order to circumvent geo-location and receive the privileges offered by the law of a particular country, ultimately pushing towards anonymity not only *vis a vis* users of the platforms, but also against law enforcement agencies -- even for serious criminal matters.
- 27 Further segmentation is likely to occur even *within countries* if content hosts choose to adopt a mixed regime, in which they offer second-tier services to anonymous users, with limited or abridged capacity

to create content and interact with other users. This would lead to the creation of a suboptimal Internet experience for those wishing to remain anonymous, and impair their ability to use the Internet to further what is its fundamental goal: enabling communication. As this practice turns into a convention, the use of differentiated services between anonymous and registered users will likely make anonymity so unattractive as to become, in the long run, gradually meaningless. In other words, modeling liability on the basis of characteristics relating to the originator of content, as opposed to the content, itself, would lead to the creation of an important bias against pseudonymous speakers, running counter to the idea of the Internet as a global public resource available to all, and an empowering technology. As a matter of fact, this would lead to the exclusion of the voices of several people who seek anonymity for a variety of legitimate reasons that are often related to safety, fear of retaliation or repercussions in the professional context, and prejudices which a potential speaker wishes to overcome in order to freely engage in Internet communication⁴⁰. Again, this will push those people who treasure anonymous speech to increasingly resort to circumvention technologies -- and, if necessary, even the use of fake IDs -- thus, simply increasing the amount and scope of “illegal acts”, and reducing the ability of public authorities to enforce a law that, depending on the amount of “civil disobedience” generated by the adoption of these policies, will be perceived less and less socially acceptable. And, given the magnitude of the public outcry following the recent revelations by Edward Snowden about the US National Security Agency and the civil movement that it has generated⁴¹, one can expect significant support from the crypto community to ensure the protection of anonymity. To be clear, this is not to deny the importance of a phenomenon that is already occurring, and that regulators can arguably do little to prevent; the argument is simply that oppressive control inevitably leads to increased instances and forms of evasion. Much like between hackers and security systems, malwares and antivirus programmers, and, in some sense, peer-to-peer copyright infringers and the copyright industry, there will always be a set of more “skilled” or simply “undismayed” users managing to circumvent the technology of control that proves sufficient for the majority of the population. However, when such technology is used to deprive those users of their essential liberties (a reaction from content hosts that may unfold from the confirmation of the Delfi judgment), the movement of protest and liberation from control will be of a much wider scale, thereby leading to the complete ineffectiveness and repulsion of the current system of law and governance.

28 We have already touched in the previous section upon the main challenges to an effective implementation of the alternative solution (n. 2) to disabling pseudonymity following the *Delfi* judgment, i.e. enhanced content oversight. In particular, it has been pointed out that the sensitivity of certain fine-grained distinctions required in determining the legality of content makes it impossible to rely on a completely fool-proof machine, and that systemic human oversight implies substantially raising the costs of doing business for content hosts. So, what kind of scenario can we expect in the aftermath of *Delfi*, were the notion of responsibility for pseudonymous comments to be confirmed by the Grand Chamber? The most visible consequence would be that big players with adequate economies of scale and of scope would be willing and able to use reliable algorithms for the detection of potentially illegal content, as they are currently doing for copyright infringement. The other, small- and medium-sized websites would probably end up outsourcing this task to independent technology providers, which are increasingly emerging in the marketplace⁴², but will never attain the same degree of accuracy and effectiveness. As the economics of search engines demonstrates⁴³, the key factor to the improvement of algorithms is not simply a large enough amount of data points to form a rich database of “potentially illegal” content (although that is clearly a first threshold requirement), but more importantly, the capacity to connect through them in a sensible manner. This can only be done through continuous experimentation, which in turn requires a continuous flow of traffic that can be used to test, verify and challenge the accuracy of the connections established by the algorithms. For this reason, it is clear that large operators already have a significant advantage over small content hosts, which are unlikely to catch up absent a regulatory obligation on the part of the established operators to share their tools for detection. Worse yet, the scenario prospected here would increase the dominance of the big market players, in light of the liability that is likely to be imposed upon the adopters of “inferior” technologies in the detection of illegal content; this is because large operators would be able to rely on a *bonus pater familias* defense⁴⁴, proving their diligence in having adopted “state-of-the-art” technology to detect defamatory content. What is unclear from the *Delfi* judgment is the extent to which a content host would also need to prove that the utilized technology is effectively functioning for its purpose; again, this is largely due to the case-specific nature of ECtHR rulings, but a question remains concerning how much more sophisticated (and effective) should *Delfi*’s screening system have been in order to escape liability, in the Court’s view. This may leave some wiggle room for smaller platforms that achieve a sufficiently effective detection algorithm, but they would have to risk their judgment regarding the

margin of error that is likely to be tolerated for the purpose of accepting a particular technology as offering “adequate protection” of the rights of third parties.

29 In any case, it should be kept in mind that the potential sufficiency of an effective detection algorithm was considered in *Delfi* only in conjunction with the operation of a user notification system, whereby requests for takedown could be received by the company so as to proceed expeditiously to removal. This constitutes an essential component of the envisaged system of protection, which enables the achievement of the ultimate purpose by complementing the best technology with the sensibility that only a human being can have towards nuanced uses of language and complex balancing exercises. In the case of smaller platforms, for the reasons mentioned above, the extent of human involvement will have to be extensive, if not exclusive. As noted, this runs contrary to the provision excluding the imposition of monitoring obligations, which is widely recognized in Internet intermediary liability regimes around the world⁴⁵. Others have expressed disappointment with the fact that the Court in *Delfi* has seen this prohibition as an innovative policy measure, and not strictly as a requirement of human rights law⁴⁶. In fact, what the Court is missing here is, on the one hand, the privacy issues stemming from such practice and, on the other, the consequences that this is likely to generate in terms of competition amongst platforms and their ability to set restrictive terms of service, to the detriment of the freedom of expression of their users.

D. How to stop it

30 Although the core objective of this article is to show the problems that an acceptance of *Delfi* would generate for intermediaries and Internet users, it seems appropriate to suggest, also with a *pars construens*, how the Court *should* have ruled – and how the Grand Chamber should approach this issue going forward.

31 As it has been stressed already, there are a number of situations where anonymity constitutes, as an enabler of speech, an essential pre-requisite to the enjoyment of human rights. At the same time, it is clear that not all cases of anonymity are matters of human rights, and it is very difficult to ascertain the extent to which a request for anonymity belongs to one group or the other. First of all, this is a difficult task because anonymity is not a human right, in and of itself; rather, it may constitute an intermediate condition for the enjoyment of a variety of human rights – such as freedom of expression, privacy, life, liberty and security, freedom of thought, conscience

and religion. Therefore, in order to establish whether anonymity is required by human rights law, it needs to be determined the extent to which it is needed for the enjoyment of one of those rights. This is inherently hard to accomplish because the merits of the argument that may be put forward in support of protection of anonymity depend on the accuracy of a prospective evaluation, i.e. on the occurrence of an action or a series of actions in the future.

32 Secondly, the very act of evaluating the necessity of anonymity in a particular case requires a disclosure that may defeat its purpose: unless there is strict separation between the entity that is seeking disclosure and the one who is adjudicating, combined with a strong system of safeguards to prevent leaks from the latter, anonymity may be compromised by the mere act of evaluating whether it is well-founded.

33 Due to the complexity of these evaluations, it is quite logical to expect intermediaries to steer away from case-specific assessments and, therefore, embrace categorical solutions – generally speaking, either allowing or not allowing online anonymity or pseudonymity. However, as we have seen in Section 1, anonymity is not a monolith: it is a concept which can be modeled in scope and depth. Accordingly, in order to allow for the emergence of a human-rights compliant solution, it is necessary to identify which aspects of anonymity are specifically sought by users. Since the range of users and demands is very wide across different groups and geographies, it is argued here that a key, and often underestimated, value for the establishment of balanced and respected legal rules of anonymity protection is the encouragement of competition on this feature: only competition in the market can ensure the continuous availability and improvement of empowering technologies.

34 This is exactly the opposite of what the *Delfi* decision stimulated: a system of incentives that impose technological mandates tipping the market in favor of the already-established big players deters market-based solutions to the problems of human rights compliance, and impairs the ability of the State to ensure protection of the rights of users *vis a vis* intermediaries. In contrast, a market-based system would enable the existence of certain platforms that offer better protection for privacy and of the reputation of others, even if it comes, admittedly, at some cost for ease of use or freedom of expression. Thanks to the ability of technology to incorporate the modularity of anonymity, protection can be granular and tailored to the needs of users, allowing competition to unleash on even the smallest details. As a result, people would get to learn about the pros and cons of new technologies and would be naturally attracted to those platforms and applications that offer features (including anonymity privileges) that best cater to their needs.

35 However, it is necessary to draw a line in order to prevent those technologies from making law enforcement impossible or unfeasible. Competition in technological solutions to anonymity is, indeed, welcome for the development of innovative solutions, but only as long as it occurs within a framework of minimum standards -- which may be called of “procedural” and “substantive” due process -- that protect fairly and equally the interests of the parties involved. For this reason, it is suggested here that the ECtHR should have reflected on what those standards are, particularly to the extent to which an alleged infringer has a right to have its anonymity protected by a third party, and eventually asked this question: should the intermediary bear the burden for failing to actively engage in the evaluation of such entitlement? I suggest that it should not; rather, the ability of the intermediary to provide a forum for the evaluation of respective weight of the claims of protection can be harnessed to promote the respect of ECHR rights in a consistent manner across ECHR member States.

E. Delineating a “due process” doctrine from the existing ECtHR case-law

36 Since we are discussing an ECtHR case, the solution should, in principle, be sought in the jurisprudence of that Court, defining the way to handle balancing of the right to anonymity of third parties with conflicting state interests. While the Court only adjudicates specific matters and grants States a certain margin of appreciation in undertaking their balancing of conflicting interests, there are situations where it has made clear that a State has exceeded its margin, crossing the line of permissible interference with a Convention’s right. Thus, these “red lines” crossed by the Court can be taken as useful guidance in defining minimum standards. Such red lines are concerned with both substantive and procedural due process concerns.

37 First of all, procedural due process: to define whether the State’s appreciation has remained within an acceptable limit, the Court needs to ascertain whether the interference was prescribed by law. As often clarified by the Court⁴⁷, such law should not only be formally in place, but also be both adequately accessible and foreseeable. This means that it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention, indicating with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise. This measure of protection can only be guaranteed if the law describes the scope of the discretion granted to the authorities

with sufficient clarity, and includes legal procedural safeguards commensurate with the importance of the principle at stake. At a minimum, this must include the guarantee of review by a judge or another independent and impartial decision-making body. For example, in *Sanoma Uitgevers B.V.*⁴⁸, the Court was required to decide the proportionality of the interference by the police with the right to non-disclosure of anonymity for public order reasons. Here, the right to anonymity concerned the identity of third parties engaged in illegal car races, who appeared in the pictures taken by a reporter that had been authorized to do so only after having guaranteed that it would preserve the anonymity of the participants. However, prior to the publication of the reporter’s article, police officers suspected that one of the vehicles participating in the race had been used as a getaway car following a ram raid. Having been informed of the picture taken at the race, the authorities compelled the editor of the magazine to release the photos, which enabled the police to identify the drivers of that car. The Court found this to be an interference with regards to the journalistic privilege of source protection (stemming from the right to freedom of expression⁴⁹) and not prescribed by law, in that the legal system did not allow review by an independent body *before* access and use of the seized material.

38 In more complex cases, the Court needs to engage in a more detailed overview of the balancing of the interests at stake. However, the way it does so and avoids substituting itself *in toto* to the judgment of the states is by adopting a procedural posture (also known as “proportionality balancing”⁵⁰) -- that is, defining whether the appropriate procedural framework was in place to be able to satisfy (in general terms) the holders of the different interests at stake, and whether the measure adopted is, as a result, more restrictive than necessary. In doing so, by ranking values and solving conflicts on the basis of relative weight, it inevitably delineates a doctrine of “substantive due process”.

39 In *Godelli*⁵¹, for example, the Court had to determine whether the grant of perennial anonymity to women giving birth in public hospitals was a proportionate interference with the applicant’s right to know her origins, which is integral part of the right to respect for private and family life. The reasons given for the existence of a law guaranteeing such a strict adherence to anonymity were the protection of a woman’s interest in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions, the freedom of women to decline their role as mother or to assume responsibility for the child, and the general interest of the State to protect the mother’s and child’s health during pregnancy and birth and to avoid illegal abortions and children being abandoned in ways other than

under the proper procedure. Despite recognizing these objectives as well-founded, the Court contrasted the measure taken by the Italian State with the more flexible approach of France, analyzed in *Odièvre*⁵², which permitted a son or daughter to obtain non-identifying information about the anonymous parents and to request the mother's identity be disclosed with the consent of the latter to a National Council for Access to Information about Personal Origins. It concluded that, since the Italian system did not attempt to strike any balance between the competing rights and interests at stake, the interference was disproportionate.

- 40 In a vocal dissent, Judge Sajo stressed the importance of what he believed to be direct emanation of the highest value of the convention: the right to life. Reflecting on the system of incentives that the provision in question created, he pointed out that what this serves, ultimately, is the right to life of the offspring – which would have, otherwise, been endangered. Interestingly for our purposes, he specified:

Of course, the right to life is only indirectly protected by the anonymity provision. However, this supremacy is decisive for me in the balancing exercise, which cannot be limited to a conflict between two Article 8 right-holders.

- 41 While it is questionable –as deemed by the majority– that this principle would necessarily lead to the permissibility of a blanket grant of anonymity, this judgment is illustrative of one important parameter in the methodology that should be used to assess the rank of anonymity protection: above all, anonymity should be guaranteed when it clashes against the right to life (protected by article 2 of the Convention). At the same time, because of the rank of the right to life in the Convention, anonymity should be protected more forcefully when it is justified by the need to protect such a right.
- 42 A further notable aspect of the dissent is its focus on the long-term consequences of the decision, and in particular on the incentives that a grant of disclosure would have on the behavior of prospective mothers in similar cases. This is precisely the kind of reasoning that would have allowed the Court to ascertain, in *Delfi*, the enormous consequences that a ruling allowing intermediary “responsibility” for user comments would have on the ability of individuals to express themselves anonymously in the future, and thereby receive protection for some of their Convention rights while exercising their right to speak.
- 43 Another complex case on anonymity protection is *K.U. v Finland*⁵³, where the Court was asked to establish whether the absence in the legal framework of an injunction to compel ISPs to disclose the identity of a subscriber liable of a criminal offence amounted

to a disproportionate interference with the right to respect for private and family life for the victim, and a justified interference with his right to an effective remedy. In particular, such possibility existed for certain offences, but not for the type of misrepresentation committed by the customer in question (posting the photo and contact information of a minor and inviting people to contact him “to show him the way”). The Court noted that the facts at hand concerned a serious matter of interference with private life in the sense protected by article 8 ECHR (because of the potential threat of sexual abuse), and that effective deterrence against grave acts where fundamental values and aspects of private life are at stake requires *efficient* criminal law provisions⁵⁴. The Court conceded that freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression will be respected, but remarked that such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others⁵⁵. For this reason, and without prejudice to the question whether the conduct of the person who placed the offending advertisement on the Internet can attract the protection of Articles 8 and 10, the Court made clear that “it is nonetheless the task of the legislator to provide the framework for reconciling the various claims which compete for protection in this context⁵⁶”.

- 44 This judgment illustrates again the typical approach taken by the Court to complex balancing: bearing in mind that its role is not to substitute its view to that of the member State in question, it ensures that the adequate procedural framework is set in place so that the conflicting interests are taken into account. However, what procedural framework will be considered adequate depends on the weight attached to the interest to be protected. In this case, having regard for the potential threat to the victim's physical and moral integrity, the Court reminded us? of the vulnerability of individuals at such a young age (12 years old) and concluded that there had been a violation of article 8 because both the public interest and the protection of victims of crimes committed against their physical and psychological well-being require the availability of a remedy enabling the actual offender to be identified and brought to justice.⁵⁷
- 45 Again, one can see the role that incentives play in this regard: the reasoning of the court is that if there is no possibility of identifying the perpetrator and bringing him to justice, it is unlikely that prospective offenders will refrain from engaging in such conduct in the future. And once again, what the Court took issue with was the lack of an appropriate procedural

framework to duly take into account the respective interests at stake, which the State had a positive obligation to ensure⁵⁸. By doing so, the Court showed the way in which substantive considerations are to be taken into account for “procedural due process” purposes: when balancing between conflicting interests, States must ensure that the legal system does not neglect or insufficiently take into account the interest of protection from “grave” acts.

F. Situating platform anonymity within the existing technological framework

- 46 Today, technology offers an opportunity for companies to market products that incorporate modularity, and to ensure that such procedural framework can be implemented by design, enabling the intermediary to undertake a first instance balancing between competing rights and interests. For example, the recent platform Whisper grants anonymity but, in exchange, “vets” the content posted by users in line with its terms and conditions⁵⁹, deciding over publication on the basis of the public interest character of the matter to be disclosed⁶⁰. Similarly, in the copyright context, Vimeo’s Copyright Match immediately fingerprints its content and searches for matches in its database to detect any possible infringement by videos being uploaded by its users, enabling immediate removal. At the same time, however, Vimeo allows users to explain possible circumstances justifying the upload notwithstanding the match, including the open-ended and balancing-centered defense of “fair use”⁶¹.
- 47 It should also be clarified that the specific programs or applications which guarantee anonymity by default are of two different kinds: one offering anonymity *vis a vis* users of the same platform (“platform anonymity”) but not *vis a vis* the internet service provider (“customer anonymity”⁶²) or the public authority (“citizen anonymity”⁶³); the other (and more difficult to accomplish) gives partial “citizen anonymity” and “customer anonymity”, through the use of Tor or VPNs and other technological arrangements that minimize the disclosure of identifying information⁶⁴. However, both types of anonymity are imperfect: they only operate at one layer -- respectively, the application layer and the network layer. In addition, the latter also requires the users to de-identify themselves by clearing cookies between sessions and not logging into identifying applications. Furthermore, some countries (as well as some payment intermediaries⁶⁵) have started to block or prohibit VPN providers⁶⁶, thus making the task even more complicated for an average user. Even admitting that skilled users will easily circumvent those blocks and that highly
- sophisticated identification techniques exist for exceptionally important targets, it should be borne in mind that more complexity requires higher expenditures for law enforcement, and it is therefore unwise for a legislator to devise a whole regulatory procedure focusing on anything other than the “average user”. For an average user, who doesn’t know all the precautions that he or she needs to take in order to be completely anonymous, nothing is available in the market that provides protection simultaneously at the application and the network level; so, when talking about platforms, it is clear that there will always be the possibility of tracing individual users, unless they have themselves combined the two functionalities above. It must be understood, therefore, that except for the very narrow group of skilled users, technological traceability dominates the net.
- 48 What this implies is that it is generally possible for platforms, in line with their terms of service, to retain, obtain and disclose the data they have gathered to perform their services. Some may voluntarily choose to erase data about their users in a very limited timeframe⁶⁷, and some may be forced by law to keep it for a longer period. The latter scenario had, in fact, materialized in the national implementation⁶⁸ of the EU Data Retention Directive (2006/24/EC), which established an obligation for providers of publicly available electronic communications services and of public communications networks to retain traffic and location data for up to six months or two years for the purpose of the investigation, detection, and prosecution of serious crime. However, the past tense is required when speaking about this Directive, since it was recently invalidated by a decision of the CJEU for its inconsistency with the protection of fundamental rights.⁶⁹ In the aftermath of the invalidation of the Directive, it is expected that its national implementations will be repealed or declared unconstitutional⁷⁰. However, it is submitted here that a complete absence of European coordination on this matter would be problematic for the lack of uniformity that would arise as a consequence in national laws⁷¹ and, worse yet, for the risk of insufficient protection of the rights of European citizens, who may have no, or limited, remedies available without the traffic and connection data.
- 49 One thing that the saga of the rejection of the data retention provisions⁷² has taught legislators is that normative provisions introducing law enforcement measures with such a sweeping potential of interference with individual rights must contain adequate safeguards against abuse, and lay out with clarity the conditions on which interference with the right to private life and personal data would be allowed. In fact, the ECJ found problematic the fact that the retention obligations of the Directive applied

even in the absence of evidence of any serious crime⁷³ and without requiring any relationship between the data and a threat to public security⁷⁴, but also that it provided no objective criterion to determine the limits and conditions of access and subsequent use of data by national authorities for the purpose of prevention, detection or criminal prosecutions of serious offences – a notion left for national member States to decide⁷⁵. This decision shows a clear path for measures introducing technological solutions to rights adjudication, pointing to the need to specify conditions and limitations for the interference with fundamental rights, require end-means proportionality, and provide adequate safeguards against abuse.

50 The law at issue in the *Delfi* case, that was interpreted to apply to news publishers in the same way for user comments as for articles, would be unlikely to pass muster under this test. This is because such law shifts the responsibility for defamatory comments to a third party who is neither the author nor the publisher (since it does not edit the content), and does not clarify the conditions for such interference with freedom of expression. The rationale for the existence of such provision is, in the words of the ECtHR, the greater likelihood that an Internet news operator possesses the resources for continual monitoring of the Internet and an adequate financial situation for ensuring redress of the victim, compared to the little chances that a victim would have to be effectively compensated if it was required to address his or her claims to the original poster⁷⁶. However, as pointed out earlier, the Internet has made it possible for everyone to become a publisher and run, for example, a news portal, therefore rendering the foundations of the argument of financial solvency that was traditionally applied to media somewhat shaky. In addition, the web offers also tools that enable users to easily monitor the Internet for the appearance of content regarding themselves or any information that they are particularly interested in, through search engine alert notifications.⁷⁷ In contrast, requiring a news portal to be the guardian of potential interests of anyone who might be affected by comments published by third parties in a news article amounts to a serious interference, both with the right to freedom of expression of the potential commenters and the right to property (protected by Article 1 of Protocol 1 of the Convention) of the portal operator. For these reasons, it appears that the shift of responsibility to the news publisher is more restrictive than would be necessary to achieve its aim, i.e. to ensure the ability of the victim to become aware of a violation of their privacy, obtain prompt removal and recover from it.

51 Furthermore, the way such law has been interpreted by the ECtHR adds another layer to the problem, in suggesting that the news portal assumes a certain responsibility over comments when it allows for

anonymous speech. As a matter of fact, the ruling of the court puts the measure in a light that sets the incentive for future content hosts to restrain anonymity – that is, to prevent content creation by unregistered users – and offers member States a (dangerous) opportunity to impose technological mandates for monitoring purposes, which is in direct conflict with the letter of the EU E-Commerce Directive. As noted, this would have serious consequences on the privacy and freedom of expression of users, both immediately and in the long run, by affecting competition in the market for news portals and, more generally, content hosting.

G. Conclusion: the need for standards of joint responsibility for intermediary conduct

52 Given all the above, it is submitted that the Court should have verified whether such interpretation of the law, resulting in an interference with the desire for anonymity of its users, was legitimate and proportionate in ensuring the effectiveness of redress of civil claims. Had it done so, it would have found already quite a consolidated jurisprudence in the EU providing a negative answer to that question, the general understanding being not only that monitoring obligations are explicitly excluded, but also that the law doesn't allow judges to force third parties to disclose identifying information of their customers. For example, as it was clear from the fact pattern from which a Spanish court raised a preliminary question to the ECJ in *Promusicae*, Spain does not allow the disclosure of identifying data for purposes of civil proceedings. A similar standard applies in Germany, where the ISPs can only be forced to disclose identifying information in serious criminal investigations⁷⁸ and in the case of alleged infringers of copyright on a commercial scale,⁷⁹ or otherwise obvious infringement of copyright⁸⁰; and in Italy, where it is settled that a subscriber's information can only be disclosed by ISPs "in exchange for the protection of superior values protected by criminal law"⁸¹. In some jurisdictions, the possibility of obtaining such information is not foreclosed but is subject to a strict balancing of criteria that ensures the well-foundedness of the alleged victim and prevent potential abuse of the process: this is the case, for example, of the Netherlands, where the Supreme Court ruled that disclosure for civil proceedings is not prohibited by data protection law, provided that certain restrictive conditions are met⁸². Similarly, in Sweden an order for disclosure of this kind can be made if there is clear evidence of an infringement of an intellectual property right, if the information sought can be regarded as facilitating the investigation into an infringement of copyright or impairment of such a

right, and if the reasons for the measure outweigh the nuisance or other harm which the measure may entail for the person affected by it or for some other conflicting interest⁸³. Likewise, in United Kingdom the procedure of *Norwich Pharmacal* order can be used to require third parties involved in any kind of wrongdoing to disclose certain documents or information about the wrongdoer, but the granting of such requests is contingent on the weighing of a variety of factors which focus prominently on the balance of inconvenience⁸⁴. One notable difference is France, where the system of injunctions seems to provide no explicit consideration for “equities” and rests entirely on the likelihood of success on the merit and irreparable harm⁸⁵, although it has been argued that balancing is increasingly conducted in intellectual property cases⁸⁶.

- 53 Instead, the Court should have clarified that the right to anonymity can be vital to ensuring the ability for users of a platform to engage in free speech while maintaining adequate protection for other Convention rights that can be adversely affected by the identification of the speaker. Accordingly, it should have been recognized that restrictions to anonymity must be done in accordance with the law and must be necessary in a democratic society for achieving an aim that is explicitly recognized by the Convention in relation to the article that is invoked for the protection of anonymity.
- 54 In the author’s view, the fact that the restriction would occur, in the case at hand, through self-regulation by the intermediary in response to the incentives set up by the standard of liability imposed by the legislation, should not have exonerated the Court from reviewing the necessity and proportionality of the mechanisms of liability generated by that legislation, as interpreted by the courts and perceived by platforms in the market. In doing so, the Court could have, at least implicitly, defined the conditions under which such intermediary would be permitted to restrict anonymity without implicating the liability of the State for failure to comply with its positive human rights obligations. In particular, the Court could have established that a system of balancing operated by the intermediary and triggered by user notification would be compatible with the Convention, as long as it incorporates the standard of procedural and substantial due process that the Court has elaborated in its jurisprudence. Although going into detail as to what those standards imply would be beyond of the limited purview of the Court in a specific case, a roadmap on the major factors to be taken into account and the procedural devices to be used for such balancing would be a significant step ahead towards clear and administrable responsibility of Internet intermediaries.
- 55 Incidentally, this framework would be largely transposable to the situation envisaged by the recent *Google Spain* judgment of the CJEU⁸⁷, which allows for the submission of notification to search engines for the erasure of links appearing in relation to one’s personal name, and thereby attributes adjudicative powers to this particular intermediary. As a result, the clarification that could be provided by the Grand Chamber of the ECtHR is potentially of great relevance for the future of privacy and freedom of expression in the EU, not only with regard to disclosure of the identity of anonymous (or pseudonymous) commenters, but also in relation to the criteria that should be used by search engines to respond to requests of removal –and more generally, by intermediaries receiving takedown requests.
- 56 These criteria may be, concretely, topics that deserve, in and of themselves, another article, or perhaps an entire book, to be dealt with. My suggestion in that respect is that the definition of an overarching framework would allow intermediaries to offer in the market effective and viable solutions to anonymity conflicts, with a balancing methodology that duly takes into account all of the relevant factors. To go back to the title of this article and the question posed therein, the real answer lies not so much in choosing between the affirmative and the negative but in identifying the circumstances under which intermediaries and/or States should be held responsible for not having set an adequate framework for the evaluation of conflicting rights claims. Clear and predictable boundaries on the operating space for an intermediary in evaluating such claims would allow us to answer that question, at least succinctly, and set the seeds for a market of technological solutions to rights adjudication in accordance with the rule of law. Specifically, enabling platforms to set presumptions in favor or against anonymity disclosure in specific circumstances⁸⁸ would go a long way towards ensuring the quick resolution of those requests, avoiding an excessive hindrance to the freedom of expression of the content generators and ensuring the viability of the business model of many Internet intermediaries.

* Comments welcome at n.zingales@uvt.nl. This paper was selected among the five finalists of the Young Scholars competition at the Information Influx Conference of the Institute for Information Law on 2 July 2014. Comments from Prof. Joel Reidenberg of Fordham Law School are gratefully acknowledged.

- 1 L. Lessig, *Code v.2*, available at <http://codev2.cc/>, p. 35.
- 2 Although the primordial version of Internet (ARPANET) was built upon a cooperative network of trusted and verified connecting computers, this limitation was overcome as the network turned from a military project into a means of mass communication.
- 3 A. Debashis, *On the Internet, nobody knows you’re a dog*, University of North Carolina at Chapel Hill (1993).

- 4 The handbook on European data protection law recently published by the European Union Agency for Fundamental Rights, the Council of Europe and the Registry of the European Court of Human Rights adopts a strict stance to the concept of “anonymisation”, with direct bearing on the understanding of “anonymity”, by requiring *all* identifying elements to be eliminated from a given set of personal data. However, at the same time the Handbook neither defines what such elements are, nor does it prescribe the complete, irreversible anonymization which would make it impossible any type of re-identification: making reference to recital 26 of the EU Data protection directive, it specifies that in the course of anonymisation, “*no element may be left in the information which could, by exercising reasonable effort, serve to re-identify the persons(s) concerned*”. See European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European data protection law* (Luxembourg, Publications Office of the European Union, 2014), p. 45 (emphasis added).
- 5 See V. S. Ekstrand & C. I. Jeyaram, *Our Founding Anonymity: Anonymous Speech During the Constitutional Debate*, 28 *American Journalism* 35 (2011).
- 6 See e.g. P. Ohm, *Broken promises of privacy: Responding to the surprising failure of anonymization*, *UCLA L. Rev.*, 57, 1701 (2009); A. Narayanan and E. W. Felten, *No silver bullet: De-identification still doesn't work* (July 9th, 2014), available at <http://randomwalker.info/publications/no-silver-bullet-de-identification.pdf> (accessed July 2014); see also M. Braga, *Sticky data: Why even ‘anonymized’ information can still identify you*, *The Globe and Mail* (Aug 06, 2014) <http://www.theglobeandmail.com/technology/digital-culture/sticky-data-why-even-anonymized-information-can-still-identify-you/article19918717/> (accessed August 2014)-
- 7 See “Introducing Airbnb Verified ID”. Available at <http://blog.airbnb.com/introducing-airbnb-verified-id/> See also <https://myverifiedid.com/what-is-it>.
- 8 See A. Hsiao, “ID Verify”. Available at http://ebay.about.com/od/glossaryofebayterms/g/gl_idverify.htm.
- 9 See for example, <http://www.facerec.com/> and <http://www.facedetection.com/>.
- 10 “Citizen” is used here as a generic notion, of an individual that is subject to the jurisdiction of the public authority in a particular state.
- 11 One significant step in the direction of “citizen anonymity” is end-to-end encryption of communication. However, while this can be a solution to prevent mass surveillance abuses by the authority, it is (1) unlikely to withstand individual and targeted efforts; and (2) concerning only the content of communications, and not the information regarding the end points of the conversation. See Eric J. Stieglitz, Note: *Anonymity on the Internet*, 24 *Cardozo Arts & Entertainment Law Review* 1395 (2007), 1401.
- 12 VPNs is the acronym for Virtual Private Networks, which create an encrypted connection between a PC and a remote server, preventing traffic data (including the IP address) to be transmitted to the visited website. Web proxies are browser add-ons which perform the same routing function, but do not encrypt all traffic and for this reason can handle many more requests at the same time. Both may retain traffic logs, which they can still be ordered to disclose through the regular legal process. Finally, there are special anonymity applications that enable users to access the Internet anonymously, much like in VPNs, but use a specific technique consisting in using multiple servers to relay data across several randomly chosen nodes of the network (“onion routing”). The most common example is of TOR (acronym for The Onion Router), a free open network originally developed by the US Navy to protect government communication. With TOR, it is practically impossible to identify the IP address; however, data is more vulnerable when it leaves the last server (so called “exit server”), as it must be unencrypted before reaching the target website. Unsurprisingly, this weakness of TOR and other VPNs has led to a finding of liability on the part of the identifiable user operating an “exit server” which routed an illegal exchange occurred within a private and encrypted filesharing network, and resulted in an injunction from transferring the copyright infringing song with a maximum penalty of €250,000 or a six month prison term. See LG Hamburg, 24 September 2012 (308 O319-12).
- 13 A classic example, which will be discussed more in detail infra, is the possibility to obtain further information after having identified an alleged infringer through a “DNS reverse lookup” on the IP address used to perform a certain action, which traces the ISP who provided the Internet connection. As a general rule, the legal system does not offer the possibility in civil matters to obtain the names of the subscribers to whom the particular IP address identifying the alleged infringer was assigned; by contrast, this is a routine procedure in criminal matters, provided that the adequate procedures are followed. See e.g. Principle 7 of the Declaration on freedom of communication on the Internet, adopted on 28 May 2003 by the Committee of Ministers of the Council of Europe, according to which: “*In order to ensure protection against online surveillance and to enhance the free expression of information and ideas, member states should respect the will of users of the Internet not to disclose their identity. This does not prevent member states from taking measures and co-operating in order to trace those responsible for criminal acts, in accordance with national law, the Convention for the Protection of Human Rights and Fundamental Freedoms and other international agreements in the fields of justice and the police*” (emphasis added).
- 14 *Delfi v. Estonia*, Judgment of the ECtHR on 10 October 2013 (Application no. 64569/09).
- 15 In particular, article 10.2 recites: “*The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary*” (emphasis added).
- 16 At 72.
- 17 *Delfi*, at 75.
- 18 See in particular Supreme Court of Estonia, case no. 3-2-1-95-05 of 21 December 2005, and case no. 3-2-1-67-10 of 21 December 2010, both cited in the *Delfi* judgment at 38.
- 19 In particular, article 14 (“hosting”) and 15 (“no general obligation to monitor”).
- 20 See in this sense ECJ judgment of 12 July 2011 in Case C-324/09, *L’Oreal and Others*.
- 21 ECJ Judgment of 23 March 2010, joined Cases C-236/08 to 238/08, *Google France and Google*.
- 22 The fourth factor considered by the court was the consequences of the imposition of a damages liability for the applicant company, which, given its size and the relatively small amount awarded, weighed in favor of the finding that such (small) interference with the applicant’s freedom of expression was not disproportionate.
- 23 Case C-324/09, *L’Oreal and others v. eBay* [2011], para. 120.
- 24 *UMG Recordings, Inc. v. Shelter Capital Partners*, 718 F.3d 1006, 1027 (9th Cir. 2013); *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 36, 38 (2d Cir. 2012).
- 25 For an overview, see J. R. Reidenberg et al., Section 230 of the Communications Decency Act: A Survey of the Legal Literature and Reform Proposals, Fordham Law Legal Studies Research

- Paper No. 2046230, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2046230 (accessed August 2014)
- 26 *Fair Housing Council*, 521 F.3d 1157, at 1168.
- 27 *Delfi*, at 89.
- 28 *Krone Verlag GmbH & Co. KG v. Austria* (no. 4), no. 72331/01, para. 32, 9 November 2006.
- 29 See *supra*, section I.
- 30 However, it does require that in the transposition of its Directives, “Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order”...and” must not only interpret their national laws in a manner consistent with those directives but must also make sure that they do not rely on an interpretation of them which would conflict with those fundamental rights or with the other general principles of Community law such as the principle of proportionality”. See *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, Case C-275/06. CJEU January 29, 2008.
- 31 See for instance, the recent case of the siren of a car in an uploaded performance of Grant Theft Auto, mistakenly confused with a famous copyrighted jazz song: <http://www.escapistmagazine.com/news/view/130742-Kevin-Smith-Defends-Lets-Plays-Speaks-Against-YouTubes-Content-ID>.
- 32 As was the case with the automated filtering adopted by *Delfi*. See *Delfi*, at 87.
- 33 An example is the UK Defamation Act 2013, which provides a defense from secondary liability for website operators only as long they allow victims to identify posters. According to Section 5 of the Act:
- “(1) This section applies where an action for defamation is brought against the operator of a website in respect of a statement posted on the website.
- (2) It is a defence for the operator to show that it was not the operator who posted the statement on the website.
- (3) The defence is defeated if the claimant shows that—
- (a) it was not possible for the claimant to identify the person who posted the statement,
- (b) the claimant gave the operator a notice of complaint in relation to the statement, and
- (c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.
- (4) For the purposes of subsection (3)(a), it is possible for a claimant to “identify” a person only if the claimant has sufficient information to bring proceedings against the person”.
- 34 For Facebook, see <https://www.facebook.com/help/292517374180078>; for Google plus, see <http://content.time.com/time/business/article/0,8599,2094409,00.html>.
- 35 In China, the use of “real names” is mandated by government regulation. See D. Caragliano, “Why China’s ‘Real Name’ Internet Policy Doesn’t Work”, *The Atlantic* (March 26, 2013). Available at <http://www.theatlantic.com/china/archive/2013/03/why-chinas-real-name-internet-policy-doesnt-work/274373/>.
- 36 See *supra*, Section I, footnote 4.
- 37 OLG Dusseldorf, MMR 2006, 618 at 620.
- 38 See S. Schmitz, “Facebook’s Real Name Policy: Bye-bye, Max Mustermann?”, 4 (2013) JIPITEC 3, 190. See also <http://www.theverge.com/2013/2/15/3991458/german-court-rules-in-facebooks-favor-europeans-must-use-real-names->.
- 39 Available at <http://www.oaic.gov.au/privacy/applying-privacy-law/app-guidelines/chapter-2-app-2-anonymity-and-pseudonymity>.
- 40 For an account of beneficial motivations behind anonymity, see V. S. Ekstrand, “The Many Masks of Anon: Anonymity as Cultural Practice and Reflections in Case Law”, 18 *Journal of Technology Law and Policy* 1 (2013). For an empirical study about the motivations behind pseudonymity in Google Plus, see <http://infotrope.net/2011/07/25/preliminary-results-of-my-survey-of-suspended-google-accounts/>.
- 41 Most notably, the International Principles Applicable to Communication Surveillance (<https://en.necessaryandproportionate.org/text>) and “The day we fight back” initiative (<https://thedaywefightback.org/>). More recently, see the “Reset the net” campaign (<https://www.resetthenet.org/>).
- 42 See for example Muso: www.muso.com; Tunesat: <https://tunesat.com/tunesatportal/home>; Discovery Anti-Piracy Service: <http://info.icopyright.com/discovery-anti-piracy-copyright-infringement-check-duplicate-content>; ACID: <http://www.prnewswire.com/news-releases/autonomys-virage-automates-copyright-infringement-detection-for-online-video-57891637.html>. For a longer list, see M. Barr, Tools to Detect Software Copyright Infringement, at <http://embeddedgurus.com/barr-code/2010/09/tools-to-detect-software-copyright-infringement/>.
- 43 See N. Zingales, Product Market Definition in Online Search And Advertising, 9 (1) *Competition Law Review* 29 (2013), 44.
- 44 *Bonus pater familias* is a Latin expression frequently used in Roman law and which can by and large be equated with the duty of care of a reasonable man in common law parlance. This also resembles the “diligent economic operator” criteria devised by the ECJ in *L’Oréal and others v. eBay* to infer awareness of illegality from circumstances in which “a diligent economic operator should have identified the illegality in question.
- 45 An example outside the reach of EU law and thus of Article 15 of the E-Commerce Directive is the Digital Millennium Copyright Act, whose section 512m provides that “Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on [...] a service provider monitoring its service or affirmatively seeking facts indicating infringing activity [...]”.
- 46 M. Husovec, ECtHR rules on liability of ISPs as a restriction of freedom of speech, 9 (2) *Journal of Intellectual Property Law & Practice* 108 (2014) 109.
- 47 See for instance the *Sunday Times v. the United Kingdom* (no. 1) judgment of 26 April 1979, Series A no. 30, § 49; *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, § 37, Series A no. 316-B; *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V; *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 84, ECHR 2000-XI; and *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I.
- 48 *Sanoma Uitgevers BV v Netherlands*, Merits and just satisfaction, App no. 38224/03 [2010] ECHR 1284, IHRL 3714 (ECHR 2010), 14th September 2010.
- 49 It should be noted also that the importance of the protection of journalistic sources for freedom of expression is explicitly recognized in Recommendation No. R(2000) 7, on the right of journalists not to disclose their sources of information, adopted by the Committee of Ministers of the Council of Europe on 8 March 2000. The Recommendation established (in its principle 3b) that the disclosure of information identifying a source should not be deemed necessary unless it can be convincingly established that:
- i. reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and
 - ii. the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that:
 - an overriding requirement of the need for disclosure is proved,
 - the circumstances are of a sufficiently vital and serious nature,
 - the necessity of the disclosure is identified as responding to a pressing social need, and

- member States enjoy a certain margin of appreciation in assessing this need, but this margin goes hand in hand with the supervision by the European Court of Human Rights.
- c. The above requirements should be applied at all stages of any proceedings where the right of non-disclosure might be invoked.
- 50 See A. Stone Sweet and J. Mathews, Proportionality Balancing and Global Constitutionalism, 47 Columbia Journal of Transnational Law 68 (2008).
- 51 *Godelli v. Italy*, (no. 33783/09), 18 March 2013.
- 52 *Odièvre v. France* ([GC], no. 42326/98, ECHR 2003- III.
- 53 *K.U. v Finland*, no. 2872/02, 2 December 2008.
- 54 *Id.*, at 43 (emphasis added).
- 55 *Id.*, at 49.
- 56 *Id.*
- 57 *Id.*, At 47.
- 58 In particular, the Court found that the positive obligations that are inherent in an effective respect for private or family life (see *Airey v Ireland*, 9 October 1979, Section 32, Series A no. 32) include the adoption of measures designed to secure respect for private life even in the sphere of the relations of individual themselves.
- 59 See A. Greenberg, “Whistleblower apps not as anonymous as they seem”, *Wired* (May 16, 2014). Available at <http://www.wired.co.uk/news/archive/2014-05/16/whistleblowers>.
- 60 See R. Lawler, “Whisper CEO Michael Heyward Defends Gwyneth Paltrow Post”, *Wired* (May 7, 2014) <http://techcrunch.com/2014/05/07/whisper-michael-heyward-tc-disrupt/>.
- 61 D. Witt, “Copyright Match on Vimeo”. Available at <http://vimeo.com/blog/post:626>.
- 62 Customer anonymity vis a vis technical ISPs (that is, internet access providers) can only be achieved when using someone else’s network which does not require authentication, and is not as such “offered” in the market.
- 63 Examples of this are platforms like “Whispers” and “Secret”. See B. Ortutay, Whispers, Secret and Lies? Anonymity Apps Rise”. Available at <http://bigstory.ap.org/article/whispers-secrets-and-lies-anonymity-apps-rise>.
- 64 See for example the new App “Onionshare”, which allows transfer of file through the darknet allowing untraceability of the original sender (unless he or she makes a mistake in the anonymization procedure): see A. Greenberg, “Free App Lets the Next Snowden Send Big Files Securely and Anonymously”, *Wired* (May 21, 2014). Available at <http://www.wired.com/2014/05/onionshare/>.
- 65 See “Mastercard and Visa block payments to Swedish VPN firms”, *The Register* (4 July 2013), http://www.theregister.co.uk/2013/07/04/payment_block_swedish_vpns/; “Paysafecard begins banning VPN providers”, *Torrentfreak* (25 August 2013), <https://torrentfreak.com/paysafecard-begins-banning-vpn-providers-130825/>.
- 66 See for instance “UK internet filter blocks VPNs, Australia to follow soon?”, *Torrent Freak* (5 September 2013), <http://torrentfreak.com/uk-internet-filter-blocks-vpns-australia-to-follow-soon-130905/>; “Iran to crack down on web-censor-beating software”, *Daily News* (10 June 2012), <http://www.hurriyet-dailynews.com/iran-to-crack-down-on-web-censor-beating-software.aspx?pageID=238&niD=22789&NewsCatID=374>.
- 67 This has happened for the major search engines, which, partially under the pressure of the European Article 29 Working Party, have progressively lowered the amount of time they keep their users’ search log to 6 months (180 days).
- 68 See the High Court’s decision in *Chambers v. DPP* [2012] EWHC 2157 on [2012] 27 July 2012, holding the obligations established by the Directive applicable to social networks.
- 69 Judgment of the Court (Grand Chamber) on 8 April 2014, joined. Cases C-293/12 (*Digital Rights Ireland*) and C-594/12 (*Kärntner Landesregierung*)
- 70 See J. Rauhofer, D. Mac Síthigh, “The Data Retention Directive Never Existed”, 11 (1) *SCRIPTEd* (April 2014)
- 71 This is because the EU Data Protection Directive (95/46/EC) contains in its article 13 a list of justifications for which the States can adopt legislative measures to restrict the obligations of data processors, provided that such a restriction constitutes a necessary measure to safeguard:
- (a) national security;
 - (b) defence;
 - (c) public security;
 - (d) the prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions;
 - (e) an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters;
 - (f) a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (c), (d) and (e);
 - (g) the protection of the data subject or of the rights and freedoms of others.
- 72 Prior to the invalidation of the Directive by the ECJ, the provisions laid down for its national implementation had been repealed in Germany, Romania, Bulgaria, Cyprus and Czech Republic. For a detailed account of the several decisions of invalidation, see E. Kosta, “The Way to Luxembourg: National Court Decisions on the Compatibility of the Data Retention Directive with the Right to Privacy and Data Protection”, 10 (3) *SCRIPTEd* 2013; J. Durica, “Directive on the Retention of Data on Electronic Communications in the Rulings of the Constitutional Courts of EU Member States and Efforts For Its Renewed Implementation”, 3 (2) *International Journal for Legal Research* (2013).
- 73 at 58.
- 74 At 59.
- 75 At 60-61.
- 76 At 92.
- 77 See for instance “Google Alert”: <http://www.google.com/alerts>.
- 78 See Federal Constitutional Court, Mar 11, 2008, 1 BvR 256/08 (F.R.G.).
- 79 See G. Frosio, *Urban Guerrilla & Piracy Surveillance*, *Rutgers Computer & Technology Law Journal* vol. 37 [2011], 27
- 80 Federal Constitutional Court, decision of 19.04.2012 (I ZB 80 /11)
- 81 Court of First Instance of Rome, 14 July 2007, n. 1187, AIDA 2007, 1049.
- 82 In particular: (1) it must be likely that the user acted unlawfully towards the applicant; (2) the applicant must have a real interest in obtaining the name and address of the user; (3) there may be no less intrusive means of tracing the data than through the ISP; and (4) in light of a balancing of the interests involved, those of the applicant must prevail. See *Lycos/Pessers*, HR (Supreme Court), November 25, 2005 [2006] NJ 9.
- 83 See ECJ judgment of 19 April 2012, case C-461/10, *Bonnier Audio AB, Earbooks AB, Norstedts Förlagsgrupp AB, Piratförlaget AB, Storyside AB v Perfect Communication Sweden AB* (paraphrasing Swedish legislation, in particular articles 53c and 53d of the Law on Copyright)
- 84 More specifically: (1) the respective strength of the case; (2) the relationship between the alleged wrongdoer and the respondent; (3) the possibility to obtain the information from another source and (4) whether the disclosure order would put the respondent into trouble which could not be

The EU's Trouble with Mashups

From Disabling to Enabling a Digital Art Form

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Abstract: New tools for editing of digital images, music and films have opened up new possibilities to enable wider circles of society to engage in 'artistic' activities of different qualities. User-generated content has produced a plethora of new forms of artistic expression. One type of user-generated content is the mashup. Mashups are compositions that combine existing works (often) protected by copyright and transform them into new original creations. The European legislative framework has not yet reacted to the copyright problems provoked by mashups. Neither under the US fair use doctrine, nor under the strict corset of limitations and exceptions in Art 5 (2)-(3) of the Copyright Directive (2001/29/EC) have mashups found room to

develop in a safe legal environment. The contribution analyzes the current European legal framework and identifies its insufficiencies with regard to enabling a legal mashup culture. By comparison with the US fair use approach, in particular the parody defense, a recent CJEU judgment serves as a comparative example. Finally, an attempt is made to suggest solutions for the European legislator, based on the policy proposals of the EU Commission's "Digital Agenda" and more recent policy documents (e.g. "On Content in the Digital Market", "Licenses for Europe"). In this context, a distinction is made between non-commercial mashup artists and the emerging commercial mashup scene

Keywords: Mashups, Artistic Expressions, Copyright Directive, CJEU, user-generated content

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A. Introduction

- 1 The European Union (EU) desperately wants to be digital. To achieve this aim, the European Commission has launched the Digital Agenda¹ in 2011, which is one of the seven flagship initiatives on the Europe 2020 Agenda.² One part of 'becoming digital' is to incentivize and maintain social interaction on the Internet in order to enable online creativity. A form of creativity that has evolved with the advent of affordable digital editing techniques is the music mashup.
- 2 Mashups probably do not fall in the narrow and rather traditional conception of culture that the EU had in mind when it adopted its motto "Unity in

Diversity".³ Yet, mashups are undeniably an aspect of modern musical culture that Europe shares with other non-European nations and societies; and, therefore, they should deserve special attention. From a legal perspective, support must come through a framework that enables this art form instead of hindering new musical creations. In this context, enabling can only mean to give mashup creators legal certainty. Since the EU legislator has, for quite some time now, taken an interest in shaping copyright law, the EU law dimension is worthwhile exploring.

- 3 The paper focuses on music mashups under the EU legal regime for copyright. In the absence of much relevant literature on mashups, relevant US law will be discussed briefly to provide for some guidance to approach the subject matter from an EU copyright law perspective.

I. The Object of Scrutiny

- 4 The scope of this research is limited to music mashups. While other forms of visual and mixed mashups exist, an authoritative definition of the term is missing.⁴ Mashups based solely on musical works are a mass-phenomenon that fuels social networks, and video and music platforms. Quantitatively, they are by far the most commonly found typology of mashups; at the same time, they have created fundamental challenges for (digital) copyright law.⁵
- 5 Music mashups constitute a new art form that relies on combining music from different artists in new arrangements. These works appear differently, sound differently, and, when combined, may convey other messages than the original works. Music mashups are often supplemented by different forms of visual support, either by simple photos of the artists whose songs were used to create the musical digital collage or, more elaborately, by parts of the corresponding music videos. Depending on the proficiency of the mashup artist, their works – although it still needs to be discussed if mashups in general, or only certain mashups, constitute original works within the legal meaning of the term ‘work’ under European copyright law – differ in quality.
- 6 Mashups can be critical, provocative, ironic, or they can just reveal a new side of a given work. Be it as it may in every individual case, mashups as an art genre are immensely popular. The most viewed mashups on YouTube have gained more than 58 million views,⁶ with other mashups still going into the millions. Mashup artists do not only publish their works online but also perform them live. One of the most known mashup artist, Gregg Gillis, who releases under the pseudonym Girl Talk on the label Illegal Art, does not only offer his songs for download for free⁷ but also tours the world and performs his mashups live on stage.
- 7 On his label website the artist does not use the word ‘mashup’ but refers to “samples” and “pop collages”. The term ‘mashup’, as it is used in this paper, refers to a work that combines elements of other pre-existing works to form something new. This means that mashups rely exclusively on multiple pre-existing works and do not contain any original material.⁸ In particular, the author of the new work does not contribute any element of the new work. DJ Danger Mouse became famous when he created an entire album of mashups that exclusively consist of lyrics

of the US rapper Jay-Z’s “The Black Album” and the ninth Beatles album, which became known as “The White Album”. He called his new production “The Grey Album”. Gillis re-used elements of immensely popular musical works to create something that has been praised by music critics and is still circulated on the Internet today.⁹ One might therefore rightfully argue that mashups are recycled¹⁰ works with the advantage that the original works of art continue to exist and have not been destroyed in the process of creating a new work.

II. An attempt of a definition

- 8 As a legal definition, the term ‘mashup’ does not exist. This paper concentrates on a narrow working definition of music mashups which, unlike many other works referred to as mashups,¹¹ combine pre-existing works by way of reproduction, one-to-one-copying, and must be distinguished from other creations that merely incorporate parts of works from other authors into original creations. Music mashups can be distinguished from remixes which mainly re-arrange existing individual songs and, possibly, add new material, as well as cover songs, which take existing musical compositions that are then re-recorded and, possibly, altered.¹² What mashups per definition do not include is any sort of original or new material, but mashups rely exclusively on existing sound recordings to create new works. The process of reproducing small or larger parts of existing recordings is, therefore, essential to the concept of music mashup. The samples as the constituting elements of mashups, or if one will their inspiration, are usually sufficiently long to make the listener recognize the original work. When combined with visual support by parts of corresponding music videos, this effect is further enhanced. There are, however, several subcategories within the broader category of music mashups, which do not exclusively use pre-existing material.¹³
- 9 Mashup artists use pre-existing recordings instead of performing songs themselves. They arrange these songs not only horizontally or subsequently but also vertically and simultaneously. Accordingly, mashups consist of more than one song, as opposed to classic remixes, and the number of songs in one mashup can exceed 30 individual works. Finally, it has been observed that most mashups contain at least one popular song;¹⁴ the majority of mashups found on the Internet are composed from songs that have almost exclusively been released in the recent past.
- 10 To summarize, music mashups display a number of criteria that distinguish them from other musical works that quote or cite other sources. For the purposes of a working definition, mashups are constructed exclusively from existing recordings

(1) which they combine not only horizontally but also vertically (2), it also implies that more than one song is used (3) and the parts of the songs used make the source easily recognizable (4).

1. Mashups as an art form

- 11 Other combinations of works exist for which the term ‘mashup’ is used as a description of the process of their creation, during which elements of distinct works are mixed or mashed together – cut in parts and re-arranged – to form a new composition.¹⁵ Non-music mashups, at least the majority thereof, can be distinguished from music mashups as defined above in that they do not copy pre-existing works or combine them vertically and horizontally.¹⁶ Instead, they tend to combine patterns and motives from preexisting works of art and create entirely new works. These works, however, similar to music mashups, often want their sources to be recognized.
- 12 Graphic mashups are vertical by nature, most commonly known are collages. Modern poster art combines different *sujets*, such as the unique styles of painters Dali and Van Gogh with the Marvel character Wolverine.¹⁷ Other mashups combine the work of Picasso, Vermeer and Lichtenstein into one unique piece of work, by cutting and pasting elements of three works combining it into one.¹⁸ The Huffington Post reported¹⁹ on an artist that mashed Andy Warhol’s Campbell Soup with Star Wars characters.²⁰ All of those works are not mashups in the stricter sense of this paper, but it becomes clear that mashing and mixing is an art phenomenon that is popular and widespread, and that transcends different media. This phenomenon oscillates between amateur creations that are made ‘just for the fun of it’ and professional productions that are sold for economic profit.
- 13 The excitement that these ‘mashups’ create is founded in their appeal to popular culture. They re-contextualize and create often ironic or sarcastic connections between artistic topics, themes and genres. Mashups are more than remixing. The process of creating a mashup involves copyright as much as file-sharing does, but the intention is much different. Mashing has established itself as a veritable art form, not only in classical art and music, although one should be careful with the terminology, but in contemporary, digital and pop-music culture, as well.

2. Digital mashups

- 14 Technological developments and digitization have revolutionized the way we consume and interact with music. Affordable computers and inexpensive digital editing tools enable almost everyone to create

new audio and visual works by making use of existing content.²¹ Classical Hip-Hop ‘remix-mashups’ are live performances that combine songs by way of playing two vinyl records simultaneously and often simply mixing tracks with a cross-fader. Ever increasing bandwidth has enabled ‘bedroom artists’ to share their creations with their friends and everyone who has access to the Internet via social networking sites and other content platforms. This creativity for ‘the small man’ and the extent to which amateur users embraced the phenomenon created new legal problems, for which the existing copyright systems were not prepared.

- 15 If classical sampling techniques already created certain tensions, the new digital environment has increased the problem exponentially. The trouble with mashups as a mass phenomenon is that it exposes strong tensions between authors and commercial artists whose interest is to commercialize their works and the general public which enjoys consuming music and visual works, and possibly engages in the occasional amateur mashup. Another dimension of this tension is the conflict between current artists, whose songs are used in modern mashups, and future artists, who use pre-existing works to create new works.²²

B. Mashups on the EU Agenda...

I. ... as Mashups

- 16 The term ‘mashup’ does not appear very often in European Union documents. In fact, the more recent communications from the European Commission mention ‘mashup’ only twice. And when the term indeed has found its way into the vocabulary of the Commission it only features in brackets as a part of enumerations of other types of digital content.²³ The term is always used in relation to the bigger category of user-generated content, of which it is a part. The Commission does not address the commercial nature of mashups as a separate art form, which can be, and certainly is, a subject of commercial exploitation.

II. ... as user-generated content

- 17 Instead, the policy approach for mashups is globally dealt with under the category of user-generated content, to which the Commission counts other types of content, such as blogs, podcasts, posts, wikis, mash-ups, file and video sharing. This is not surprising because individual approaches to all types of user-generated content would overburden legislators and not necessarily provide for a flexible, future-proof legal framework. However, the EU has identified user-generated content as an important

aspect of the digital age and the digital common market, which is worth increased, though not overwhelming, attention.

- 18 In point 2(ii) in its 2012 Communication on “Content in the Digital Single Market”,²⁴ the European Commission calls for greater clarity on legitimate and illegitimate uses for end-users and easy access to simple licensing solutions to enable small-scale uses at affordable costs, or potentially for free. The Communication announced a structured stakeholder dialogue “Licenses for Europe”. The stakeholder dialogue was concluded with a conference on January 7, 2014, and produced a document titled “Ten Pledges to Bring More Content Online”.²⁵ The third of the Ten Pledges reads: “Easier licensing for music: commitments by the music sector”. As Working Group 2 of the stakeholder dialogue, which dealt exclusively with user-generated content, could not agree on substantial issues, the result is rather meager.²⁶ The music industry under Pledge Three commits to make information available on licensing agreements with online platforms and how this can work to benefit creative users. It further commits to identify existing practices for licensing for small-scale uses, in particular in relation to website background music and images and small-scale web/podcasting.²⁷
- 19 A public consultation on the review of the EU copyright rules dedicates a set of questions to user-generated content. It acknowledges the problems that technological developments have created in relation to the re-use of creative content in the sense that the re-use of copyrighted material is “no longer the preserve of a technically and artistically adept elite”.²⁸
- 20 Already in 2011 the Commission had realized the importance of user-generated content for social networking and social media sites.²⁹ The Commission supports a two-track approach, encouraging responsible use, on the one side, and enabling users to “enjoy the full benefits of new interactive online services,” on the other. For the latter, an easy-to-use and quick permission system is necessary. In particular, “amateur” uses of third-party protected content for non-commercial purposes should be enabled under a legal framework that builds “on the strength of copyright to act as a broker between rightsholders and users of content in a responsible way”. This can only be understood as to mean that certain uses of copyright-protected works should automatically be free to use, either for free or via an automated licensing system which would gather minimal fees for non-commercial purposes. This, however, is not what the stakeholder dialogue mentioned above produced.
- 21 The EU’s policy approach to user-generated content is a soft one. Although missing licensing solutions for

user-generated content is recognized as a problem, the EU does not seem to push towards a big solution. One reason could be that policy makers are aware that another remodeling of the EU copyright rules, even if it is only to accommodate user-generated content amidst the existing limitations and exceptions of the Copyright Directive, would be a troublesome endeavor. Other fields of EU copyright law, for example collective rights management³⁰ and private copying levies,³¹ receive significantly more attention by the legislator, as well as the judiciary.

C. Mashups: Legally speaking?!

- 22 The processes of creation and dissemination of mashups open up several legal dimensions at the same time. This is, indeed, true for other forms of digital content, particularly user-generated content. However, mashups are extreme in one particular sense: they do not contain any original elements added by the author; originality, if at all, can only be found in the arrangement of bits and pieces of pre-existing works. And, their immense popularity has taken them from a more private sphere into the public spotlight, where they are consumed in millions, by millions. Therefore, a number of exclusive rights are concerned and potentially infringed by creating mashups and making them available over the Internet.
- 23 From an EU law perspective, the pertinent rights are the right of reproduction, as provided for in Article 2 of the Copyright Directive and the right of communication to the public and the right of making available under Article 3 of the same Directive. While mashups infringe these rights, at least *prima facie*, and, at the same time, attract great public interest, they find themselves in the middle of the traditional balancing exercise that sits at the heart of copyright. Copyright provides protection to authors in order to give incentives to create new works. On the other hand, copyright permits reproductions in certain cases, “borrowing” as Eble put it, to promote creativity and advance the arts.³² It is the vital role of limitations and exceptions to copyright to balance the interests of rightsholders and the general public. In relation to mashups, the general public enjoys new combinations of existing music that form new and often (more) exciting arrangements of already-beloved tunes. Mashup artists, in order to provide the general public with new popular works, must be able to rely on limitations and exceptions to escape liability for copyright infringement.
- 24 Very little literature on mashups as a separate field of study exists in Europe.³³ Therefore, it is instrumental to observe how mashups have been discussed under existing copyright laws in other jurisdictions. The US example lends itself because of its well-established

copyright law. Any comparison between both legal systems should, however, be treated with caution due to the systematic differences between EU copyright law and US copyright law. Whereas the US system represents a comprehensive, national system of statutory and common law, the law applicable to copyright in the EU, by its very nature, does not constitute a system comparable to that of the US. EU copyright law is not, as a general rule, directly applicable to its subject, viz. the citizens of the EU Member States, but comes in forms of directives that harmonize certain aspects of copyright at EU level. Because of the legal nature of EU directives, these rules have to be implemented by national legislators who enjoy a certain margin of discretion in their transposition.

- 25 One crucial distinction that must be drawn is the one between commercial and non-commercial mashups. Especially with a view to enabling mashups by way of a favorable legal environment, each form requires different frameworks. Whereas mashups for non-commercial purposes, created by amateurs for the pure joy of engaging in artistic activities, require easy-to-use licensing mechanisms for no, or only marginal, fees,³⁴ commercial mashup-artists are more likely to afford licensing fees if they are economically successful. For both cases, however, facilitating multi-territorial licensing solutions are necessary.

I. Mashups under US law

- 26 On the one hand, US copyright law does not *ab initio* prohibit the creation and distribution, by any means, of mashups. On the other, it does not contain an exception to copyright or certain related rights that enables the creation and dissemination of mashup works. But, it offers an instrument, which, under certain circumstances, potentially permits the use of existing works to create a derivative work.³⁵
- 27 Recent research has analyzed the fair use doctrine with a view to accommodating mashups under this general exception to copyright. The fair use exception provides sufficient room to accommodate mashups that meet certain criteria, however most mashups that are mainly created for entertainment purposes are most likely not jumping the four hurdles of the fair use defense. Another potential solution out of the dilemma is the *de minimis* defense. The latter is discussed only briefly, while fair use is analyzed in more detail.

1. De Minimis Defense

- 28 The *de minimis* defense has been developed in the courts as part of judge-made law and only applies

to the act of copying, whereas the statutory fair use defense applies to all exclusive rights under copyright.³⁶ However, the *de minimis* defense has often been invoked in relation to sampling. The defense permits the reproduction of small parts of a given work,³⁷ but no exact delineation exists as to how much exactly can be copied under the *de minimis* defense. This decision is left to the individual judge to make in every individual case.³⁸

- 29 In several cases, US judges have come down on either side of the *de minimis* defense, which makes it difficult to predict with certainty what constitutes a *de minimis* use and what does not. In *Newton v. Diamond*, the 9th Circuit Court of Appeals ruled that the use of a three-note segment does constitute a *de minimis* use,³⁹ however, the US Court of Appeals for the 6th Circuit rejected the defense in *Bridgeport v. Dimension* for a four-note segment, because the segment constituted “the heart of the composition”⁴⁰. In the same judgment, the court stated rather emphatically: “Get a license or do not sample”⁴¹, but the judgment has been criticized for not taking into consideration a possible fair use defense.⁴²
- 30 A further limitation of the defense is that it does not apply to sound recordings, which prevents the application of the doctrine to digital sampling, in general, and to mashups, in particular.⁴³ The doctrine only applies to musical compositions,⁴⁴ which would require the mashup artist to play the relevant notes himself and record the vocal track in addition.⁴⁵ This would make the ‘mashup’ fall out of the definition of ‘mashup’ for this paper and, moreover, probably result in a very displeasing experience for the listener, in most cases. However, as Lae noted, the strict interpretation of the US Copyright Code that *per se* prohibits sampling and mashing of original material under the *de minimis* doctrine is not followed by all US Courts.⁴⁶

2. Fair Use Defense

- 31 The fair use defense can save an author that has appropriated parts of the work of another author if the *de minimis* defense has failed. Under the defense, the appropriating author receives the fictitious implied consent to use the work in a reasonable and customary manner.⁴⁷ Codified in section 107 of the US Copyright Act, the defense required the consideration of inter alia (“shall include”) (1) the purpose and character of the use, (2) the nature of the protected work, (3) the amount and substantiality of the part of the protected work that has been used and (4) the potential market effect.⁴⁸ These four factors, as the wording of the section suggests, are not cumulative, but have to be weighed against each other in a careful balancing exercise.

a.) Purpose and character of the use

- 32 The first element of the four-pronged fair use defense, as defined in section 107 of the Copyright Act, inquires into the purpose and character of the use, including its commercial or non-commercial nature. Accordingly, there are two aspects to be considered under the first point.
- 33 The first aspect asks, in essence, whether the use is transformative, which means whether the new work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”⁴⁹ The US Supreme Court has given this aspect the highest weight by stating that the higher the degree of transformation, the less important the other factors are.⁵⁰ It is not clear whether this relates to the two expressly stated factors under the first element of the defense or the entire set of elements.⁵¹ At least within the first element the transformative nature of a secondary work, which is to say its purpose, should, indeed, be weighed more than the other factors. A multitude of arguments is brought forward in the literature to discuss whether music mashups or other types of mashups are, in fact, transformative when compared to the original works. One line of arguments that would, if at all, consider mashups to be transformative argues that mashups are only meant to entertain and offer little in the sense of critique, parody or commentary.⁵² At least for parody, the Supreme Court grants a *carte blanche* under the fair use defense.⁵³ A ‘parody’ under this definition requires that the work that parodies directs its criticism at the work that is used for criticism. The latter work is used particularly *because* it is the object of parody and the reproduced part, the part that conjures up the memory of the work, is the “heart [of the work] at which the parody takes aim.”⁵⁴ It is the distinguishing characteristic of mashups that they do not add anything original but exclusively rely on existing works. In this respect, it makes them vulnerable. Every argumentative construction that could bring mashups under a transformative defense by arguing that mashups are a general critique of mainstream music or in certain cases of the particular artist must rely on original elements. Without external comment, which means any original contribution, although the author of the mashup might have intended to criticize or parody an author or a certain work, this intention might not become apparent, and the fair use defense would fail.⁵⁵ In *Campbell v. Acuff-Rose Music*, the defendants prevailed because they used a sample of the original song’s music track and further altered the lyrics, keeping significant parts of the overall arrangement intact. The court granted protection under the fair use defense arguing that the defendant’s use of the original was transformative because it criticized the naive connection the original author made between romance and prostitution.⁵⁶ There is another line of reasoning that supports the transformative nature of mashups. It is argued that by combining different songs all songs are transformed simultaneously⁵⁷ and that mashups could be able to claim protection equal to that of parodies.⁵⁸ Eble suggests that mashups could be protected as parodies or “quasi parodies”,⁵⁹ or, even further, that the non-exhaustive list of section 107 USC could still embrace mashups as transformative⁶⁰ because they add a new purpose and create new expressions.⁶¹
- 34 Outside the parody defense, non-musical works have been found transformative although they did not criticize the original works when they used the original work as “raw material” to pursue “distinct creative or communicative objectives”.⁶² In this case, the artist Jeff Koons had reproduced a pair of legs from a picture of professional photographer Andrea Blanch. The photograph with the legs had been published in a beauty magazine and Koons used the reproduction in an altered form in a painting that also contained other reproduced elements. Koons did not criticize the work of Blanch but used parts of her photographic work “as fodder for his commentary on the social and aesthetic consequences of mass media” to create “new information, new aesthetics, new insights and understandings.”⁶³ Instead of characterizing the work of Koons as a parody, the court employed the concept of satire but found, nevertheless, that the artist had a good justification for choosing to reproduce the particular part of Blanch’s photograph.⁶⁴ The same court had taken a different view some 14 years earlier, and two years before *Campbell v. Acuff-Rose Music* arguing that in a similar work by Koons the artist could not rely on the parody defense and did not further extend fair use to other transformative works.⁶⁵
- 35 Applying *Campbell v. Acuff-Rose Music* without reservations to non-parody cases would be daring and would be a gamble, considering the jurisprudence on music samples. The second Koons case suggests that transformative works should, probably under stricter conditions, be able to borrow from pre-existing material. However, *Blanch v. Koons* could be distinguished in relation to mashups: Koons’ intention was not to use that particular pair of legs he ultimately integrated into his work, but the legs were used as a symbol for materialism, consumerism and a critique of mass media. Any pair of beautiful, long female legs would have sufficed. For mashups, not any song, or part of a song will do, but it must be a particular, recognizable song. A US court could make a distinction here for two good reasons. First, a mashup remains a musical work, whereas in *Blanch v. Koons* a part of a photograph was integrated into a collage-style painting. And, second, Koons’ painting is very much unlikely to compete on the same market as the original photograph by Blanch, whereas, it

could be argued, mashups could, under the fourth fair use criterion, compete with the original work.

- 36 The second aspect seeks to inquire whether or not the use of a new work has a commercial character. In favor of this criterion, it is argued that mashups are usually offered for free and that artists do not make any direct profit from mashups.⁶⁶ But, this defense would not hold up for artists that do, indeed, make direct profit from mashups by performing them live or selling mashup albums online. However, in *Campbell v. Acuff-Rose Music* the Supreme Court affirmed the commercial nature of the defendant's use of the original work but argued that the commercial nature of a use is not necessarily determinative to establish fair use.⁶⁷ Therefore, only mashups that do not create direct or indirect commercial benefits for the author are likely to profit from the fair use defense. But, not all is lost if authors do derive some benefit as the commercial nature of the use is only one part of the bigger balancing exercise.

b.) Nature of the copyrighted work

- 37 The nature of the copyrighted work is the object of scrutiny under the second element of the defense. It essentially assesses how much protection the original work deserves by distinguishing between works of fact and fiction. Works of fiction and expressive arts, such as musical compositions and their recording, receive higher protection under this element than news reports or newspaper articles. Because music mashups primarily use creative works,⁶⁸ most authors agree that this factor would slightly disfavor the finding of a fair use defense.⁶⁹

c.) Amount and substantiality of the portion used

- 38 Under the third element, the question is, 'how much of the original work did the appropriating author used for his new piece?' The opinions differ in the literature,⁷⁰ but most commentators agree that different types of mashups must be distinguished. The purpose of a mashup is to build on existing musical works and make the listener recognize individual songs. Therefore, the use of a certain amount of the work is necessary to 'conjure up' the particular song in the memory of the listener. The 'conjure up' test originates from a parody case,⁷¹ and parodies enjoy greater leeway in reproducing larger parts of original works to the extent necessary to recall the work that is subject to parody.⁷² Mashups that use only a limited number of songs and therefore have to use more extensive parts, an extreme case are A vs. B mashups,⁷³ will find themselves at the other end of the spectrum. Somewhere in-between there are

mashups that use a multitude of songs from which they only extract shorter snippets, but even the latter use substantial parts of songs because mashups artists want to make their listeners recognize the song they mash and typically select those parts that make the song unique and identifiable.⁷⁴

d.) Potential market effect

- 39 The final element contained in section 107 USC asks a court to determine whether the newly created work harms the market for the original work. The landmark case in this regard is *Harper v. Nation*⁷⁵ in which the publication of significant passages of an unpublished book harmed the market of the book, itself; a fair use defense was not granted. The question for mashups is, therefore, whether or not mashups harm the market for original works or other rights that the author of the original work might possess. One market that should be considered is the market for other derivative works.⁷⁶ But, the more transformative a work is, the less likely it is to create competition on the primary and even on most derivative markets. The effect on derivative market is sometimes considered detrimental for rightsholders⁷⁷ because it infringes the exclusive right under section 106 USC.⁷⁸

e.) Good faith as fifth element?

- 40 Some authors add a good faith criterion either under the first element as an extension of the non-exhaustive list of criteria thereunder,⁷⁹ or as a "lurking fifth factor" as an extension of the non-exhaustive enumeration under section 107 USC.⁸⁰ Most commentary focuses on the situation in which artists – again, the relevant case law only refers to sampled music and parodies –⁸¹ tried to acquire a license but the request was refused by the rightsholder.⁸² After having been refused the grant of a license, the sampling artists then used the samples nevertheless. Good faith in these cases lies in the fact that sampling artists at least attempted to obtain a license for their transformative uses of samples.

f.) Is it, or is it not (fair use)?

- 41 The beauty of its flexibility is fair use's conundrum, and academic commentary is divided.⁸³ Whereas some favor the protection of mashups under fair use,⁸⁴ some strongly oppose.⁸⁵ And, in any case, it is not certain that the case law in relation to sampling will apply to mashups without reservation. In particular, the fact that songs containing samples as well as original elements are more likely to be considered transformative, or even to be considered parody, could tilt the balance against mashups that

are missing any obvious creative elements, in the sense of original contributions from the author.

- 42 Lae suggests treating different types of mashups differently. She believes that “collage-style mashups” that only incorporate small parts of other songs, but a great number thereof, should benefit from the fair use defense because they are transforming the original works sufficiently, almost making the originals unrecognizable. Creators of A v. B mashups should be required to obtain a license, and only if the request for a license is rejected should they be allowed to profit from the fair use defense. Mashups with the purpose to criticize or parody should always benefit from protection under the fair use defense.⁸⁶
- 43 Mazzone is more pessimistic, fearing that licensing may win the battle over copyright.⁸⁷ He stresses that fair use is the justification for exclusive rights with long protection term and an overly strict stance against admitting fair use would give rightsholders the ability to stifle creativity and, in the long run, endanger free speech. Interestingly, the number of lawsuits against creative samplers increased with the availability of cheap sampling technology, which then, in turn, made the position of rightsholders stronger. At the peak of its creative potential, sampling and mashing are put into a legal straightjacket.⁸⁸
- 44 Under US copyright law the legality of mashups is not entirely clear, but jurisprudence has given some orientation. Under the fair use doctrine, a mashup artist who uses only small parts of a certain song (that has already been released) and distributes an immensely creative and possibly parodying mashup for free over the Internet and does, in addition, not derive any secondary commercial benefit, might be able to dodge infringement claims (and yet might sit on top of huge legal bills). In the absence of relevant case law, all that artists can do is wait until somebody sues them.
- 45 Therefore, neither fair use nor *de minimis* offer reliable and satisfactory solutions and a significant degree of legal uncertainty remains.⁸⁹ Fair use or *de minimis*, and this is the crux of most exceptions to copyright, were not written for sampling, remixing or mashing; in short, for most forms of expression enabled by modern digital reproduction techniques.⁹⁰

II. Mashups under EU law

- 46 EU Law does not exist in a legal vacuum but by virtue of national law, and national law is, in many areas, heavily influenced by EU law. This is particularly true for copyright, which is a field of law that is not entirely subjected to the control of the European legislator, though it has experienced significant legislative interventions. But, important aspects

of copyright remain within the competence of the Member States – most importantly, moral rights.

- 47 The history of EU copyright begins with the conflict between the free movement of goods provisions of the Treaties and the exclusive and territorial nature of copyright (and other intellectual property rights). In a number of decisions, the Court of Justice of the European Union (CJEU) has confirmed the existence of (now) 28 different copyright titles in the EU, however it has limited the exercise of national copyrights by rightsholders to safeguard the free movement of goods and services.⁹¹
- 48 Following the jurisprudence of the CJEU and its influence on intellectual property rights, the EU has begun harmonizing certain aspects of intellectual property law. For copyright, this meant fragmented, vertical harmonization directives from the beginning until in 2001, when the Information Society Directive (or Copyright Directive) was passed, which harmonized certain aspects of copyright.⁹²
- 49 The Directive provides for the right to basic reproduction,⁹³ the right of communication to the public,⁹⁴ the right to make available to the public,⁹⁵ and the right to distribute.⁹⁶ The four rights guaranteed by the Copyright Directive are the rights relevant when mashups are created and published on the Internet. The usual evolution of a mashup looks like this: first, the mashup artists identify the songs they want to combine to create a new song; from these songs they isolate by way of reproduction the vocal and instrumental parts they wish to be the parts of the mashup and arrange them. Then, the fresh mashup is uploaded to either a streaming website, maybe even a private online radio station, shared via peer-to-peer services, or uploaded to other sites that enable the download of the mashup. These actions that enable Internet users to access the mashup concern rights of communication to the public and making available. Without limitations and exceptions to copyright, which either exclude certain acts from copyright protection or permit certain *prima facie* violations of copyright for reasons of public policy, mashup artists would commit multiple copyright and related rights infringements each time they create and publish their works. This is because hardly any amateur mashup artist can afford to pay licensing fees, which is why artists often refrain from obtaining licenses for all works they use to create mashups.

1. EU Copyright – exclusive rights

- 50 The Copyright Directive harmonizes substantive copyright in the EU horizontally. The Directive is of particular importance for mashups because it defines the reproduction right, which grants certain categories of rightsholders “the exclusive right to

authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, *in whole or in part*”.⁹⁷ The reproduction right is enjoyed by authors as copyright proper but also by performers for their performances, phonogram producers for their phonograms and other classes of rightsholders of related rights.⁹⁸ Article 3 introduced the communication to the public right and the making available right. Under the former, the author of a work enjoys the exclusive right to communicate his work to the public “by wire or wireless means”; the latter grants authors the exclusive rights to make their works available so “that members of the public may access them from a place and at a time individually chosen by them”. Both rights are to be understood to cover any transmission of their works communicated to an audience that is not present at the place where the communication takes place.⁹⁹ The making available right is further extended by virtue of Article 3(2) to other rightsholders, such as phonogram producers and broadcasting organizations for their respective works. Article 4 further provides for a distribution right, which is, however, not very important for mashups because the right only applies to the distribution of physical objects that embody copyrighted works.¹⁰⁰ Mashups are, in the overwhelming number of cases, distributed digitally, not on physical media.

2. Article 5 of the Copyright Directive - nothing is fair (use)

51 EU law provides for exceptions to the exclusive rights granted to rightsholders. Limitations and exceptions to exclusive rights serve the purpose to strike a balance between the interests of the rightsholder to protect his intellectual creations, and the interest of the public to have access to these works. Historically, this balance between a high degree of protection and certain exceptions should promote creativity, and, since recently, the protection afforded to copyrighted works should result in creating economic growth, employment and investment.¹⁰¹ The majority of these exceptions are contained in Article 5 of the Copyright Directive.

a.) Exhaustive list of limitations and exceptions

52 Directive 2001/29/EC was passed in 2001 to implement, in part, the WIPO Internet Treaties. The EU legislator was faced with the situation that the 15 Member States at that time all had existing systems for copyright limitations and exceptions, which differed significantly. Minimum harmonization had already taken place to specific limitations and exceptions provided by vertical harmonization directives. However, the bigger part of copyright still

remained unharmonized and international treaties had not approximated this culturally very sensitive area of copyright law.¹⁰²

- 53 Negotiating a set of binding exceptions for all Member States was, therefore, almost impossible. The solution adopted by the EU was to find a compromise that would leave all Members States content. The compromise that was found reflects this struggle for an acceptable solution.
- 54 Article 5 of the Copyright Directive sets up a very diverse landscape of exceptions to the exclusive rights defined in Article 2 and 3. It provides for only one mandatory exception, which has to be implemented in every Member State. Paragraph 1 exempts temporary reproductions from the exclusive reproduction right, as defined in Article 2. This very limited exception for reproductions that are “transient and incidental” is generally assumed to apply to cases of caching and browsing.¹⁰³ The reproductions referred to are those without which digital communication, and even the most simple and essential computer processes, could not work without constantly violating copyright rules.
- 55 A set of five optional limitations to the reproduction right contained in Article 5(2) includes limitations for non-commercial private uses (b) and for ephemeral recordings by broadcasting organizations (d). Article 5(3) gives a longer list of optional limitations that Member States can implement with respect to the reproduction, the communication, and the making available to the public right. However, these limitations include only two exceptions that could be interesting in relation to mashups, which are the exceptions “for purposes such as criticism or review”¹⁰⁴ (d) and “for the purpose of caricature, parody or pastiche” (k). Both are exceptions that would, in comparable situations, most likely fall under the US fair use defense.
- 56 National legislators are limited by the exhaustive list of exceptions in Article 5 but may maintain some limitations that already existed before the Copyright Directive entered into force.¹⁰⁵ It is particularly prohibited to introduce new limitations and exceptions that are not expressly included in the exhaustive lists of limitations and exceptions to the reproduction, communication to the public, and making available rights under Article 5 of the Copyright Directive.¹⁰⁶ Therefore, there is only little leeway to extend limitations and exceptions to copyright beyond the EU copyright regime.¹⁰⁷ However, some scholars have argued that further limitations could be introduced by an extensive interpretation of the three-step test of Article 5(5).¹⁰⁸ The three-step test would grant national legislators the competence to introduce exceptions that are in conformity with the test beyond the exhaustive list of Article 5(1-4).

- 57 Case law on the interpretation of Art 5 is still rather limited, in so far as Art 5(1) has received the biggest share of attention by the CJEU.¹⁰⁹ A number of exceptions and limitations under Article 5(2) and (3) have been discussed in proceedings in front of the CJEU. Of particular interest for mashups is the exception for parody, caricature and pastiche in Article 5(3)(k), not least because this exception comes closest to the safe parody defense under the US fair use doctrine.
- 58 Only in April 2013 was a case was referred to the CJEU by a Belgian court asking for interpretation on the nature and the content of one of the more relevant exceptions for mashups. In Case C-201/13 *Deckmyn v. Vandersteen*, the Court was asked to decide if the concept of parody in Article 5(3)(k) of Directive 2001/29/EC is an independent concept under EU law and, if so, what criteria must be fulfilled by a work in order to fall under this exception. The referring court suggested four distinct criteria, and asked the Court, in addition, whether further conditions must be fulfilled. The criteria suggested were (1) whether the new work must “display an original character of its own” to such an extent (2) “that the parody cannot be reasonably ascribed to the author of the original work”, whether (3) the new work must “be designed to provoke humor or to mock, regardless of whether any criticism thereby expressed applies to the original work or to something or someone else” and whether (4) the new work must mention the parodied work. The outcome of this case was eagerly anticipated. After the Advocate General had delivered his Opinion on May 22, 2014, almost two months later than originally announced, the Court rendered its judgment on September 3, 2014.

b.) Strict and uniform interpretation of limitations and exceptions

- 59 The exceptions of Article 5 of Directive 2001/29/EC, as repeatedly confirmed by the CJEU, must be interpreted narrowly as derogations from the exclusive rights granted under the directives.¹¹⁰ This goes against a more popular view in the literature that these exceptions are primarily a tool to strike the balance between the interests of the public and the interests of rightsholders.¹¹¹ More recently the CJEU has interpreted limitations and exceptions to enable their effectiveness.¹¹² Under the corresponding international framework, it is agreed that limitations should prevent the commercial exploitation against the will of the rightsholder and should be construed narrowly as exceptions to the exclusive rights.¹¹³
- 60 After the *Infopaq I* case, it is clear now that the exceptions to the exclusive rights of the Copyright Directive must be interpreted narrowly,¹¹⁴ but this

does not automatically mean that limitations have an independent meaning under EU law. However, it would make the situation even worse from a common market perspective if exceptions and limitations had different scopes in all 28 Member States, and if these concepts, in addition, would be construed narrowly. This would safeguard Member States’ autonomy and sovereignty for the cost of legal uncertainty and high transaction costs. Therefore, exceptions and limitations should have a uniform meaning in all EU Member States, even if some of those notions, particularly the notion of parody, might be appreciated differently in different Member States with diverse traditions of freedom of speech. In *Padawan*, the CJEU ruled that the concept of ‘fair compensation’ under Article 5(2)(b) of the Copyright Directive is an autonomous concept of EU Law.¹¹⁵ This argument is supported by recital 32 of the Copyright Directive, which states that while the “list [of limitations and exceptions in Article 5 of the Copyright Directive] takes due account of the different legal traditions in Member States [...] Member States should arrive at a coherent application of these exceptions and limitations”. This wording, together with the ruling in *Padawan*, leaves little room to argue that Article 5(3)(k) should not have a uniform meaning if Article 5(2)(b) does. The only reason imaginable is that the notion of parody is more culturally loaded than the rather technical notion of ‘fair compensation’. But, on the other side, especially when parodies are made available online, artists would want to be sure that they can rely on a harmonious concept of parody throughout the EU. In his opinion, AG Cruz Villalón likewise suggested that the Court should answer the question whether parody is an autonomous concept under EU law in the affirmative,¹¹⁶ adding, however, that, in that autonomous and uniform interpretation, Member States, in the absence of a definition in the Directive, still have a wide margin of discretion to have regard for their national cultural peculiarities.¹¹⁷ The CJEU largely followed the Opinion of the AG, confirming that the concept of parody has an autonomous meaning once implemented by a Member State. This autonomous interpretation, the judgment seems to imply, leaves little room for national peculiarities as this “would be incompatible with the objective of [the Copyright Directive]”.¹¹⁸

3. A European parody

- 61 It is only one of many exceptions, but likely the most important when it comes to bringing mashups under the umbrella of Article 5 of the Copyright Directive. If a parody under Article 5(3)(k) were to allow artists a certain degree of freedom regarding the target of their criticism or mockery, at least some mashups would be granted protection under this exception. In the US, the concept is still very restricted, but

it might relax in the near future. After the CJEU's judgment in *Deckmyn*, the concept of parody in the EU has taken shape.

- 62 In his opinion, AG Cruz Villalón first recalled that exceptions to the general rule that rightsholders must consent to reproductions of their works must be construed narrowly¹¹⁹, and that, in interpreting the exceptions, regard must be given to the special characteristics of each exception, for which a wide margin of discretion exists.¹²⁰ Contrary to the position of the Commission, which suggested that the concept of parody should be defined in strict delineation to the other two categories – pastiches and caricatures, the AG argued that all of those categories have the same purpose, which is to derogate from an exclusive right.¹²¹ In fact, some pastiches can be caricatures or parodies; in many cases, these categories can overlap. Therefore, an interpretation that would isolate each category would be rather artificial.
- 63 From a literal analysis of the respective terms in different languages, AG Cruz Villalón went on to identify common characteristics of a parody that seem to be common to most jurisdictions. In attempting to define the concept of parody, Cruz Villalón distinguished between structural characteristics and the functional dimension of a parody. The Court, itself, did not follow this categorization to determine the constituent elements of parody, but the distinction provides a nice framework for analysis.

a.) Structural characteristics

- 64 The AG argued that parodies are always both, a copy and a new creation.¹²² A parody relies on an element of recognition, which is not incidental but essential and indispensable for the new creation.¹²³ By borrowing large or small parts from existing works and, at the same time, creating a new meaning, parodies are always ambivalent, drawn between the original and its transformation. Although parodies borrow significant parts from other works, it is always that new element that distinguishes them from the original, and that makes the creator of the parody desire recognition. It is especially the creator of the parody's intention not to be confused with the author of the original work that is the basis of a parody. The creative element is a product of the genius of the author of a parody.¹²⁴ This argumentation could imply that a parody must be original, or is by definition original, although the majority of the work is copied.¹²⁵ Indeed, a parody should be original because it must be the author's own intellectual creation, by addition or distortion, that adds the mocking element; this originality can be achieved by minor alteration or transformations,

which distinguish parodies from (unintentional) bad copies.

- 65 The referring court had suggested a number of elements that could constitute the elements of a uniform interpretation under EU law. The AG, however, suggested that the optional character of the exception would not support such a strict corset of criteria and only the core characteristics mentioned would be indispensable.¹²⁶ This does not mean that there can be no other elements, but it would be for the national courts, taking advantage of their wide margin of discretion, to decide in each case whether a certain creation constitutes a parody.¹²⁷
- 66 The Court limited the position of the AG, applying a literal interpretation of the term parody. There are only two criteria that are relevant and that a parody must display: a parody must (a) “evoke an existing work while being noticeably different from it”, and (b) it must constitute “an expression of humor or mockery.”¹²⁸ For the sake of effectiveness and in the absence of any other indication in the Directive, the Court refused any and all of the suggested additional criteria the referring court had enumerated.¹²⁹ The judgment seems to suggest that parodies must not display an original character that goes beyond humor or mockery.

b.) The functional dimension

- 67 In what the AG called the “functional dimension”, Cruz Villalón distinguished between the object of the parody, its intention and effect, and its content. The referring court had asked whether it is necessary that a parody directs its mockery at the original work, or whether the original work can be used to criticize, mock, or humor another subject. The AG saw a wider definition of parody, which includes, on the one side, ‘traditional’ parodies that refer back to the original work (‘parody of’).¹³⁰ On the other side, he argues that a type of parody that employs an original work to comment on another subject (‘parody with the help of’) is sufficiently established in our modern communication culture, and that the scope of the parody exception cannot be limited to ‘parodies of’.¹³¹
- 68 A second functional dimension is opened by the effects of parody. AG Cruz Villalón stressed that the effects of parody are a necessary consequence of the transformation. Again, arguing with a literal interpretation, he acknowledged that critical, humorous, or mocking remarks – and this is the essential quality of parody – can transport serious and tragic-comedic notions.¹³² He settled on the term ‘mockery’ (“*Verspottung*” or “*burlesque*”) as a description of the effects of a parody and suggests granting Member States a wide margin of discretion.¹³³

- 69 Finally, he engaged in an analysis of the relation between parody and freedom of expression. Based on the facts of the proceedings that resulted in this preliminary reference, the AG discussed whether or not a rightsholder could object to a parody defense if the message transported through the parody runs fundamentally against his own convictions. Cruz Villalón suggested, because the freedom of expression occupies an outstanding position in a democratic society,¹³⁴ that a rightsholder cannot, as a general rule, object to a parody based on his work only because he does not share the opinions expressed through the parody, even if these opinions are opposed by a large number of the population.¹³⁵ However, in cases in which the expressed opinion is *fundamentally* opposed to the *core values* of the (European) society, rightsholders can invoke their rights against such an adaptation, which would not be considered to be a parody in such a case.¹³⁶ Whether or not this is the case, AG Cruz Villalón suggested leaving it to the referring court to decide in this particular case.¹³⁷
- 70 Again, the Court was much more brief regarding what it called the ‘objective’ of a parody. It acknowledged, basing it on the argumentation in recital 31 and Articles 2 and 3 of the Copyright Directive, the necessity to strike a balance between rightsholders and users of protected subject matter.¹³⁸ This balance must be considered when applying the parody exception in every particular case. On the one side of the scale, the Court puts the interests of “persons referred to in Articles 2 and 3” of the Copyright Directive, and, on the other side, the right to freedom of expression of users of protected works.¹³⁹ In a case such as the one in front of the referring court, where a discriminatory message is transported through the parody, the Court ruled that rightsholders “have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with such a message.”¹⁴⁰
- 71 The Court limited the scope of the parody, which the AG had opened significantly, leaving national courts little room for interpretation. However, the standard it sets for striking the balance between the interests of rightsholders and users of protected works tilts more in favor of rightsholders. Whereas the AG had seen the limitation in cases in which the message of the parody is fundamentally opposed to the core values of society, the Courts finds it sufficient if the rightsholders have an interest to be disassociated with the work.
- 72 An interest to be disassociated with the work must, however, remain an objective standard in the interest of foreseeability and legal certainty. Of course, no author is very interested in being mocked, besides those with a good sense of humor. But, authors should accept that their works are decontextualized and transformed to transport

critical messages. This means that mashups do have a chance if they can establish that they mock, even if their target is not the reproduced work, itself, but something or someone else.

4. Does EU copyright law provide for a reliable framework for mashups?

- 73 In the absence of an explicit exception for mashups or sample-based music in Article 5 of the Copyright Directive, or a clear indication that the three-step test can be extended beyond the exhaustive list of exceptions and limitations,¹⁴¹ it seems that EU copyright law neither provides room for legal mashups without paying licensing fees, nor are Member States in a position to enable mashups in their respective jurisdictions independent of EU law.¹⁴²
- 74 First, national legislators are bound by EU law, and a narrow construction of limitations and exceptions under EU law automatically restricts their scope under national law.¹⁴³ Recital 32 of Directive 2001/29 states explicitly that Article 5 “provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public”.¹⁴⁴ The introduction of additional limitations or exceptions into national law, which would go beyond the catalogue of exceptions in the Directive that constitutes the maximum ceiling of permitted derogations,¹⁴⁵ would bring a Member State in violation of EU law. In addition to this condition, Member States cannot stretch the scope of Art 5 but may only adopt limitations and exceptions that are exactly within the scope or stricter than the limitations enumerated in Article 5 of the Copyright Directive.¹⁴⁶
- 75 Second, national initiatives within the framework of Article 5 of the Copyright Directive can improve the current situation only minimally. Given the normal ways of distribution of mashups over the Internet, which makes the works instantaneously available in all Member States, authors would want to be able to rely on the same exceptions and limitations in all Member State to avoid infringing acts. Without this legal certainty that enables the creation and dissemination of mashups, creativity could be significantly stifled.
- 76 Third, the provisions of Article 5 provide anything but legal certainty, not only for mashup artists. The system of limitations and exceptions is already complicated, with some exceptions – potentially, after implementation – applying to the reproduction right, and also to the rights of communication to the public and making available, and to different classes of rightsholders. Further, the “extra legislative layer”¹⁴⁷ that stems from the requirement of legal interpretation of the rules of limitations and

exceptions complicates the matter and makes the application of limitations and exceptions more uncertain than necessary. As in the case for parody in the *Deckmyn* case, even after the judgment of the Court, many of the concepts that Article 5 of the Copyright Directive relies on are unclear and will only be clarified when a case is brought in front of the CJEU for interpretation.¹⁴⁸

- 77 In general, the harmonizing effect, which is necessary in a borderless information society more than ever, has been strongly criticized. Hugenholtz states that the “actual harmonizing effect must seriously be called into doubt”¹⁴⁹ due to the ability for Member States to “pick and mix” from a “shopping list” of broadly-phrased, wide categories of limitations and exceptions.¹⁵⁰ Janssens described the results of copyright harmonization under the Copyright Directive as “disappointing”, regarding limitations and exceptions.¹⁵¹ More drastic are Geiger and Schönherr; in their opinion, “harmonization in the field of limitations and exceptions has been a failure”.¹⁵² The current situation has created a lack of coherence among a very limited number of limitations and exceptions.
- 78 Finally, the limitations and exceptions under Article 5 of the EU Copyright Directive do not reflect an understanding of copyright as a mediator between rightsholders and third parties but one that gives primacy, as a principle, to rightsholders of exclusive rights and their economic interests.¹⁵³ What the current legal framework is missing is weight on the other side of the scale – support for developing and maintaining creativity. Especially for user-generated content, this means that there is little content available for re-use, which significantly hampers creativity based on pre-existing material. With little exceptions for user-generated content, which are, further, very much unclear, and the long duration of copyright and related rights,¹⁵⁴ mashup artists have very little material at their disposal to work with legally.

D. Enabling Mashups

- 79 The European Union does not provide for a legal environment that enables individuals to create mashups.¹⁵⁵ The exceptions of the Copyright Directive fail to provide room for transformative uses outside the narrow corset of the concept of parody. Authors of mashups are, therefore, required to ask rightsholders for permission to use musical compositions and sound recordings. But, with mashups mainly published digitally on the Internet, the rights clearing process is burdensome, cost-intensive and, considering the little economic significance of most mashups, often impossible. For example, the German GEMA, the collecting society

for reproduction and performance rights, offers simple-to-use licenses for certain uses. However, such licenses are only available as repertoire licenses for web-radios, podcasts, and for certain uses of members of the collecting society.¹⁵⁶ Other quick licenses are not available through GEMA’s website. Neither do the relevant French collecting societies¹⁵⁷ provide for such licenses nor the PPL and PRS in the United Kingdom. The UK Copyright Hub,¹⁵⁸ which was established following the 2011 Hargreaves review, currently only provides for information on who to contact to acquire licenses for different uses. Concrete advice is still missing on how to obtain licenses for non-commercial, small-scale uses.

- 80 With the current system of collective rights management, mashups continue to suffer from the flaw of legal uncertainty. The new Collective Rights Management Directive¹⁵⁹ that was passed in late February 2014 does not help to illuminate the legal grey area. Although it provides for the possibility to grant multi-territorial licenses, it does not explicitly refer to licenses for small-scale uses. This step must be taken by collecting societies, themselves, in offering one-stop shop licensing mechanisms for amateur users against small fees. Currently, it seems unrealistic that this option will be available in the near future.
- 81 But, even if mashup artists, in the absence of practical licensing services by collecting societies, were to approach every rightsholder in every relevant country individually, it is hard to imagine that all their inquiries would be answered, and, in many cases, an answer would probably not be positive or unconditional. Not every author or record company is happy to see their songs mutilated on the Internet, be that mutilation for commercial or non-commercial purposes, which is to say that the commercial nature of a use is not necessarily the biggest problem for authors, but rather the fact that their works are significantly altered. And, casting aside any moral rights considerations, most artists and record companies will not agree to waive their remuneration rights for mashups that are or can be commercialized, although some musicians have encouraged the use of their songs for mashups.
- 82 In order to enable a vivid mashup culture that provides amateur artists the opportunity to express themselves and that makes the commercial exploitation of professional mashups with worldwide dissemination possible, a parallel system built on limitations and exceptions for non-commercial mashups and compulsory licensing for commercial mashups could be one imaginable solution. Realistically, a system just for mashups cannot be expected, but an approach with a wider scope, including all sorts of user-generated content, could help to boost creativity as imagined by the European Commission.

I. Non-commercial mashups – limiting control

- 83 A strong case should be made for the free use of copyrighted material for amateur creativity.¹⁶⁰ Considering the relative economic insignificance of amateur mashups, a solution that would enable user-generated content to rely on exceptions that cover copyright and all relevant related rights would seem appropriate. A special exception could be inserted for transformative uses that are not commercially exploited. Such an exception is included in the “European Copyright Code”, which has been drafted by a number of distinguished copyright scholars.¹⁶¹ The interests of users could be safeguarded by balancing rightsholder interests against the right to freedom of expression, as the Court in *Deckmyn* has demonstrated. More guidance on the interest to be disassociated with another work would, however, be necessary. Because mashups are an international phenomenon, this exception, ideally, would be mandatory and therefore available to mashup artists throughout the entire EU. With such a solution, legal certainty would be provided, and creativity encouraged.¹⁶²
- 84 Opening one particular exception would surely provoke demands from other interest groups to introduce further exceptions with a rather narrow scope, and this is, therefore, very unlikely to happen in the near future. It has been suggested to give Member States the possibility to introduce further limitations and exceptions by deleting recital 32 of the Copyright Directive.¹⁶³ But, this would again result in a fragmented patchwork of limitations and exceptions in the EU to the detriment of legal certainty, which is so direly needed in an online environment that affects copyright and related rights in all 28 Member States. Therefore, a flexible exception that can accommodate uses that have not been foreseen in an enumerative list should be introduced to function as a ‘catch-all’ exception. Such an exception would not question the legitimacy of the other exceptions contained in Article 5 of the Copyright Directive and would be less likely to provoke demands by other stakeholders. It could take the form as suggested by the Wittem Group or even draw inspiration from the three-step test. What is more important is that it should function to react efficiently to developments that collide with the inflexible framework of limitations and exceptions under the Copyright Directive.

II. Commercial mashups – facilitating licensing

- 85 Mashup artists, who use pre-existing works to compose mashups and earn money with their

compositions, either by selling them online or by performing their mashups in front of audiences, should indeed be required to obtain licenses for all songs they integrate. The process of obtaining licenses can, as described above, be burdensome and, potentially, prohibitively expensive, especially if artists or phonogram producers refuse to grant licenses. In the interest of promoting creativity and creating an environment that encourages and enables artists to rely on pre-existing works for their artistic output, there could be a ‘right’ to use works of other artists against remuneration, albeit within certain limits.

- 86 A solution to enable mashups and to compensate rightsholders at the same time could be a system of compulsory licensing, which would make it easier to obtain licenses and provide mashup artists with legal certainty as to the legality of their activities.¹⁶⁴ Such a system would require an information system that provides all necessary information on whom to address to obtain licenses and the extent of licenses granted. It could be imagined that this task can be taken over by collecting societies, which are now able to offer pan-European licenses. These licensing mechanisms must be easy and quick to use and preempt objections based on moral rights as much as possible.
- 87 The concerns of rightsholders with respect to economic exploitations of their works could be dispensed by offering compensation for certain uses of works that do not run the danger of creating confusion over authorship. At the same time, they would receive another source of income, which could be attractive, especially for artists with older repertoires. A positive side effect could be that songs included in mashups can gain new popularity by bringing them back to public attention. There is, however, no empirical proof that mashups have such an effect, yet.

III. A matter of distinction

- 88 The problem with a system that distinguishes between commercial and non-commercial mashups is to find the thin red line that marks the distinction between the two types of activities. At some point, individual mashup artists began to profit from their amateur activity by making economic gains. The mashup phenomenon has evolved from amateurs using sample-based music to worldwide popularity with artists that can live from the revenue their productions create. These gains may not always enable an artist to sustain himself completely, but it can be argued that composers, artists and record producers on whose works and efforts mashup artists rely should be allowed to partake in the success of mashup culture. But, when does an artist

cross the line between non-commercial activities, or even activities of marginal significance? And, a commercial activity must somehow be determined. Whether this should be assessed quantitatively by the number of downloads or video- and audio-streams, remains a matter open to discussion.

IV. European Fair Use?

- 89 US fair use offers little certainty for mashup artists, but still a bit more than the inflexible system of EU limitations and exceptions. Moreover, it has the potential to open up to new uses if the four factors are applied liberally and generously. The introduction of fair use in Europe has been discussed in academic literature with varying results either as a replacement of the catalogue of limitations and exceptions, or as an addition in the form of an open-ended, catch-all provision.¹⁶⁵
- 90 It is certainly possible – in theory – to adopt a fair use provision and integrate it in some way into the existing copyright *acquis*. It is also desirable to include such a provision to give the EU copyright system a higher degree of flexibility in order to accommodate technological, cultural and artistic developments that imply reproductions, adaptations and alterations – in other words, the re-use of copyright protected works. Whether or not this is politically feasible is a question that does not need to be answered here.
- 91 Assuming that a fair use-style provision would find its way into the Copyright Directive; or in a broader, more comprehensive copyright regulation; or any other piece of EU legislation on copyright, the key to its effectiveness would be its interpretation and application. The current position of the EU judiciary concerning limitations and exceptions is that they must be interpreted restrictively as exception to exclusive rights. This approach would most likely deprive a European fair use exception of many of its potential benefits. Such a situation can be avoided by abandoning the principle of strict interpretation for a purposive approach that aims at striking a ‘new’ balance between the interest of rightsholders, and those of users of protected works. This approach should take into consideration the enabling function of copyright and underline its function as a motor for creativity. Elements of fair use can already be found in the jurisprudence of the CJEU and, if supplemented with a more flexible and integrated three-step test,¹⁶⁶ an open exception could foster creativity for mashup artists and other re-users of protected works.

V. And what about moral rights?

- 92 Moral rights are not harmonized in the EU, yet they can play an important role in enabling and, in particular, disabling mashups. National moral rights, such as the right of integrity,¹⁶⁷ could be used to prevent mashup artists to use parts of works and include them in a bigger composition. Although moral rights were identified as important in the information society already in 1995,¹⁶⁸ today, the Copyright Directive states in recital 18 that “[t]he moral rights of rightsholders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty, and of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive.”¹⁶⁹
- 93 Therefore, mashup artists are confronted with 28 different moral rights systems with the common law Member States providing a lower degree of protection.¹⁷⁰ Whether any of the 28 jurisdictions in their respective formulations of the right of integrity prohibit sampling or the creation of mashups is currently not conclusively explored. It is, however, unlikely that any mashup artist, professional or amateur, is prepared to check whether a new creation would violate the right of integrity in all Member States.
- 94 Authors could (ab)use the right of integrity to prevent mashups based on their works, even if, in principle, a copyright exception permitted the use. Ultimately, it would be left to the courts to decide whether certain mashups constitute violations of the right of integrity as a part of the wider notion of moral rights and how moral rights must be reconciled with limitations and exceptions. Harmonization efforts in relation to moral rights could improve legal certainty for mashup artists, but this is not likely to happen anytime soon. None of the recent Green Papers or Commission Communications mentions moral rights in any way, and recital 18 of the Copyright Directive, it seems, has been the last word on this issue.¹⁷¹ It has been argued that the ruling in *Deckmyn* could constitute a shift in the direction of moral rights harmonization at EU level.¹⁷² But, the decision would grant an author only a very limited right to object to the re-use of a work, namely only in such cases in which the author has a genuine interest to be disassociated with the new creation. When a new work transports a discriminatory message or one that promotes xenophobia, racism, and comparable sentiments, the balance would probably be struck in favor of the author in most, if not all cases. It is unlikely that a court would refuse the re-use of a work if the author of the original merely dislikes the new work for aesthetic reasons, moderate

political views or the like – for parodies or any other transformative works.

- 95 Ideally, moral rights should already be considered when formulating limitations and exceptions. Whether this is in the context of a closed list of exceptions, as currently under the Copyright Directive, or by an open exception for non-commercial uses, is of little relevance. The three-step test, still the yardstick for limitations and exceptions under the international and European framework, leaves room for such considerations under the third element (“does not unreasonably prejudice the legitimate interests of the author”). A flexible fair-use style provision in the copyright *acquis* is more likely to achieve this balance already on the legislative level, even if it is only by instructing the judiciary to take the ‘moral’ interests of authors and related rightsholders into consideration.

E. Conclusion

- 96 Although the Commission has repeatedly expressed its intention to facilitate the legal environment for user-generated content (including mashups), little has happened so far to alleviate the situation for ‘recycling artists’ and amateur users.
- 97 Under the current legal framework, mainly the exceptions of Article 5 of the Copyright Directive, creators of mashups must be careful in designing their works and have regard to the relevant national laws to find loopholes that permit for the lawful re-use of musical compositions and sound recordings.
- 98 In the US, although the situation is far from clear, it seems that an author whose work has elements of a parody (P_{Par}), is mainly distributed privately (D_{Priv}) and has a non-commercial character (C_{N}) is likely to succeed in claiming the fair use defense. Conversely, an artist that produces a mashup solely for entertainment purposes (P_{Ent}), and then distributes the mashup to a wider public (D_{Pub}) for economic gain (C_{C}), would fall short of the defense.¹⁷³ In a situation where an author parodies another work, and makes the parody available for the public for a slight economical gain, e.g. through advertisements on a homepage, all factors need to be weighed against each other.¹⁷⁴ As this is left to the courts in every individual case, any prediction is flawed with uncertainty. Other transformative works, including mashups, are not disabled, but must climb the higher hurdles of non-parody transformativeness.
- 99 Given the wording of the current limitations and exceptions regime in the EU, it is unlikely that a European judge, *viz.* a judge that applies national law as harmonized by the EU directives on copyright and related rights, would have as much latitude in assessing the legality of mashups as his or her US colleagues have.¹⁷⁵ Further judgments of the CJEU must be awaited. The *Deckmyn* case has given mashup artists some hope that the freedom of expression venue is worth exploring in the future to further extend the scope of limitations and exceptions.
- 100 In comparison to the parody defense under the US fair use doctrine, the CJEU has widened the scope of Article 5(3)(k) by recognizing parodies that comment on the original work, as well as parodies that use an original work to comment on another work. A mashup with more than 30 songs will have its difficulties to display targeted criticism to one particular work, but it is more likely to convey a general critical message. The original contribution must then be sought in the added meaning, the expression of an opinion or mockery. As such, it is at least one hurdle that the US fair use doctrine puts up that must not be overcome by artists under the EU parody exception. This could make room for the argument – which would be difficult to make under US law – that mashups do not directly criticize the songs they are composed of, but a music genre, altogether. Whether or not music mashups that contain no original contribution aside from the arrangement of song snippets will face more difficulties in passing the test for critique and parody, which seems to be the only available limitation that could be a fix for mashups, is still unclear. It is also unclear what ‘mockery’ or ‘humor’ are defined as, with regards to European concepts¹⁷⁶, and whether mashups that are primarily entertaining and leave room for critical interpretations can be captured by the EU parody exception.
- 101 The CJEU also eliminated uncertainty created by the AG in *Deckmyn* by rejecting the wide margin of discretion for national courts to supplement the indispensable structural elements in the functional dimension of a parody. The Court also refused the strict standard the AG had suggested to balance freedom of expression against rightsholder interests. An interest to be disassociated with a parody is more likely to be applied uniformly in the EU than a standard that is based on opinions which are fundamentally opposed to the core values of the society; such standard might differ from Member State to Member State.¹⁷⁷ What the AG and the Court in *Deckmyn* both completely ignored, which is part of the US fair use defense, is the potential economic impact of a parody.¹⁷⁸ But, as the AG did not even include these considerations in his section on ‘questions I was not asked’,¹⁷⁹ it is unlikely to play an important role under EU law.
- 102 However, the interpretation of existing exceptions and limitations as part of case-by-case decisions is not sufficient to enable mashups in the EU. After *Deckmyn*, legal certainty for mashups, as well as user-generated content in general, exists only within the limited scope of the parody exception. Enabling

mashups in the EU would require a widening of limitations and exceptions to accommodate user-generated content for at least non-commercial purposes, and compulsory licensing schemes for commercial mashups and other types of sample-based music must be considered in order to unleash the creative potential that is slumbering in mashups.

103 Whether the ongoing review of the EU copyright framework will bring a solution for amateur uses and whether collecting societies or other actors will provide for easy licensing mechanisms remains to be seen.¹⁸⁰ After the disappointing outcome of “Licenses for Europe”, it seems unlikely that much more will come from the Commission except for half-hearted commitments from the industry. And, the CJEU does not have much on its docket that could shed light on the effect of limitations and exceptions on user-generated content. Moral rights, as the ‘wild horse’, are still waiting for a place on the European copyright stage, and they are even more likely to disable non-critical mashups.

104 This means for the moment that mashups are more likely to be found illegal under the EU copyright law regime, which positions European mashup artists slightly worse than their US counterparts. The US fair use doctrine offers more room for flexibility and creativity, certainly under the parody defense, but also for other transformative works. Recent US jurisprudence could denote a change to the effect that the re-use of protected works, under certain conditions, is permitted as transformative without the intention to criticize the borrowed work. In the EU options for transformative works of art beyond the parody exception are still rather limited. The US fair use doctrine should, at least, be considered as an inspiration. A European version of the defense could be constructed based on the three-step test and a wider interpretation of such an exception in comparison to the current interpretational regime.

105 Currently, neither the US nor the EU copyright system offer legal certainty and, therefore, are likely to strangle (legal) creativity in both markets. With an active mashup scene on the continent and across the pond, it seems only a matter of time until a ‘pure’ mashup-case is brought in front of either court, but it might be, as well, that we have to wait because record companies are afraid that a mashup-favoring ruling might unleash the full potential of this popular art form.

- 1 COM(2010) 245 final/2, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. A Digital Agenda for Europe, Brussels, 26.08.2010.
- 2 COM(2010) 2020 final, European Commission Communication from the Commission. EUROPE 2020. A strategy for smart, sustainable and inclusive growth, Brussels, 3.3.2010.
- 3 Declaration (no 52) by the Kingdom of Belgium, the Republic of Bulgaria, the Federal Republic of Germany, the Hellenic

Republic, the Kingdom of Spain, the Italian Republic, the Republic of Cyprus, the Republic of Lithuania, the Grand-Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Republic of Austria, the Portuguese Republic, Romania, the Republic of Slovenia and the Slovak Republic on the symbols of the European Union, [2007] OJ C306, 267.

- 4 Modern dictionaries define the term as “something created by combining elements from two or more sources” and provide examples from the field of music (a piece of music created by digitally overlaying an instrumental track with a vocal track from a different recording”), visual arts (“a movie or video having characters or situations from other sources”) and computer software (“a Web service or application that integrates data and functionalities from various online sources”) (Merriam Webster online: <http://www.merriam-webster.com/dictionary/mash-up>); or “A mixture or fusion of disparate elements” (Oxford Dictionaries: <http://www.oxforddictionaries.com/definition/english/mash-up?q=mashup>).
- 5 This is no to say that other forms of mashups do not create legal problems: mashups of audiovisual material create similar problems in terms of reproductions of works or parts of works and their communication to the public, the same is true for mashups of images.
- 6 The Pop Danthology 2012 (<http://www.youtube.com/watch?v=If5MF4wm1T8>, accessed 14 October 2014) has over 58 million views since published on 2 December 2012, DJ Earworm’s United State of Pop 2009 (Blame it on the Pop) (<http://www.youtube.com/watch?v=iNzrwh2Z2hQ>, accessed 14 October 2014) has been viewed more than 44 million times, this does not come close to the Youtube success of popular music songs such as Gangnam Style by the South Korean artist PSY (more than 2,1 billion hits), or other well-known pop artists such as Justin Bieber (slightly more than a billion views), Jennifer Lopez and Eminem. The only video that can break the phalanx of pop-music songs in the Youtube Charts is a video of a small boy biting another boys finger (http://www.youtube.com/watch?v=_OBlgSz8sSM, accessed 14 October 2014) with over 750 million views.
- 7 On <http://illegal-art.net/girltalk/> (accessed 14 October 2014) Girl Talk’s five albums are available as individual mp3s for free, the seamless version cost 5,00 \$, CDs and vinyl discs of the albums are available for purchase at higher prices.
- 8 Cf. M. A. Pote, Mashed-Up in Between: The Delicate Balance of Artists’ Interests Lost Amidst the War on Copyright, 88 N.C. L. Rev. 639, 646 (2010), see also A. Power, The Mouse That Roared: addressing the Post-Modern Quandary of Mash-ups through Traditional Fair Use Analysis, 8 Vand. J. Ent. & Tech 531, 532 (2006), who for his analysis adds three other criteria: (1) to the pre-existing works that are exclusively used to create a new work he adds (2) that the works must be immediately recognizable, (3) adding further, which significantly narrows his approach, that the new work must criticize or comment on prior recordings, and finally (4) that the new work must be made available for free. Power’s analysis is, therefore, very narrow in scope because it excludes any commercial exploitation in constructing his definition of a ‘mashup’. In relation to his third point, that the new work must “comment or criticize”, Power applies a very generous standard for parody. One element of the parody analysis is the transformative nature of the new work; here he argues that for a mashup both works, in the most elemental form of a mashup, are transformed simultaneously (see p. 537.). Lee takes an even broader view of mashups, expressly including video mashups that incorporate any third-party material, E. Lee, Remixing Lessig, 6 I/S: J.L. & Pol’y for Info. Soc’y 41, 54 (2010).
- 9 Initially, Gillis distributed “The Grey Album” by giving out for free a limited number of 3000 CDs, due to its popularity the

- album was soon circulating on the Internet as downloads and later in p2p networks.
- 10 *Pote* even refers to recycled art, see *M. A. Pote*, 88 N.C.L.Rev. 639, 640 (2010); further *Boone* from a music theory perspective in her title: *C. Boone*, *Mashing: Towards a Typology of Recycled Music*, 19 *Music Theory Online* 1 (2013).
 - 11 *Gelke* makes the fundamental distinction between four different types of mashups: audio mashups, video mashups, photo mashups and so-called web mashups; web mashups mainly refer to participatory open-source software applications but further encompass geographic novels and HTML5 videos, see *E. Gelke*, *Mashups im Urheberrecht, Nomos, Baden-Baden*, 2013, p. 168. The term 'web-mashup' does not relate in any way to the distribution form of the work, but it is used to distinguish between 'artistic mashups' and mashups that integrate other material for purposes of 'utility', *E. Gelke*, (2013), p. 180.
 - 12 The distinction is often not very clear and at times both terms are used interchangeably, and third-party remixes create similar legal problems as mashups do.
 - 13 *C. Boone*, 19 *Music Theory Online* 1 (2013), 'mashup' as used for the scope of this paper *Boone* has titled "Basic Mashups" (para 4 et seq.), she distinguishes these from "Cover Mashups" (para 5 et seq.), which do not rely on existing recordings; within the narrower category of 'mashups' she distinguishes 'ordinary' mashups, that include two or slightly more songs from "Paint Palette Mashups" (para 8 et seq.) that use small snippets of songs and make them difficult to be recognized, the metaphor is taken from *Lessig* who commented on a *Girl Talk* Album: "This is not simply copying. Sounds are being used like paint on a palette. But all the paint has been scratched off of other paintings." (*L. Lessig*, *Remix: Making Art and Commerce Thrive in the Hybrid Economy*, Bloomsbury Academic, London, 2008, p. 70), note that *Boone* erroneously connects this quote with the *Grey Album*; another distinction drawn by *Boone* are "Megamix Mashups" that combine a greater number of songs (para 10 et seq.).
 - 14 *C. Boone*, 19 *Music Theory Online* (2013), para [12.1].
 - 15 *Lessig* expresses his difficulties to explain why sound recordings and films on the one side and books and other forms of written copyrighted works are treated differently, see *Lessig* (2008), pp. 53-54; in 2013 *U.D. Bauer* published a book that was entirely composed of quotations from other books, even the preface consists exclusively of sentences borrowed from other authors (*U.D. Bauer*, O.T. - sowie ein Gespräch mit Max Dax, *Die Andere Bibliothek*, Berlin, 2013).
 - 16 Indeed, other non-music mashups exist that use parts of existing images and combine them to form a new work of art.
 - 17 <http://2penniesworth.com/2009/12/27/wolverine-comic-covers-homage-to-dali-van-gogh-and-gorey/> (accessed 14 October 2014).
 - 18 http://www.artsology.com/mashup_1.php (accessed 14 October 2014).
 - 19 http://www.huffingtonpost.com/2013/12/15/star-warhols_n_4413528.html (accessed 14 October 2014).
 - 20 See <http://www.chungkong.nl> (accessed 14 October 2014).
 - 21 From a legal perspective this is extremely relevant as it increases content that relies on acts of reproduction, which is protected by copyright, as *Lessig* has put it: "remixing without technology does not copy", *L. Lessig*, *Free(ing) Culture for Remix*, 2004 *Utah L. Rev* 961, 964 (2004).
 - 22 See *M. A. Pote*, 88 N.C.L.Rev 639, 642 (2010).
 - 23 COM(2011) 427 final, Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a single market, Brussels, 13.07.2011, p. 14; COM(2011) 287 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. A Single Market for Intellectual Property Rights. Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe, Brussels, 24.05.2011 under chapter 3.3.3. User-generated content.
 - 24 COM(2012) 789 final, Communication from the Commission. On content in the Digital Single Market, Brussels, 18.12.2012.
 - 25 http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf (accessed 14 October 2014).
 - 26 See Consultation on copyright p. 29, available at: http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf (accessed 14 October 2014).
 - 27 COM(2011) 287 final, para. 3.3.3.
 - 28 Public Consultation on the review of the EU copyright rules, p. 29.
 - 29 COM(2011) 287 final, para. 3.3.3.
 - 30 Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20.03.2014, p. 72-98.
 - 31 *J. Poort/J.P. Quintais*, *The Levy Runs Dry: A Legal and Economic Analysis of EU Private Copying Levies*, JIPITEC 2013.
 - 32 *M. A. Pote*, 88 N.C.L.Rev 639, 683 (2010).
 - 33 One notable exception is a dissertation published only in 2013: *E. Gelke* (2013). However this is an analysis that focuses on mashups under German copyright law, albeit it does touch, out of necessity on a number of aspects in relation to EU copyright law.
 - 34 *Power* has argued that licensing *per se* endangers a vivid mashup culture as the imposition of licensing fees could deter amateur users to create mashups in the first place, see *A. Power*, 8 *Vand. J. Ent. & Tech* 531, 534 (2006).
 - 35 Section 107 complements a number of exceptions and limitations contained in sections 108-112.
 - 36 *J. Mazzone*, *Copyfraud and Other Abuses of Intellectual Property Law*, Stanford University Press, Stanford, 2011, p. 59.
 - 37 *Newton v. Diamond*, 388 F.3d 1189 (9th Cir. 2004).
 - 38 *J. Mazzone* (2011), p. 59.
 - 39 *Newton v. Diamond*, 388 F.3d 1189(9th Cir. 2004).
 - 40 *Elsmere Music Inc. v. Nat'l Broad. Co., Inc.*, 482 F. Supp. 741, 743-44 (S.D.N.Y. 1980), *aff'd sub nom.* 623 F.2d 252 (2nd Cir.1980).
 - 41 *Bridgeport Music, Inc v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005).
 - 42 *J. Mazzone* (2011), pp. 58-59.
 - 43 *E. Harper*, *Music Mashups: Testing the Limits of Copyright Law as Remix Culture Takes Society by Storm*, 39 *Hofstra L.Rev* 405, 420 (2010); see *E. Lae*, *Mashups, A Protected Form of Appropriation Art or a Blatant Copyright Infringement?* (December 2011), pp. 21-22.; available at SSRN: <http://ssrn.com/abstract=2003854>, with further references.
 - 44 In *Newton v. Diamond* the defendants had failed to acquire a license for the musical composition underlying the sound recording, but the sample taken from the original song was deemed to be insubstantial in relation to the entire work and therefore the claimant could not establish a *prima facie* case of copyright violation for the musical composition, see *E. Lae* (SSRN: December 2011), pp. 8-9.
 - 45 17 U.S.C. §114(b) provides that the exclusive rights in sound recordings "do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such

- sounds imitate or simulate those in the copyrighted sound recording.”
- 46 See *E. Lae* (SSRN: December 2011), p. 8; *Saregama India Ltd. v. Mosley*, 687 f. Supp. 2nd 1325 (S.D. Fla 2009).
- 47 *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539 (1985).
- 48 17 U.S.C. § 107 reads: “[T]he fair use of a copyrighted work [...] for purposes such as criticism, comment, news reporting, teaching [...] scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include— (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.
- 49 *Campbell v. Acuff-Rose Music, Inc.*, 510, 579 U.S. 569 (1994).
- 50 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994), and further: “[T]ransformative works] lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright”.
- 51 *Harper* reads *Campbell* as implying that first element, the purpose and character of the use, is the most important, the reading of the Supreme Court judgment, does not necessarily support this reading, *E. Harper*, 39 Hofstra L.Rev 405, 422 (2010).
- 52 *E. Harper*, 39 Hofstra L.Rev 405, 423 (2010).
- 53 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994): “We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107.”
- 54 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), p. 570
- 55 In particular because the court in *Dr Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1400 (9th Cir. 1997), argued that parodies must be distinguished from satirical works; whereas the latter generally comment or criticize society and is therefore not transformative, the former comment or criticize a particular work. Mashups, if only two tracks are combined, can hardly claim to be a parody of one or the other song. The situation gets even worse for fair use defendants when multiple songs are mashed and the work that is supposed to be subject to parody becomes even harder to identify. See also *M. A. Pote*, 88 N.C.L.Rev 639, 671 (2010).
- 56 “[The song] reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences.”, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994).
- 57 However, *Pote* argues, that it is unclear what two songs in a mashup, in his example a drum beat from Nirvana and the chorus of Elton John’s “Tiny Dancer” could have to say about each other, put differently, what would be the element of critique or parody in the absence of original input of the author, *M. A. Pote*, 88 N.C.L.Rev 639, 673 (2010).
- 58 *A. Power*, 8 Vand. J. Ent. & Tech 531, 537 (2006).
- 59 *K. Eble*, This is a Remix: Remixing Music Copyright to Better Protect Mashup Artists, 2013 U. Ill. L. Rev. 661, 677 (2013).
- 60 See *K. Eble*, 2013 U. Ill. L. Rev. 661, 677 (2013), see also *E. Lae* (SSRN: December 2011), p. 11.
- 61 *V. Elman/A. Middleton*, Girl Talk on Trial: Could Fair Use Prevail?, 2009 Cardozo L. Rev. 149, 153-154 (2009); it can further be argued that mashups, which combine a greater number of songs criticize entire genres, the monotony of popular music, the consumer society etc.
- 62 *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006).
- 63 It is unlikely here that Koons wanted his audience to recognize the legs as a part of *Blanche’s* work, in his affidavit he stated that he wanted to “comment on the ways in which some of our most basic appetites - for food, play, and sex - are mediated by popular images.” (*Blanch v. Koons*, 467 F.3d 244, 247 (2d Cir. 2006)).
- 64 *Blanch v. Koons*, 467 F.3d 244, 254 (2d Cir. 2006); the court confirmed the ruling in *Campbell v. Acuff-Rose Music*, but maintained the distinction between parody and satire, adding that “the broad principles of *Campbell* are not limited to cases involving parody.”
- 65 *Rogers v. Koons*, 960 F.2d 301, (2d Cir. 1992).
- 66 *A. Power*, 8 Vand. J. Ent. & Tech 531, 537 (2006).
- 67 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584-585 (1994).
- 68 Other types of mashups that use news videos or other works of facts would be treated differently.
- 69 *E. Harper*, 39 Hofstra L.Rev 405, 430-432 (2010), adds that published works receive less protection than unpublished works, coming, however, to the same conclusion; *E. Lae* (SSRN: December 2011), pp. 14-15; *A. Power*, 8 Vand. J. Ent. & Tech 531, 538 (2006); *K. Eble*, 2013 U. Ill. L. Rev. 661, 678 (2013),
- 70 Advocating for a defense of parodies: *E. Lae* (SSRN: December 2011), against a detrimental effect of this element *A. Power*, 8 Vand. J. Ent. & Tech 531 (2006). undecided, leaving the matter to a case-by-case decision *E. Harper*, 39 Hofstra L.Rev 405 (2010).
- 71 *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986).
- 72 The Court in *Fisher v. Dees* identified three factors whether the amount of appropriated content of a song is excessive: “the degree of public recognition of the original work, the ease of conjuring up the original work in the chosen medium, and the focus of the parody.”, *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986); see also with further references *E. Lae* (SSRN: December 2011), p. 15.
- 73 So called A vs. B mashups combine only two songs by contrasting the vocal track of song A with the audio track of song B. Often the speed of either track, or both is adjusted to synchronize the length of both tracks.
- 74 *K. Eble*, 2013 U. Ill. L. Rev. 661, 679 (2013),
- 75 *Harper & Row Publishers, Inc., v. Nation Enter.*, 471 U.S. 539 (1985).
- 76 *E. Lae* (SSRN: December 2011), p. 16.
- 77 *E. Harper*, 39 Hofstra L.Rev 405, 423 (2010): the author argues that although mashups do not affect the primary market for the original works as mashups do not compete with these works, the secondary market for derivative works would face competition from mashups; although no statistical data for this scenario is available it is rather unusual that authors of original works engage in mashing their own songs with songs of other authors, or even with their own songs, unless they publish medley albums, which, this author believes, and hopes, are things of the past.
- 78 17 U.S.C. § 106 reads: “[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
[...]
(2) to prepare derivative works based upon the copyrighted work;”.
- 79 See e.g. *E. Harper*, 39 Hofstra L.Rev 405, 428-429.
- 80 See e.g. *E. Lae* (SSRN: December 2011), p. 17.
- 81 *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986) and *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).
- 82 Understandably so, because which author would willingly agree to grant a license to enable his work to be ridiculed in public!
- 83 Interesting, arguing both sides in a fictitious court opinion see *V. Elman/A. Middleton*, 2009 Cardozo L. Rev. 149, (2009).

- 84 Rather positive A. Power, 8 Vand. J. Ent. & Tech 531 (2006), also affirmative M. A. Pote, 88 N.C.L.Rev 639 (2010).
- 85 Strongly opposed, rather favoring an effective licensing system based on the idea of fair compensation for rightsholders E. Harper, 39 Hofstra L.Rev 405 (2010).
- 86 E. Lae (SSRN: December 2011), as a short-term solution, for the future suggests compulsory licensing system for sound recordings.
- 87 J. Mazzone (2011), p. 50.
- 88 Cf. J. Mazzone (2011), p. 68.
- 89 R.M. Vrana, The Remix Artist's Catch-22: A Proposal for Compulsory Licensing for Transformative Sampling-Based Music, 68 Wash. & Lee L. Rev. 811, 832 (2011).
- 90 Cf. R.M. Vrana, 68 Wash. & Lee L. Rev. 811, 837 (2011).
- 91 See Case 78/70, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG*, EU:C:1971:59; Joined Cases 55/80 and 57/80, *Musik-Vertrieb membran GmbH et K-tel International v GEMA - Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte*, EU:C:1981:10; Case 262/81; *Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others*, EU:C:1982:334; Case 158/86, *Warner Brothers Inc. and Metronome Video ApS v Erik Viuff Christiansen*, EU:C:1988:242; Case 341/87, *EMI Electrola GmbH v Patricia Im- und Export and others*, EU:C:1989:30; Case C-200/96, *Metronome Musik GmbH v Music Point Hokamp GmbH*, EU:C:1998:172; Case C-128/11, *UsedSoft GmbH v Oracle International Corp.*, EU:C:2012:407; in particular a recent case (Case C-128/11) has extended the so-called exhaustion principle, under which the right to control the marketing and resale of copyrighted material is exhausted once it has been legally marketed with the consent of the rightsholder anywhere in the EU, to software that is distributed through a website and simply downloaded by the customer.
- 92 Not least the Directives serves to implement many obligations arising under the WIPO Internet Treaties, the WIPO Copyright Treaty (1996) and the WIPO Performances and Phonograms Treaty (1996).
- 93 Article 2 of Directive 2001/29/EC.
- 94 Article 3(1) of Directive 2001/29/EC.
- 95 Article 3(2) of Directive 2001/29/EC.
- 96 Article 4 of Directive 2001/29/EC.
- 97 Emphasis added.
- 98 Article 2(b) and (c) Directive 2001/29/EC.
- 99 Cf. recital 23 of the Copyright Directive, see further T. Shapiro, "Part II Directive 2001/20/EC on copyright in the information society", in: B. Lindner/T. Shapiro, Copyright in the Information Society: A Guide to National Implementation of the European Directive, Edward Elgar, Cheltenham/Northampton, 2011, p. 32.
- 100 I. Stamatoudi/P. Torremans, „The Information Society Directive“, in: I. Stamatoudi/P. Torremans, EU Copyright Law. A Commentary, Edward Elgar, Cheltenham/Northampton, 2011, para 11.36.
- 101 M.-C. Janssens in: E. Derclaye (2009), p. 324, see also recitals 4, 9 and 11 of Directive 2001/29/EC, also COM(2008) 466 final, p. 4.
- 102 See M.-C. Janssens, The issue of exceptions: reshaping the keys to the gates in the territory of literary, musical and artistic creation, in: E. Derclaye, Research Handbook on the Future of EU Copyright (Research Handbooks in Intellectual Property), Edward Elgar, Cheltenham/Northampton, 2009, p. 324.
- 103 See recital 32 Copyright Directive, further T. Shapiro in: B. Lindner/T. Shapiro (2011), p. 40 and CJEU Order of the Court in Case C-302/10, *Infopaq International A/S v Danske Dagblades Forening* (Infopaq II), EU:C:2012:16, Judgment in Joined cases C-403/08 and C-429/08, *Football Association Premier League Ltd and Others v QC Leisure and Other* (FAPL), EU:C:2011:631.
- 104 Although implemented in almost all Member States and covered by similar defenses (e.g. fair dealing in the UK), the quotation exception, as the wording suggests, related to works that incorporate other works to make reference to that work. A mashup, which commenting or criticizing function is difficult to assess, would more likely not fall under this defense. Cf. Queen Mary Intellectual Property Research Institute: Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonization of Certain Aspects of Copyright and related Rights in the Information Society. Final Report. Part II. The Implementation of Directive 2001/29/EC in the Member States. Study commissioned by the European Commission, February 2007 2006, pp. 44-45, available at: http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study-annex_en.pdf (accessed 14 October 2014).
- 105 Article 5(3)(o) of Directive 2001/29/EC.
- 106 J.-L. Piotraut, Limitations and Exceptions: Towards a European "Fair Use" Doctrine?, in: A. Ohly, Common Principles of European Intellectual Property Law, Mohr Siebeck, Tübingen, 2012, p. 156 and p. 164 and Recital 32 of Directive 2001/29/EC.
- 107 It has been argued that Member States do have some room for flexibility under the current regime, see C. Geiger/F. Schönherr, Defining the Scope of Protection of Copyright in the EU: The Need to Reconsider the Acquis regarding Limitations and Exceptions, in T.-E. Synodinou, Codification of European Copyright Law. Challenges and Perspectives, Kluwer Law International, Alphen aan den Rijn, 2012), pp. 143 et seq.
- 108 C. Geiger/F. Schönherr, in T.-E. Synodinou (2012), pp. 145-147, further: C. Geiger, The Three-Step Test, a Threat to a Balanced Copyright Law, IIC 2006, pp. 683-698; A. Lucas, For a reasonable interpretation of the three step test, EIPR 2010, pp. 277-282; and M. Senftleben, The International Three-Step-Test. A Model Provision for EC Fair Use Legislation, JIPITEC 2010, pp. 67-82, however, Advocate General Sharpston in para. 40 of her Opinion in CJEU Case C-351/12, *OSA - Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.*, EU:C:2014:110 stated that the three-step test of the Copyright Directive does not entitle Member States to create new exceptions but "merely states the scope of the exceptions and limitations provided for in the paragraphs preceding Article 5(5)". The Court confirmed this in para. 35 of the judgment.
- 109 Transient copying under Article 5(1) without the authorization of the rightsholder is only permitted for lawful uses and the profit generated by may not go beyond that of a lawful use (Judgment in *Infopaq II* EU:C:2012:16), temporary reproduction in satellite decoders or on a TV screen are within the scope of Article 5(1) (Judgment in *FAPL* EU:C:2011:631).
- 110 A. Kur/T. Dreier, European Intellectual Property Law: Text, Cases and Materials, Edward Elgar, Cheltenham, Northampton, 2013, p. 302, see Judgment in C-5/08, *Infopaq International A/S v Danske Dagblades Forening* (Infopaq I), EU:C:2009:465, paras. 56-57 and Judgment in *FAPL* EU:C:2011:631, para 162.
- 111 See e.g. A. Kur/T. Dreier (2013), p. 302; even further: C. Geiger/E. Jzyumenko, Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression, IIC 2014, the authors argue for an external counterweight to copyright in the form of the right to freedom of expression, based on the jurisprudence of the ECtHR, which in its analysis employs aspects of the US fair use defense.
- 112 Judgment in C-201/13, *Deckmyn v Vandersteen* (Deckmyn), EU:C:2014:2132, para 23, and before also in *FAPL* EU:C:2011:631, paras 162-163; see also ; M. Leistner, Europe's Copyright Law Decade: Recent Case Law of the CJEU and Policy Perspectives, CMLRev 2014, pp. 585-586. With a limitation to technical processes, Judgment in C-360/13, *Public Relations Consultants*

- Association Ltd v Newspaper Licensing Agency Ltd*, EU:C:2014:1195, para 24.
- 113 Cf. M.-C. Janssens in: E. Derclaye (2009), p. 323.
- 114 Judgment in *Infopaq I* EU:C:2009:465, para. 56, see further J. Griffiths, *Unsticking the centre-piece - the liberation of European copyright law?*, JIPITEC 2010, p. 88.
- 115 Judgment in C-467/08, *Padawan SL v Sociedad General de Autores y Editores de España (SGAE)*, EU:C:2011:798, paras. 35-37; the Court specified that the optional nature of the exception, which leaves Member States free to adopt it, does not mean that Member States are free to interpret it “in an inconsistent and un-harmonised manner which may vary from one Member State to another”.
- 116 Opinion of AG Cruz Villalón in C-201/13, *Deckmyn v Vandersteen (Deckmyn)*, EU:C:2014:458, paras. 32-37.
- 117 Ibid. para 38.
- 118 Judgment in *Deckmyn* EU:C:2014:2132, para 16.
- 119 Opinion of AG Cruz Villalón in *Deckmyn* EU:C:2014:458, para 43.
- 120 Ibid. para 44.
- 121 Ibid. para 46.
- 122 Ibid. para 49.
- 123 Ibid. para 50.
- 124 Ibid. para 51.
- 125 The notion of originality has been discussed more recently in *Painer* (Judgment in C-145/10, *Eva-Maria Painer v Standard VerlagsGmbH and Others (Painer)*, EU:C:2013:138.) In this case the Court stated, reiterating its finding in *Infopaq I*, that “copyright is liable to apply only in relation to a subject-matter [...] which is original in the sense that it is its author’s own intellectual creation.” (Judgment in *Infopaq II* EU:C:2012:16, para 37, see also Judgment in *Painer* EU:C:2013:138, para 87.) When discussing the notion of parody in relation to mashups it is critical whether a work that is entirely composed of pre-existing material is original. However, the use of copyrighted material under the parody defense must not necessarily meet the originality requirement, because the latter is only relevant when considering whether a given work enjoys copyright protection itself. The consequence would be that the work that parodies would itself not be protected under copyright. In how far the original works used to produce the parody enjoy continuing protection as parts of the parody is another question. However, it can be argued that even transformative works can be original if they only make use of pre-existing material. It is in fact argued, that Article 5(3)(k) only applies to transformative uses. (M. Borghi/S. Karapapa, *Copyright and Mass Digitization*, Oxford University Press, Oxford, New York et al, 2013, p. 35).
- 126 Ibid. para 58.
- 127 Ibid. paras 54, 56; therefore the AG did not address the question asked by the referring court whether a parody must explicitly mention the original work it is based on.
- 128 Judgment in *Deckmyn* EU:C:2014:2132, para 20.
- 129 Ibid. paras 21-24.
- 130 Ibid. para 61.
- 131 Ibid. para 65.
- 132 Ibid. paras 67-68.
- 133 Ibid. para 69.
- 134 Ibid. para 80.
- 135 Ibid. para 85.
- 136 Ibid. para 85.
- 137 Ibid. para 87.
- 138 Judgment in *Deckmyn* EU:C:2014:2132, paras 25-26.
- 139 Ibid, para 27; this does not only include the interests of authors but also record producers, and other related-rightsholders.
- 140 Ibid, para 31.
- 141 The AG in *Deckmyn* had explicitly referred to the three-step test as an issue he would not address, as the referring court had not referred a question in that regards. see *ibid.* para 29; the AG further did not address the issue of moral rights, which he seems to consider relevant, but was prevented from elaborating on the matter for the same reasons, para 28.
- 142 However, the grandfather clause in Article 5(3)(o) could preserve applicable exceptions in Member States before the Copyright Directive came into force, it is however limited to “cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community”.
- 143 Cf. M. Kleinemenke, *Fair Use im deutschen und europäischen Urheberrecht?: Eine rechtsvergleichende Untersuchung zur Flexibilisierung des urheberrechtlichen. der US-amerikanischen Fair Use-Doktrin*, Nomos, Baden-Baden, 2013, p. 566.
- 144 See also C. Seville, “EU Intellectual Property Law and Policy”, Edward Elgar, Cheltenham/Northampton, 2009, p. 53.
- 145 M. Kleinemenke (2013), p. 567.
- 146 C. Geiger/F. Schönherr, in T.-E. Synodinou (2012), p. 136.
- 147 M. v. Eechoud/B. Hugenholtz et al., *Harmonizing European Copyright Law: The Challenges of Better Lawmaking*, Kluwer Law International, Alphen aan den Rijn, 2009, p. 300.
- 148 Cf. B. Hugenholtz, *Harmonization or Unification of EU Copyright Law*, in: J. Axhamm, *Copyright in a borderless online environment*, Norstedts Juridik, Stockholm, 2012, p. 193.
- 149 Ibid, p. 193.
- 150 Ibid.
- 151 M.-C. Janssens in: E. Derclaye (2009), p. 327.
- 152 C. Geiger/F. Schönherr, in T.-E. Synodinou (2012), p. 136; similar also Institute for Information Law, University of Amsterdam: *The Recasting of Copyright & Related Rights for the Knowledge Economy*. Study commissioned by the European Commission, November 2006, p. 74, available at: http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf, accessed 14 October 2014.
- 153 A. Kur/T. Dreier (2013), p. 302.
- 154 Directive 2006/115/EC, musical compositions enjoy a term of protection of 70 years after the death of the any of the authors (Article 1(7)), phonograms are protected for 70 years after their first fixation (Article 3(2)).
- 155 The big music labels might be able to shoulder the licensing burden.
- 156 <https://online.gema.de/lipo/index.hsp>, accessed 14 October 2014.
- 157 SACEM, SCPP, SPPF.
- 158 <http://www.copyrightclub.co.uk> (accessed 14 October 2014).
- 159 Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20.03.2014, p. 72-98.
- 160 L. Lessig (2008), pp. 254 et seq.
- 161 The Wittem Project, “European copyright code” (April 2010), available at <http://www.copyrightcode.eu> (accessed 14 October 2014); Article 5.2(1)(e) in connection with 5(5).
- 162 Arguing even further: M.-C. Janssens in: E. Derclaye (2009), p. 339.
- 163 Institute for Information Law, University of Amsterdam: *The Recasting of Copyright & Related Rights for the Knowledge Economy*. Study commissioned by the European

- Commission, November 2006, p. 75, available at: http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf, accessed 14 October 2014; *M. Senftleben* and *B. Hugenholtz* already see room for flexibility in the current system of the Copyright Directive, cf. Fair Use in Europe. In Search of Flexibilities. Study funded by Google, November 2011, p. 13 *et seq.*, available at: <http://www.ivir.nl/publications/hugenholtz/Fair%20Use%20Report%20PUB.pdf> (accessed 14 October 2014).
- 164 A similar system is suggested for the US by *R.M. Vrana*, 68 *Wash. & Lee L. Rev.* 811, 850 *et seq.* (2011).
- 165 *J. Griffiths*, *JIPITEC* 2010, pp. 91 *et seq.*; see also the suggestion made by the Wittem Group.
- 166 Cf. *M. Senftleben/B. Hugenholtz*, Fair Use in Europe (2011), pp. 18 *et seq.* and 29-30.
- 167 Specifically on the right to integrity in the EU and related problems: *J. de Werra*, The moral right of integrity, in: *E. Derclaye* (2009), in particular pp. 281 *et seq.*
- 168 In a 1995 Green Paper the importance of moral rights against the background of technological development was stressed and with reference to the case law of the CJEU moral rights were included in the specific subject matter of copyright, COM(95) 382 final, Copyright and Related Rights in the Information Society, Brussels, 19.07.1995, Section VII pp. 65-68; the Green Paper expressly states the importance of moral rights for transformative uses with new technologies: "One aspect of the information society is that total digitization of works and other protected matter combined with interactivity over networks means that it is becoming easier and easier to transform works, to colourize them, to reduce them and so on." p. 65.
- 169 See also *W. Grosheide*, Moral Rights" Research Handbooks in Intellectual Property, in *E. Derclaye* (2009), pp. 256 *et seq.*
- 170 Cf. *P. Goldstein/B. Hugenholtz*, International Copyright: Principles, Law, and Practice, Oxford University Press, Oxford, New York *et al.*, 3rd ed., 2012, p. 364.
- 171 Academics, however, argue that European copyright, especially if harmonization is further advanced, can hardly afford to leave moral rights out of the picture, *see.e.g. I. Kikkis*, Moral Rights, in: *T.-E. Synodinou* (2012), in particular pp. 234 *et seq.*
- 172 Cf. <http://ipkitten.blogspot.com/2014/09/has-cjeu-in-deckmyn-de-facto-harmonised.html> (accessed 14 October 2014).
- 173 See, for similar solution: *K. Eble*, 2013 *U. Ill. L. Rev.* 661, 688 (2013).
- 174 If one were to put this balancing exercise into an arithmetical formula it would probably look like this: $P_{Par} + D_{Priv} + C_N > P_{Ent} + D_{Pub} + C_C$. The equation, in a more advanced model, would have to include the political position of the judge as well, whether he or she is a supporter of string exclusive rights of rightsholders, or whether he or she is in support of a healthy balance between exclusive rights and public uses.
- 175 A recent French report on transformative works by *Valérie Laure Benabou* assessed the accommodation of transformative works under French copyright law, coming to the conclusion that not only is French law (as harmonized by EU law) unfit to accommodate transformative works, but that in particular moral rights will pose a barrier to an enabling legal environment for transformative creations: cf. rapport de la mission du CSPLA sur les "œuvres transformatives", available at: <http://static.pcinpact.com/medias/rapport-oeuvres-transformatives.pdf> (accessed 14 October 2014).
- 176 In the same way that the fundamental values of the society are different in every Member States, the perception of humor, at least the author has experienced this, differs from country to country, region to region, between persons of different ages, genders, professions etc.
- 177 See e.g. Judgment in Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, EU:C:2004:614, in which the Court allowed for a derogation from the free movement of services on public policy grounds, the same argument could be permitted to prohibit the (online) distribution of a parody in some Member States, whereas the work could be communicated to the public or made available via download in other Member States.
- 178 Although economic considerations have recently played a role in the case-law of the CJEU, compare Judgment in Case C-306/05, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, EU:C:2006:764, Judgment in Case C-135/10, *Società Consortile Fonografici (SCF) v Marco Del Corso*, EU:C:2012:140, and Judgment in Case C-351/12, *OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.*, EU:C:2014:110.
- 179 Opinion of AG Cruz Villalón in *Deckmyn* EU:C:2014:458, paras. 27-29.
- 180 A high degree of uncertainty is reflected in the "Report on the responses to the Public Consultation on the Review of the EU Copyright Rules", European Commission, July 2014, pp. 67-68, available at: http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf (accessed 14 October 2014).

EU Data Protection Law and Targeted Advertising

Consent and the Cookie Monster - Tracking the crumbs of on-line user behaviour

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Abstract: This article provides a holistic legal analysis of the use of cookies in Online Behavioural Advertising. The current EU legislative framework is outlined in detail, and the legal obligations are examined. Consent and the debates surrounding its implementation form a large portion of the analysis. The article outlines the current difficulties associated with the reliance on this requirement as

a condition for the placing and accessing of cookies. Alternatives to this approach are explored, and the implementation of solutions based on the application of the Privacy by Design and Privacy by Default concepts are presented. This discussion involves an analysis of the use of code and, therefore, product architecture to ensure adequate protections.

Keywords: Data Protection, Targeted Advertising, E-Privacy Directive, Consent, EU Data Protection Framework

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A. Introduction

1 The commercialisation of the internet has been rapid. Ubiquitous technological development and internet availability have propelled profits and the value of information. Online Behavioural Advertising (OBA) through the tracking of users has allowed for the development of user-targeted campaigns. The debates surrounding the legitimacy of this behaviour have been contentious. Traditional legal principles have struggled to come to terms with the rapid proliferation of internet technologies. The rigidity of the legal framework contrasts strongly with the fluid and ever-changing IT sector. In essence, tracking and the resulting profiling have become a key part of the business model of many Web 2.0 services, but the legality of this behaviour is still unclear.¹

2 The aim of this analysis is to examine the use of cookies in the tracking of users for the purposes of targeted advertising. Certain restrictions regarding the scope of this article should be acknowledged from the outset. First, it will be restricted to an examination of the use of cookies in OBA in order to track and profile users. Accordingly, an examination of the emerging use of technologies and techniques such as Browser Fingerprinting, Deep Packet Inspection and History Sniffing does not come within the scope of this article. Further, the article will not explore the legal issues around the use of analytics systems which correlate various data sources (including the cookie data) and, hence, the Big Data elements of this topic. Although, in reality, user profiles in OBA contain data from various sources in addition to cookies, this does not mitigate

the fact that the tracking and processing of cookie data constitutes profiling in itself. The text will also not outline the additional considerations necessary for a holistic interpretation of the use of tracking technologies on mobile devices. Finally, during the assessment of the consent issue, the article will focus on the general issues and concerns rather than the particular debates specific to children (or others who potentially lack capacity to consent). These are issues which merit further analysis in themselves, and to examine them here would not do justice to the complex legal issues present. Nevertheless, at times references to these matters and the further obligations will be made.

- 3 Having narrowed the scope, it is now worth outlining the focus of the research. The Article 29 Working Party has noted that most advertising technologies use some type of client side processing of users' browsers or terminal equipment to track their activity.² This processing refers to the accessing and use of information stored on users' computers. In behavioural advertising, companies use software to track user behaviour and to build personal profiles. They do not refer to users by name but, instead, use a single alphanumeric code that is placed on the users' computers. These codes are utilised to help select the advertisements people see in addition to the variety of products that are offered to them.³ These are known as 'cookies,' and they can provide a detailed profile based on user behaviour, which can be easily exploited for marketing purposes.
- 4 Cookies placed on users' machines by the publisher (website operator) are known as first-party cookies and these, 'are commonly used to store information, e.g., user preferences, such as a login name.'⁴ These 'functional cookies' are generally exempt from the legal obligations under the Data Protection framework unless they are also used for tracking or profiling purposes.⁵ However, there are also what are known as third-party cookies. These cookies originate from sources that may be unconnected with the first-party cookie website (e.g. an ad network) and are often used as a tracking mechanism for advertising purposes.⁶ In the world of AdExchanges, such as Google's AdX, this issue is complicated further given the complex array of players.⁷ More importantly, reference to the term 'cookie' in this text comprises of all variations, including the more controversial 'flash' cookies (also referred to as Locally Shared Objects). Although this form of cookie has serious technical advantages over the standard HTTP cookies (and has raised issues regarding 'respawning'), they are both placed and accessed on the terminal equipment of users and are fundamentally subject to the same legal requirements.⁸
- 5 The article will analyse the applicable legal framework, the legal requirements imposed by this framework, the difficulties surrounding the definition of consent, and the alternatives and

supplements to the current EU Data Protection edifice. Reference will be made to the current EU Data Protection framework in the form of the Data Protection Directive and the E-Privacy Directive (as amended). Specific attention will also be given to the Data Protection reform package and, more specifically, the proposed Data Protection Regulation.

B. The scope of the EU Data Protection Framework - Behavioural Advertising

- 6 Data Protection is a distinctively European innovation that has been received outside the EU with varying degrees of success.⁹ The current framework owes its origins to developments, such as the 1980 OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, the 1981 Council of Europe Convention on data protection, and the 1990 UN guidelines.¹⁰ The adoption of such provisions is hardly surprising given the historical context in which the European supranational cooperation originated.¹¹ However, there are two other factors which have proven decisive. First, the ubiquitous development of technology and the supranational challenges that this involves. Second, the need to facilitate the free movement of personal data within the Community and to resolve conflicts arising from differing national regimes.¹² Although there have been clear technological advances which have precipitated legal development, the core of the EU framework has remained constant and the essence of the data protection edifice has remained straightforward.¹³ This section of the analysis will introduce the key instruments and examine their scope in relation to OBA.

I. Data Protection as a Primary Source

- 7 Data protection is a complex issue that has traditionally been associated with the concept of privacy within the context of personal data processing. However, as observed by Borghi *et al.*:

'at least under EU law, privacy and data protection are distinct, yet complementary, fundamental legal rights. They derive their normative force from values that—although at times coincidental and interacting in a variety of ways—may be conceptualized independently.'¹⁴

- 8 This position has allowed data protection to automatically trump other interests and gives it a status that cannot be traded-off for economic benefits.¹⁵ The identification of data protection as a key personal right of the citizens of the Union was confirmed through the adoption of the Lisbon Treaty. Article 39 TEU and Article 16 TFEU provide specific provisions relating to data protection. Article 16, in

particular, promotes the data protection provision to a ‘provision of general application’ under Title II, alongside other EU fundamental principles, and also imposes an obligation on the legislator to establish a clear and unequivocal legal framework for data protection.¹⁶ In addition, the Lisbon Treaty also formally recognised the binding legal status of the Charter of Fundamental Rights of the European Union and provided specific provisions relating to the legal significance of the European Convention of Human Rights (ECHR). Article 8 of the Charter (the right to Data Protection) and Article 8 of the ECHR (the right to private life) are of clear importance in this regard.¹⁷

II. Introducing the Secondary Sources

9 There are two specific pieces of EU legislation which perform a key role in the data processing monitoring regime of the Union: first, Directive 95/46/EC (the Data Protection Directive), and second, Directive 2002/58/EC (the e-Privacy Directive including the reforms implemented by Directive 2009/136/EC). Essentially, the e-Privacy Directive provides a ‘sector-specific regime’¹⁸ which operates as the *lex specialis* vis-a-vis the *lex generalis* requirements provided for by the Data Protection Directive.¹⁹ In addition, the proposed reform of Data Protection Directive (via the General Data Protection Regulation²⁰) provides key points of analysis. The proposed Regulation signifies the first attempt at revising the data protection rules since the Directive went into effect. As Rooney notes, changes are needed, as the Data Protection Directive is outdated and ill-equipped to deal with modern technology.²¹ Each of these sources will now be analysed.

1. The Data Protection Directive

10 The Data Protection Directive requires MSs to adopt legislation regulating the processing and movement of personal data.²² As noted by van der Sloot *et al.*, it is clear from Article 2(d) that ‘[t]he applicability of the Directive is triggered when “personal data” are “processed” under the authority of the “controller” of the personal data.’²³ Under the terms of this Directive, data subjects are guaranteed certain rights vis-a-vis their personal data, while data controllers are subject to strict rules and regulations in relation to their data processing activities.²⁴ This section will analyse three particular questions that will help determine the applicability of the Directive. First, does the data used in OBA fall into the classification of personal data? Second, does the subsequent use of this data for the purposes of OBA result in ‘processing’ under the terms of the Directive? And finally, in the context of OBA, who is the data controller?

a.) Does the data used in OBA fall into the classification of personal data?

11 According to Article 2(a):

“personal data” shall mean any information relating to an identified or identifiable natural person (“data subject”); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity’.

12 In order to assess whether a particular person is identifiable, all methods likely and reasonable should be taken into consideration.²⁵

13 The Directive further distinguishes between sensitive and non-sensitive data, with the former incurring a stricter regime. These ‘special categories of data’ require explicit consent from the data subject in order to be processed. This distinction between common and ‘special categories’ (sensitive) personal data is retained in the proposed Regulation and this raises clear concerns. The choice of distinguishing the categories of data and the further listing of the categories of sensitive personal data is restrictive, as it does not allow the flexibility needed to cope with technological development. In the age of big data, analysis-intensive processing methods have blurred the lines between these data categories.²⁶ The designation of cookies into a particular classification of data type is of clear importance. In order to understand the impact of the Directive on behavioural advertising, one must first consider how cookies should be classified.²⁷ Businesses involved in behavioural targeting often maintain that privacy legislation does not apply, as specific persons cannot be traced. This is based on the assumption that users remain anonymous, as they are only identifiable through the issued tracking cookie. However, in legal terms this notion is not completely accurate.²⁸

14 The Article 29 Working Party opinion on behavioural advertising observes that targeted marketing clearly falls within the scope of the Directive for two particular reasons. First, the use of cookies normally involves the processing of unique identifiers and the collection of the IP addresses, which allows the tracking of particular machines (even when dynamic IP addresses are used). Second, the information that is collected relates to the users’ characteristics, and this is used to influence their behaviour. This view is further established if one considers the capacity for profiles to be linked with directly identifiable information given by the data subjects (for example registration details). The Article 29 Working Party observes that ‘mergers, data losses and the increasing availability on the Internet of personal data, in combination with IP addresses,’ are other scenarios that can lead to identification.²⁹

15 There is still strong debate as to whether IP addresses should be classified as personal data.³⁰ At a fundamental level, this is reflected in Court

decisions. In *EMI & Ors v Eircom Ltd* [2010],³¹ Charleton J in the Irish High Court concluded that IP addresses do not amount to personal data under the terms of the Data Protection Directive. In contrast, one year after Charleton J's judgement, the CJEU in *Scarlet v Sabam* found that IP addresses are classified as personal data, as they allow users to be directly identified.³² The Article 29 Working Party have clearly stated on a number of occasions that IP addresses constitute personal data under the terms of the Directive, as they can be traced to a natural person with the cooperation of the internet provider.³³ With increasingly powerful processing mechanisms, the identity of users can frequently be ascertained through the analysing of large quantities of data linked to IP addresses and other seemingly anonymous data.³⁴ A particularly obvious example where such information may be retrieved is found in relation to so-called vanity searches.³⁵ However, it must be acknowledged that there are exceptions to this and not all IP addresses can be effectively linked to a user (for example, computers that are used by multiple users). The Court of Justice may have been handed the opportunity to finally clarify the law in this regard with the recent referral of question by the German Court on the legal classification of IP addresses as personal data.³⁶ This case should be watched carefully, as it should provide detailed guidance on this issue.

- 16 The Article 29 Working Party is also of the opinion that cookies, in themselves, (even when IP addresses are not siphoned) still constitute personal data. In its assessment of the concept of personal data, the Working Party found that names are not always a necessary means of identifying individuals, as there are alternative methods of distinguishing an individual from other members of a group.³⁷ As such, 'unlike in the case of IP addresses, the Working Party does not consider the ability to access a name as a criterion for qualifying a cookie as personal data.'³⁸ Instead, the mere accessing of the user's machine suffices. Under the terms of the draft Regulation the definition of personal data has been altered to include 'online identifiers' in the list of examples that may be used to identify an individual.³⁹ It appears that in the proposed legislative update cookies will be specifically included as personal data under the terms of the Regulation. Even in the much more liberal landscape provided for in the US, the FTC found in a consultation document on the self-regulation of behavioural advertising a tendency to classify IP addresses and cookies that are used for behavioural targeting the same as 'regular' directly identifying personal data.⁴⁰ Hence, the applicability of the Data Protection Directive should be assumed as relevant when applied to OBA. Moreover, the use of cookies for tracking purposes results in the creation of a personal data user profile.

b.) Does the subsequent use of this data for the purposes of

OBA result in 'processing' under the terms of the Directive?

- 17 Article 2(b) states that:

'For the purposes of this Directive... "processing of personal data" ("processing") shall mean any operation or set of operations which is performed upon personal data...'

- 18 This provides an extremely broad definition of processing, which includes almost everything that can be done with personal data. It is, therefore, unlikely that the manipulation of data for the purposes of behavioural advertising would not come under the provisions of the Data Protection Directive.

c.) In the context of OBA who is the data controller?

- 19 Article 2(d) defines the concept of data controller. It states that:

"controller" shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data...'

- 20 This provides a clear and precise separation in responsibility. As observed by De Hert and Papakonstantinou, the traditional approach to data processing is for the most part maintained in the draft regulation.⁴¹ This consists of data controllers processing personal information of data subjects either through their own means or by contracting a third-party data processor. This should be considered a failure of the proposals, as the continued insistence on the outdated distinction between data controllers and data processors does not reflect some of the complex actors involved in modern data processing. Instead of modifying the data controller and data processor definitions in the draft Regulation, the Commission 'chose to strengthen controlling instances by placing certain additional obligations upon data processors, as well, and acknowledge the existence of "joint controllers".'⁴²
- 21 The addition of these further obligations strengthens the protection of the data subjects. Despite this improvement, the decision to maintain the traditional approach to data processing, where the roles are easily distinguishable and the data processors hold only passive functionality, does not reflect the technological realities. In the web 2.0 era, such a distinction must be viewed as being outdated. With this in mind, 'perhaps the preferable way forward would be for the Commission to boldly abolish the notion of "data processors" from its Regulation, altogether, and vest the data controller title, rights, and obligations upon anyone processing personal information, regardless of its means, conditions, or purposes.'⁴³

22 To make matters more complicated, distinguishing between the various actors involved in OBA is not as simple as it may seem at first glance. It appears relatively obvious that Ad Networks, who collect and process the information and place and design the cookies used to retrieve the information, are classified as data controllers. However, the role of the publisher is much more complicated. Due to the way in which websites are engineered,⁴⁴ it is the data subject's browser that automatically transmits the IP addresses to the ad network provider in order to facilitate the sending/reading of the cookies and to present the tailored advertising. It is important to note that, although the data transfer is caused by the browser, it is the publisher's implementation of the website that triggers the transfer, and the data subject has no input. Thus, the Article 29 Working Party finds that publishers have certain responsibilities under the Data Protection Directive. However:

'This responsibility does not cover all the processing activities necessary to serve behavioural advertising, for example, the processing carried out by the ad network provider consisting of building profiles which are then used to serve tailored advertising.'⁴⁵

23 Instead, their responsibility is restricted to the preliminary data processing activities and the initial transfer of the IP addresses. The Working Party came to this conclusion as 'the publishers facilitate such transfer and co-determine the purposes for which it is carried out, i.e. to serve visitors with tailored advertising.'⁴⁶ In addition to the division of responsibility between the publisher and the ad network, one must also consider the influence of the advertiser. Following an ad click, the users' actions may be tracked for conversion statistics and potential retargeting. Although this may not be strictly linked to the initial ad serving, this information can also be shared (in fact, this is often a requirement under the Terms of service) with the ad networks, and used to improve on future targeted campaigns. This certainly raises the notion of 'co-controllers'.

2. The E-Privacy Directive and 'Cookies'

24 According to Recital 10 of the E-Privacy Directive, the Data Protection Directive applies 'to all matters concerning protection of fundamental rights and freedoms which are not specifically covered by the provisions of this Directive, including the obligations on the controller and the rights of individuals.' In an analysis of the interplay between both of these Directives in a behavioural advertising context, the Article 29 Working Party observed that the Data Protection Directive has full applicability, with the exception of the provisions that are specifically addressed in the E-Privacy Directive. This mainly corresponds to the legal grounds for data processing found in Article 7 of the Data Protection Directive. The remaining requirements under the Data Protection Directive (including the principles regarding data

quality, the data subject's rights, confidentiality and security of the processing and international data transfers) have full applicability.⁴⁷ The E-Privacy Directive provides the specific rules relating to the processing of personal data and privacy protection, in relation to the electronic communications sector.⁴⁸ Of particular importance is Article 5(3), which applies when a provider is accessing or storing information on a user's computer remotely.

25 As amended, this provision now states that:

'Member States shall ensure that the storing of information, or the gaining of access to information already stored, in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user has given his or her consent, having been provided with clear and comprehensive information in accordance with Directive 95/46/EC, inter alia about the purposes of the processing.'

26 The Article 29 Working Party has observed that this article has full applicability to tracking cookies as they can be classified as 'information' stored on the terminal equipment of the user which are accessed by the ad networks. Accordingly, the placing and any subsequent use of such cookies (or similar technologies irrespective of type) will require compliance with Article 5(3).⁴⁹

3. Privacy Framework overlap and the Proposed Amendments

27 In contrast to the Data Protection Directive, Article 5(3) of the E-Privacy Directive does not relate specifically to 'personal data' but, instead, refers more generally to 'information'. In order to invoke the applicability of the Directive, it is not a prerequisite that the information is classified as personal under the terms of the Data Protection Directive.⁵⁰ This is expressed in Recital 24 which provides that the 'terminal equipment of users... and any information stored on such equipment are part of the private sphere of these users requiring protection under the European Convention for the Protection of Human Rights and Fundamental Freedoms'. Hence, information that is considered to be in the 'private sphere of the users' triggers the application of Article 5(3) and not if the data is classified as personal. The applicability of the Data Protection Directive is not affected by the E-Privacy Directive. In essence, one is required to make a clear distinction between the placing of the cookie and the actual use of the data recorded by this mechanism.⁵¹ However, from the discussion *supra* it is clear that in all probability the cookies do fall into the category of personal data. Thus, in relation to behavioural advertising, both Directives appear to have relevance.

28 Article 20 of the proposed Regulation introduces a provision which deals directly with user profiling. The addition of a provision on profiling would be a significant step, as it would remove the ambiguity

surrounding the applicability of the data protection edifice. This also recognises the development of technology that is not reliant on the accessing of the terminal equipment of the user. This addition is also aided through the proposed strengthening of the data minimisation principles under Article 5. Indeed, '[t]he strengthening of this principle is necessary in order to address the current trends of data harvesting and data mining used for profiling consumers and which involve large amounts of personal data being collected.'⁵²

- 29 Having examined the scope of the EU Data Protection Framework, it is now necessary to analyse the legal requirements it imposes upon behavioural advertising. These categories will be assessed in detail in the proceeding part of the analysis.

C. The legal requirements imposed by the EU Data Protection Framework

- 30 The applicability of both Directives to OBA, essentially, opens up three important categories of legal requirements. First, those relating to information dissemination to the users; second, those relating to consent; and finally, the further obligations laid down in the Data Protection Directive.⁵³ These requirements involve a high degree of overlap between the E-Privacy provisions and the *lex generis* requirements imposed by the Data Protection Directive. It is important to note that the Data Protection Directive has both general applicability to issues not covered by the E-Privacy Directive and specific impact when referred to by the terms of the E-Privacy provisions. The various requirements and their specific application will now be assessed in detail.

I. Interpreting Article 5(3) - legal obligations for Online Behavioural Advertising

- 31 In the opinion of the Article 29 Working Party, it is clear from a literal interpretation of Article 5(3) that prior consent is required before the information can be placed or processed. For the consent to be informed, prior information regarding the purposes of the cookie must have been given to the user.⁵⁴ It is clear that these requirements are cumulative in nature.⁵⁵ The key point of contention in relation to behavioural advertising is what constitutes unambiguous consent. However, perhaps it is prudent to, first, briefly analyse what amounts to adequate dissemination, in order to satisfy the 'informed' element of the consent requirement.

1. Information Dissemination

a.) Type of Information Required

- 32 Article 5(3) of the E-Privacy Directive declares that users must be provided with information 'in accordance with Directive 95/46/EC, inter alia about the purposes of the processing'. As such, one is required to refer to Article 10 of the Data Protection Directive. In relation to OBA, the users should be clearly informed about the purposes of the cookies and, hence, that they will allow the tracking of the users' visits to other websites, the advertisements they have been shown and which ones they have clicked.⁵⁶ Significantly, under the terms of the proposed changes in the draft Regulation, Article 14 provides a list of information that must be provided to the data subjects. In addition to the information required in the current Directive, the proposed Regulation specifies the period for which the data will be stored, the right to object to the processing, and the right to lodge a complaint with the supervisory body and the contact details of that body.⁵⁷ Interestingly, the new provision specifically dealing with profiling (Article 20) is not mentioned in Article 14. The BEUC (European Consumer Agency Organisation) in its assessment of the article observed that 'this provision should echo the inclusion of a specific article dealing with profiling (Article 20) by requiring information about tracking and profiling purposes, and its consequences on individuals to be added under Article 14.1 b.'⁵⁸ However, Article 20 does provide that information dissemination is required. More specifically, in addition to the requirements laid down in Article 14, this should include 'information as to the existence of processing' for the purposes of profiling and also the 'envisaged effects of such processing on the data subjects.' These changes reflect the overall move towards the principle of transparency as provided for in Article 5 of the proposed amendments.

b.) How should the information be presented?

- 33 It is important that the information is presented in a user-friendly manner so as not to negate its influence. This reflects the concern that the information should be easily accessible and understandable and 'should not be "hidden" in a link at the bottom of a page referring to a vague and unreadable privacy policy.'⁵⁹ Accordingly, there should be a simple explanation of the uses of the information gathered by the cookie analysis. Recital 25 of the E-Privacy Directive stipulates that notices should be displayed in a 'clear and comprehensive' manner. The Article 29 Working Party suggests that 'Statements such as "advertisers and other third parties may also

use their own cookies or action tags” are clearly not sufficient.⁶⁰ Recital 66 goes on to state that the method for refusing cookies should be ‘as user-friendly as possible’. The Directive does not provide specifics as to how this may be achieved and this is reflected in the varying implementations of cookie notices. In keeping with the general move towards more transparent data processing, Article 11 of the draft regulation contains a specific provision in relation to the communication of information. This movement towards transparency and the provision of clear communication is also aided through recital 32 of the proposal, which states that privacy policies are required to be as clear and transparent as possible and should not contain ‘hidden or disadvantageous clauses’.⁶¹ The proposed developments *vis-a-vis* the information requirements are clearly designed to strengthen the position of the data subject. This is further fortified in the draft amendments to the concept of consent.

2. Unambiguous Consent

34 Consent is a complex issue that raises clear difficulties in relation to the EU data protection framework.⁶² The preliminary obligatory requirement for consent effectively renders the other legitimate interests for data processing, as provided for under Article 7 of the Data Protection Directive, inapplicable. Accordingly, consent is a prerequisite for the legitimate placing of cookies and processing of cookie data. Nevertheless, it is important to note that with the potential development of tracking methods not linked to users’ terminal equipment, the other justifications for legitimate data processing may have future applicability. However, as mentioned *supra*, the draft Regulation seems to predict such a progression by providing for a specific tracking provision. Given the current dependency on the accessing of the terminal equipment of the users in order to effectively track online behaviour, the requirements provided for under Article 5(3) of the e-Privacy Directive moderate the relevancy of the Data Protection Directive. As such, cookie-based behavioural advertising is restricted by the interpretation and implementation of the concept of consent under the Data Protection Directive despite the availability of other grounds for legitimate data processing in circumstances not involving cookies or other forms of client side processing. The interpretation of this concept is the key debate in the analysis of Online Behavioural Advertising and the use of cookies. Given its importance, the difficulties surrounding the interpretation of consent will be analysed in Section D of this paper in detail.

II. Further Requirements and the Data Protection Directive

35 As previously discussed, there is a clear distinction between the personal and sensitive categories of data under the current data protection framework which is maintained in the draft regulation. Under the current provisions, the processing of these special categories of data requires explicit consent, which contrasts with the requirements for ordinary personal data. Given the applicability of Article 5(3) of the E-Privacy Directive, it appears from the discussion *supra* that opt-in consent will be required for the placing/accessing of cookies irrespective of whether the processed information is non-personal, personal or sensitive. Therefore, it seems that the additional requirements envisaged by the proposed Regulation will have already been satisfied by the consent requirement under Article 5(3). However, given the applicability of the Data Protection Directive, there are additional obligations which must be considered. The requirements that are particularly relevant to behavioural advertising will now be analysed.

1. Data Quality

36 There are several fair information principles which need to be complied with in order to satisfy the obligations under the Data Protection Directive. The key requirement of the Directive is the vague obligation that personal data must be processed ‘fairly and lawfully’. Article 6 of the 1995 Directive outlines various conditions that must be satisfied by the data controller in relation to data quality. It is clear from the Article that processing can only take place for legitimate purposes. In its opinion on Search Engines, the Article 29 Working Party has stated that ‘some purposes, such as “improvement of the service” or “the offering of personalised advertising” are too broadly defined to offer an appropriate framework to judge the legitimacy of the purpose.’⁶³ The Working Party observed that this was particularly true when the controller also mentions additional purposes for the data.⁶⁴

37 In relation to behavioural advertising, it must be understood that the Working Party’s reference to ‘personalised advertising’ reflects more the data controllers’ explanation of the purposes to the data subjects rather than the specificity of the activity in itself. This is also indicative of the purpose limitation principle which in Article 6(1)(b) ‘prohibits the processing of personal data which is not compatible with the purposes that legitimised the initial collection.’⁶⁵ This prevents the re-use of information for purposes other than those originally specified to the data subject. In order for the repurposing of the collected personal data to take place, one is

required to satisfy one of the legitimate grounds for processing under Article 7.

- 38 Article 6 further stipulates that data should be accurate and updated if necessary. All reasonable steps must be taken to ensure that inaccurate and/or incomplete data are erased or modified while remaining conscious of the purposes for which they are being processed. This presents a clear problem in relation to OBA in that, although analytics systems can ignore particular false positives, certain inaccuracies are unavoidable. Furthermore, Article 6(1)(e) outlines the retention principle, which requires the deletion of data where it is no longer necessary for the purposes it was gathered. This is an indication of the data minimisation principle which, although not expressly provided for, is implied by certain requirements in the Directive.⁶⁶ The principle provides that only the minimum amount of data required to adequately perform the processing should be gathered. This principle has been recognised by the Court of Justice which has found that the Directive ‘must necessarily be interpreted in the light of fundamental rights, which, according to settled case-law, form an integral part of the general principles of law whose observance the Court ensures.’⁶⁷ This reflects the overall balancing of data protection with other fundamental rights, both under the terms of the Charter and the ECHR, and, hence, the importance of the principle of proportionality in this regard.
- 39 There have been a number of key developments in this regard in the draft regulation. These developments are understood to be necessary to address the issues associated with the current trends in data mining where large data sets are being analysed in the profiling of data subjects.⁶⁸ The draft Regulation in Article 6(f) prohibits processing in the interest of controllers where the fundamental rights of data subjects require data protection. Furthermore, as part of the draft proposals, Article 5 has clarified the principles relating to data processing by expressly providing for the principles of transparency, data minimisation and controller liability, which are currently only been implicitly referred to (see discussion *supra*).⁶⁹ Although these principles have been around for 25 years, it is only now that they have been confirmed in the draft legislative text.⁷⁰

2. Data Subjects’ Rights

- 40 Data subjects have the rights of access, rectification, erasure and to object as enunciated under Article 12 and 14 of the Data Protection Directive; and, these rights should be respected by the data controller. In relation to OBA, this affords the data subject the right to access the information gathered by the ad network (i.e. their profile), to demand the modification or deletion of this profile, and to

object to any further profiling. Certain Ad Networks provide these services and allow the data subject to modify and erase interest categories.⁷¹ Under the terms of the draft Regulation, the concepts of rectification and erasure are elevated in importance. These concepts are placed in a new section (Section 3), which provides for the right to rectification in Article 16 (elements of Article 12(b) in the current Directive), right to be forgotten and the right to erasure in Article 17 (elements of Article 12(b) in current Directive) and the right to data portability in Article 18. As noted by Savin, the latter of these ‘which is a new right, consists of the right to obtain a copy of the data from the controller for the further use by the data subject.’⁷²

3. Additional Obligations

- 41 It should be further noted that the obligations related to confidentiality and security of the processing are also relevant. Article 17 states that ‘Member States shall provide that the controller must implement appropriate technical and organisational measures to protect personal data...’ As observed by the Working Party, to comply with this provision ad network providers are required ‘to implement state of the art technical and organisational measures to ensure the security and confidentiality of the information.’⁷³ Under Article 30(3) of the proposed Regulation, the security of personal data appears to have been elevated along with the concepts of privacy by default and design. As noted by Hildebrandt and Tielemans:

‘By enacting these types of duties as legal obligations the EU legislator inaugurates examples of what has been coined as legal protection by design (LPbD), confronting us with a new articulation of legal norms: next to unwritten and written law, we now have something like digital law.’⁷⁴

- 42 Article 18 is also applicable and requires data controllers to notify the data protection authorities of their data processing activities (unless they are exempt). Article 28 of the draft proposals replaces the cumbersome notification requirement with the obligation to maintain documentation of any processing activity. Under Article 28(2) the relevant pieces of documentation that controllers need to record are noted. The minimum requirements stipulate that the contact details for the controller and the data protection officers, the types of personal data being processed, the recipients (or categories of recipients) of the personal data, the purposes of the data processing, possible transfers to third countries and the relevant retention periods need to be maintained. As noted by the BEUC report this will ‘make the checking by Data Protection Authorities easier and help improve monitoring of compliance and enforcement.’⁷⁵

43 Finally, in relation to international data transfers, Articles 25 and 26 are also relevant. Article 25 provides that the Commission may ban data transfer to countries that fail to provide ‘an adequate level of protection’ of data privacy rights. Article 26 lists a number of derogations and provides that a transfer to a country that ‘does not ensure an adequate level of protection’ may occur if the controller enters a contractual arrangement that guarantees adequate safeguards for the protection of the fundamental rights and freedoms of the data subject.⁷⁶ In the context of OBA, international data transfers have particular importance given the transferability of the gathered information. Without robust protections, profiling practices prohibited by EU law could still be performed on EU users if their information was transferred to a third country for data processing. The draft regulation recognises the growing importance of international data transfers and reflects this new reality by abandoning the presumption that personal data cannot be transferred without an adequate level of protection. Instead, the Commission has opted to outline a number of requirements which must be satisfied before any such a transfer can occur.⁷⁷ These modifications are provided in Articles 40-45 and include examples of the criteria that the commission would use in their assessment of the adequacy of the level of protection provided by the third country. This is a very topical area, especially given the recent challenge to the legitimacy of such transfers to the US.⁷⁸

D. Difficulties defining consent

44 Following our discussion of the three categories of legal requirements, it is clear that prior informed consent provides the crux of the debate regarding the effective regulation and advancement of responses to the use of cookies as tracking technologies in behavioural advertising. The additional requirements imposed by the Data Protection Directive are predicated on this preliminary consideration. However, the failure to find consensus on a common definition of consent renders the existing framework divisive and ambiguous.

I. Consent in its current form

45 Article 8 of the Charter specifically recognises consent as the key condition for the protection of personal data. Behavioural advertising has based itself on the ability to place cookies on users’ terminal equipment. If users were unhappy with this, they were required to opt-out (provided they knew how).⁷⁹ Under the amended Article 5(3), it is clear that informed prior consent is required before any such technology is used or even installed.⁸⁰ Azim-Khan and Millard have observed that ‘[t]he

requirement for explicit prior consent seems to have spelt the end of the “opt-out” regime....⁸¹ The change implemented by Directive 2009/136 provides a clear departure by legislating for an ‘opt-in’ requirement by default⁸² and was a ‘bold step’.⁸³ However, there is still strong criticism of this position from certain sectors.⁸⁴ Article 2(f) provides that “‘consent” by a user or subscriber corresponds to the data subject’s consent in Directive 95/46/EC.’ Hence, the interpretation of consent provided for under the Data Protection Directive is applicable. Article 2(h) of the Data Protection Directive states that “‘the data subject’s consent” shall mean any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed.’

46 Furthermore, Article 7(a) of the Directive states that ‘Member States shall provide that personal data may be processed only if... the data subject has unambiguously given their consent’. This appears to be an extremely strict interpretation. Recital 66 of the amended E-Privacy Directive appears, however, to allow some room for the interpretations of the national legislators and advertisers in the interpretation of what constitutes consent.⁸⁵ The recital states that ‘[w]here it is technically possible and effective, in accordance with the relevant provisions of Directive 95/46/EC, the user’s consent to processing may be expressed by using the appropriate settings of a browser or other application.’ This appears to permit the use of browser settings to indicate consent to cookies.⁸⁶ As virtually all browsers have privacy settings that allow users to control cookie usage, the major talking point is whether data subjects’ consent may be inferred from pre-existing browser privacy settings.⁸⁷ Despite its focus on the issue of consent and cookies, the amended E-Privacy Directive failed to effectively clarify the interpretation of implicit consent with respect to browser settings.⁸⁸

47 The Article 29 Working Party, in its opinion on behavioural advertising, observed that consent *via* default browser settings is unlikely to meet the requirements under the data protection framework. This is for three particular reasons. First, the ‘respawning’ of flash cookies circumvents the deletion of cookies and allows the bypassing of the data subject’s choice in their browser settings.⁸⁹ Second, consent via browser settings implies user acceptance to future processing, conceivably without any knowledge of the purposes or uses of the cookie. Third:

‘based on the definition and requirements for valid consent *ex* Article 2 (h) of Directive 95/46/EC, generally speaking data subjects cannot be deemed to have consented simply because they acquired/used a browser or other application which by default enables the collection and processing of their information.’⁹⁰

48 This is due to the fact that data subjects, in general, are unaware of tracking and, additionally, are not always aware of how to adjust the browser privacy settings. The lack of user understanding is difficult to refute and it is, perhaps, a fallacy to think data subject inaction provides an unambiguous indication of their wishes.⁹¹ In a study conducted in the US by McDonald and Cranor, the authors noted that '[o]ne participant said behavioral advertising sounded like something her "paranoid" friend would dream up, but not something that would ever occur in real life.'⁹² In a similar study, Smit, Van Noort and Voorveld concluded that their findings relating to general users' lack of understanding of tracking technology raised an important question: namely, 'what does informed consent mean within a not-well-informed audience?'⁹³ Accordingly, for those involved in OBA, in theory it appears to be difficult to avoid the opt-in requirement.⁹⁴ This has not always been reflected in practice due to the ambiguity provided for by implied consent.

II. Explicit Consent and the Proposed amendments

49 Member State implementation of the changes necessitated by the cookie Directive was initially inconsistent⁹⁵ and this division reflects the dichotomy in opinions in relation to this debate.⁹⁶ The ENISA Report on online behavioural tracking observes that while '[s]ome states have suggested existing browser settings would remain adequate, through the legal fiction that they convey "implicit consent"', the majority view favours requiring explicit, affirmative consent for each website.⁹⁷ The ambiguity surrounding the interpretation of consent is a definite stumbling block to effective and consistent monitoring of OBA within the Union. In their recent article, de Lima and Legge have noted two particular criticisms of EU law in this regard. First, in relation to the ambiguous interpretation of the laws. Second, the failure to provide an effective balance between commercial and individual needs. The proposed Regulation has confirmed the EU's move towards an opt-in regime which 'is intended to strengthen consumer data protection rights by facilitating individual control over personal information.'⁹⁸ The draft adds a provision requiring all consent to be explicit. Previously, explicit consent was only required for the processing of sensitive data.⁹⁹

50 The commentary supplementing the Regulation clarified that this modification was 'added to avoid confusing parallelism with "unambiguous" consent and in order to have one single and consistent definition of consent, ensuring the awareness of the data subject that, and to what, he or she gives consent.'¹⁰⁰ The modification of the consent

requirement provided for in Article 7 of the draft is supplemented by Recital 25 which provides, '[c]onsent should be given explicitly by any appropriate method enabling a freely given specific and informed indication of the data subject's wishes.... Silence or inactivity should therefore not constitute consent.' The effect of these provisions is to effectively eliminate the enforceability of implied consent through default settings by requiring an express indication of consent by the user. According to Article 7(4) and Recital 34 consent is invalid where 'there is a clear imbalance between the data subject and the controller.'¹⁰¹ Article 7(3) provides that the data subject has 'the right to withdraw his or her consent at any time.' The burden of proof rests with the data controller in all situations.¹⁰²

51 Finally, it should be noted that the advancement of consent cannot be viewed in isolation but, instead, is indicative of the overall move towards counterbalancing 'the benefits of technological advancements and risks for individual data protection by complementing the legal framework with the principle of 'privacy by default and by design'.¹⁰³ Article 23 of the proposed Regulation provides that:

'[h]aving regard to the state of the art and the cost of implementation, the controller shall, both at the time of the determination of the means for processing and at the time of the processing itself, implement appropriate technical and organisational measures and procedures in such a way that the processing will meet the requirements of this Regulation and ensure the protection of the rights of the data subject.'

52 This provision aims at encouraging the development of user-friendly methods of incorporating privacy in the overall primary design and code in order to move towards the notion of user empowerment. This could impose a heavy burden upon existing business models that would need a complete overhaul to comply with the proposed provisions. Nevertheless, the development of this concept reflects the EU's insistence upon explicit consent and the struggle to find an effective and simple means for its implementation.

53 The move towards explicit consent in the proposed Regulation would remove some of the ambiguities surrounding the interpretation of this concept. Nevertheless, it is unclear whether this development is to be welcomed. An analysis of the potential problems associated with explicit consent is necessary.

III. Defining Consent and the associated difficulties

54 The proposed Regulation's emphasis on explicit consent indicates the assumption that the opt-in

version provides a stronger protection for users. At first glance it may seem that such a robust interpretation is justified. However as noted by Tene:

‘individuals explicitly consent to agreements all the time without such consent being informed, voluntary, or meaningful. Individuals sign boilerplate contracts (e.g., with banks or insurance companies), execute clickwrap agreements and end-user license agreements (EULAs), and download apps granting whatever permissions are asked of them.’¹⁰⁴

- 55 This is an interesting argument that possibly reflects the societal realities. US Chief Justice John Roberts has famously indicated that he does not read boilerplate provisions.¹⁰⁵ It is perhaps fair to conclude that a large proportion of users fail to take into account the terms of standard form contracts online. Many commentators have argued that the legalese used in these agreements renders them incomprehensible and thus irrelevant to the users.¹⁰⁶ Accordingly, the true value of providing the user with the information may be questionable. Nevertheless, it is worth mentioning in this regard the proposed regulation’s emphasis on user-friendly information dissemination.

1. Economic justifications for information ‘free-flow’

- 56 Richard Posner, writing *extra judiciously* and in a US context, has offered some economic justifications to allow the free flow of information. Posner has observed that these privacy harms are arguably unsubstantial *vis-a-vis* the economic and societal benefits which tracking offers.¹⁰⁷ Moreover, to render consent difficult to procure may prevent entities from engaging in those activities given the associated costs. As per Solove, ‘the result might be to restrict uses of data in a formalistic manner that fails to distinguish beneficial from harmful uses.’¹⁰⁸ However, one cannot forget that users are not only consumers but are also citizens of the Union, and that they should be afforded the protections provided in the EU primary and secondary legal sources. It must be acknowledged that there is a fundamental difference in the way data protection and privacy are viewed in the US and the EU.
- 57 Although Posner and the proponents of the economic argument make a strong case, it is uncertain whether dividing the benefit of data access so clearly in favour of commercial gains truly benefits and reflects societal interests. Nevertheless, as noted by Tene *et al.*:

‘Excessive reliance on opt-ins inevitably will disrupt user interfaces and encumber individuals with repetitive prompts, which they will be eager to click through to reach their destination. This will be exacerbated by the requirement in Article 7(2) of the GDPR that consent to data processing must be unbundled from other agreements.’¹⁰⁹

- 58 The result would be a poor user experience that nullifies any positive effects of opt-in consent. The more common cookie notices become, the more mundane, easily dismissed and ineffective the obligation to consent is rendered.
- 59 Accordingly, this issue appears to be somewhat of a double-edged sword that will result in dissatisfaction in some form, irrespective of the decision taken. It is apparent that explicit opt-in consent places the burden on the commercial entities. Nevertheless, it is uncertain whether these changes will, in fact, have any meaningful impact for the users. The task of adequately balancing interests is undoubtedly difficult. In assessing this issue, one has to realise that the commercial and data protection interests are clearly polarised. As outlined above, this manifests itself most notably in the debate surrounding the varied interpretation of consent. This ambiguity is reflected in many of the solutions presented and remains a clear stumbling block which has proven extremely difficult to navigate.

2. Choosing defaults

- 60 The key difficulty in this regard is the choosing of a default position. In her article, Willis analyses this issue and refers to what she classifies as ‘sticky defaults’.¹¹⁰ Willis’ perspective centres on the importance of default positions in manipulating user behaviour. A default position in the context of OBA refers to the standard and modifiable consent settings (i.e. opt-in or opt-out) offered to a user. Three clear assumptions from behavioural economic literature form the basis of her analysis:

‘[f]irst, that any default chosen will be “sticky,” meaning that more consumers stay with the default than would explicitly choose to do so if forced to make a choice. Second, that those consumers with a preference for the opt-out position – and only those consumers – will opt out. Third, that where firms oppose the default position, they will be forced to explain it in the course of trying to convince consumers to opt out, resulting in well-informed decisions by consumers.’¹¹¹

- 61 These assumptions have clearly motivated industry responses to opt-in consent. Although there are a series of commentaries relevant to how and why default positions are sticky, this does not fall within the scope of this text.¹¹² Instead, it is sufficient to say that the decisions relating to default settings have clear behaviour manipulating effects. Accordingly, it is no surprise that the move towards an opt-in version of consent has resulted in vastly differing interpretations. The purpose of the rest of this article is to examine the proposed solutions. The analysis contends that the future regulation of OBA lies in a legislative system that is supplemented by clever code. This is a manifestation of the concept of Privacy by Design, as proposed in the draft Regulation. It is thought that this approach could help circumvent

the difficulties imposed by the debate surrounding the default position of consent.

E. Alternatives and supplements to the EU framework

62 An alternative means of ensuring actual user agreement with the placing of tracking software (and by extension, the processing of personal data) is required. Accordingly, this section will examine the means of supplementing the current EU forms of regulating in order to effectively guarantee the protection of users. The analysis will outline and assess the alternatives offered by industry and academics and will present a potential solution to the problem.

I. Self-Regulation - A means of filling in the Regulatory gap?

63 Although it is argued that the solution lies with the concept of Privacy by Design, it is necessary to first examine self-regulation as industry associations have suggested that it could provide a platform upon which compliance with the legal requirements could be reached.¹¹³ There have been some seemingly positive developments regarding self-regulatory mechanisms. These have focused on the standardisation of approaches not explicitly (or ambiguously) regulated by law. It should be acknowledged that these methods for self-regulation have, for the most part, harmonised the approaches in the US and the EU. The Network Advertising Initiative (NAI), the Digital Advertising Alliance (DAA), the European Advertising Standards Alliance (EASA) and the Interactive Advertising Bureau Europe (IAB Europe) all impose the same core requirements,¹¹⁴ namely:

1. To provide information regarding their practices.
2. Allow users to opt out for behavioural advertising (note that this only relates to advertising and does not affect other uses).

64 In a speech delivered by Neelie Kroes in 2011 positive reference was made to the adoption of the Best Practice Recommendation and Framework by the EASA and IAB Europe advertising associations.¹¹⁵

65 Despite outward appearances, the legitimacy and legality of the adopted best practices remains unclear (especially regarding the opt-out default). In its assessment of the framework, the Article 29 Working Party concluded that the proposals failed to adhere to EU law and that they could be damaging to the industry if they believed them to

be compliant.¹¹⁶ Aside from the clear opt-out by default concerns, the WP outlined three additional difficulties. First, despite the fact that the opt-out cookie prevents further personalised advertising, it does not prevent the future accessing and storing of information on the user's terminal. Second, the user remains unaware of whether the cookie is retained on their computer and indeed the purposes of this retention. Third, the decision to install the opt-in cookie does not offer the possibility to manage previously installed cookies, while at the same time it establishes the mistaken assumption that it disables tracking.¹¹⁷ Accordingly, the potential value of the recommendations is certainly questionable. The failure to adequately meet the obligations under the legislation reflects the weaknesses associated with self-regulation.

66 Hirsh, in his assessment of the self-regulatory approach, has outlined three criticisms.¹¹⁸ First, in the balance between the public and commercial interests, firms will maintain loyal to their own profits as a priority. Indeed, the Electronic Privacy Information Center (EPIC) has observed that the self-regulatory efforts of the telecommunications industry during the 1990s enrolled approximately 5 million consumers in comparison to the over 200 million now registered on the FTC Do-Not-Call list. It is probable that this trend would be likely to continue in a behavioural advertising context and such a prediction appears to hold true to form.¹¹⁹ Second, these programmes generally lack the capacity to force compliance with the guidelines against their members. In a US context, the FTC has incentivised participation by threatening potential legislative intervention.¹²⁰ This signifies the clear impotency of self-regulation to ensure compliance and progress. Third, voluntary membership will result in companies choosing to take advantage of the goodwill generated without any particular restriction being imposed by the guidelines themselves. This reflects the notion that large corporations use self-regulatory innovations as mere public relations stunts and this is perhaps indicative of the make-up of these organisations. As noted by the ENISA report, '[a]t present most of the largest online advertising and analytics companies participate, and most of the smaller ones do not. Social networks and content providers are almost entirely absent.'¹²¹

67 This scepticism of the industry's willingness to place consumer interests first has been evidenced in practice.¹²² It is clear that this approach is not a preferable option, as it lacks the clout to force compliance and adequately protect users. However, that is not to say that it has no role in the future regulation of OBA. There have been some positive initiatives associated with user education and awareness.¹²³ Nevertheless, commercial interests will always outweigh user safety in the eyes of advertising

agents. Therefore, self-regulatory initiatives should be limited to soft policy best practices.

II. Privacy Enhancing Technologies

- 68 Given the widely accepted failure of self-regulation¹²⁴ technical solutions have been proffered and developed by industry enthusiasts. These technologies which are based on the core principles for data protection are referred to as Privacy Enhancing Technologies (PETs) and have gained increasing popularity in the last number of years.¹²⁵ PETs owe their origins to Chaum's seminal 1981 paper on 'Mix-Networks'.¹²⁶ However, awareness and adoption rates appear to have remained low.¹²⁷ This is perhaps linked to a lack of user awareness and also, potentially, the failure to provide user friendly interfaces. As observed by Mitrou and Karyda, PETs are often application or system specific and depend 'on the underlying legal and regulatory framework, on users' privacy awareness and their privacy concerns, as well as on the cost and benefits associated with their use.'¹²⁸
- 69 Despite the fact that the implementation of and concepts behind these technologies are relatively simple, 'the complexity of the term makes it difficult for many stakeholders, individuals, as well as data controllers to apprehend their usefulness and, therefore, employ them.'¹²⁹ However, there has been large scale development of PETs in the form of plugins that use Tracking Protection Lists to monitor and block the placing of cookies on the terminal equipment of the users. The difficulty with these TPLs is that they are dependent on the effective maintenance of the list in order to avoid slipping into obsolescence and exposing the users to the risk of the newest tracking technologies.

1. 'Do Not Track' – and the proliferation of PETs

- 70 The development of the 'Do Not Track' policy and technology is a recent example of the proliferation of PETs. This proposal aims at enabling 'users to opt out of tracking by (all) websites they do not visit, including analytics services, advertising networks, and social platforms.'¹³⁰ It must be understood that this is not a blocking technology but, instead, is merely a means of alerting publishers and ad networks of a user's wish not to be tracked. Essentially, the mechanism inserts a 'DNT flag' into the header of the user's browser which is communicated during routine exchanges with website servers. If the flag is enabled, the user is stating that they do not consent to tracking. This does not, in itself, either block the placing of cookies or prevent the accessing of cookies on the terminal equipment of the user. Hence, the mechanism is entirely dependent on its acceptance

and adoption as a policy by the advertisers. Although all of the large browsers offer Do-Not-Track, Microsoft sparked some debate with the launch of its Internet Browser version 10 by implementing the Do-Not-Track as a default feature.

2. 'Sticky defaults' and the DNT debate

- 71 The problems inherent in the EU framework surrounding consent and the notion of 'sticky defaults' are also prevalent in the Do Not Track debate. As noted by Fairfield:

'The problem is inherent in the implementation of the DNT flag. Do-Not-Track is, logically speaking, a binary flag. The value of Do-Not-Track is equal to zero or one. The switch is either "on" or "off". Yet there is a third state in the protocol, "unset," and the unset state must be provided by every software agent designer. Given that DNT:1 means that tracking is forbidden, and DNT:0 means that tracking is permitted, the unset term serves only as a gap-filler, a placeholder, a state from which every consumer must take action at non-zero cost, in order to reach his or her true preference.'¹³¹

- 72 The interpretation of this 'unset' state is extremely controversial, especially given that the idea appears to have had broad support amongst privacy enthusiasts. To counteract the DNT momentum, advertisers have attempted to reduce its relevance by diluting its standards and threatening to withdraw support. As noted by Fairfield in a US context, the attempts to side-step the purpose of the Do-Not-Track policy have focussed on the Digital Advertising Alliance's argument that the policy still permits the tracking of users as long as they are not targeted with advertisements. This contradicts the FTC opinion, which equates Do-Not-Track with Do-Not-Collect.¹³² The same arguments have also been prevalent in Europe and this has led to the effective elimination of this concept as a conceivable means of supplementing user protection interests in the EU.¹³³

3. Privacy by design and the future of PETs

- 73 Nevertheless, the lessons learned in the DNT context could be effectively used and developed to inspire fresh ideas under the heading of PETs.¹³⁴ This is especially true in applying the principles behind the DNT policy in a privacy-by-design context. Kirsch in his assessment of this issue proposes the adoption of a DNT policy that would encompass a legally mandatory browser start-up wizard that would explain the two available options (i.e. to allow tracking or not). This would require users to make a decision before they begin browsing. Individual advertisers could then contact the users in order to procure an exception excluding them from this rule. This approach would clearly satisfy the requirements expressed under the data protection framework and the proposed Regulation. Under the proposal, users would give informed prior consent that would

clearly fall into the explicit opt-in consent category due to the absence of a pre-selected default position.

- 74 The proposal may dilute the significance of the consent requirement by requiring users to repeatedly reconfirm their decision. In the context of internet browsing, this form of dynamic consent may be more of a nuisance than an aid. This approach also fails to take into account multi-user devices which may only allow the first user to effectively decide for or against tracking. Of course, an effective solution to this would be to require a browser log-in to enable access. This would allow ad networks and other similar service providers to distinguish between users and, hence, user consent preferences. However, to establish a log-in requirement would be cumbersome, impractical and a violation of the very idea behind the internet. In addition, such restrictions of access could potentially be deemed a violation of human rights given the increasing recognition of the right to broadband globally and, paradoxically, could also create privacy concerns in itself, as it would directly result in the creation of a profile.¹³⁵ Alternatively, one could require the start-up wizard to appear on the opening of each browsing session. This would allow the users to make informed decisions, but it would not deal with the potential development of a tracking profile that may have been created during previous browsing sessions. Moreover, this repeated requirement to make a decision would dilute the effectiveness and genuine legitimacy of user consent and would also be, potentially, deemed a restriction on the right of access.
- 75 It is clear from the above that it is extremely difficult to find an adequate balance between user and commercial interests. However, the systems described rely on existing notions of technology. Alternatively, one could consider tackling this issue at its root by changing technology's interaction with privacy in the design phase. With this in mind, Ian Brown has outlined an approach to protecting user data through guarding it on the user's device rather than allowing ad networks to store this information on their servers.¹³⁶ The proposal envisages the use of advertising scripts that would then request access to the device in order to render targeted advertisements. These scripts would not record or send any data. In simple terms, the advertiser would send a number of advertisements to the device and based on the personal data contained in certain specified files (i.e. a locally held profile), an appropriate advertisement would be rendered. This model was first considered by Brown *et al.* in the context of mobile phones, however, it appears to have general applicability across all devices.¹³⁷ The proposal depends on the adequate processing power of the devices and technological capacity. To effectively implement the proposals, no negative impact on the user experience can be permitted. This model is influenced strongly by the notion of

user empowerment and appears to be an improved version of the privacy by design proposals described above in detail. This goal of user empowerment and, thus, data subject control over personal data has also been explored from an economic perspective and has come to be known as the Proprietary Rights Model.

III. The Proprietary Rights Model

- 76 The Proprietary Rights Model proposes the direct sale of information by users. It is based on the premise that user information should be considered as a tradable commodity to be purchased by companies. In simple terms, this model suggests that companies should pay users (data creators) for the access and use of their information.¹³⁸ This system conceptualises personal data in a way similar to intellectual property rights. In a behavioural advertising context, users have, potentially, limited control over their data and knowledge of the controller's identity under the current system. As such, the concept of users controlling and selling their data as a commodity is appealing. However, although there are clear benefits to this model, it appears to lack the practicality to truly develop as an alternative in this unrefined form. There are several key reasons for this negative outlook. First, there is strong debate as to whether or not the traditional forms of property laws are capable of providing the necessary protection for personal information.¹³⁹ This is due to the fact that '[n]ormatively, no proprietary rights exist on personal information. It pertains to an individual, but it does not belong to him or her in a proprietary sense'.¹⁴⁰
- 77 It is difficult to equate personal data with intellectual property rights as, in contrast to IP, personal data only gains value when placed in the hands of advertisers.¹⁴¹ Lessig, in advocating the merits of this economic approach and his instrumentalist theory of propertisation, has observed that if personal data was viewed in economic terms, the industry would be forced to develop specific PETs that would be capable of adequately protecting the users' personal data.¹⁴² However, it remains unclear whether or not the commodification of personal data would truly inspire this protection. Companies rely on this information for advertising which, in turn, allows them to offer their website's services. If advertisers were forced to buy the information from the users, large portions of the publishers' revenue would be eliminated.¹⁴³ This could result in widespread charging for website access. In addition, this model would result in ubiquitous standard form contracts as the large internet service providers would be unable to individually negotiate contracts with each user. This would seemingly defeat this model's purpose of empowering people by forcing them to comply with contracts designed for the masses.

Finally, as noted by Cohen, the model appears to be contrary to the EU concept of ‘personhood’.¹⁴⁴ This stipulates that privacy is a fundamental part of the person which is ‘non-commodifiable’ and part of the European human rights edifice.¹⁴⁵

- 78 In addition to the criticisms already mentioned, there are also some very practical concerns regarding the actual relevance of this model given big data processing. Essentially, with today’s technology the proprietary rights model may not be feasible as users would not be able to restrict access to the massive amounts of data (including meta-data) they place online. Companies are capable of exploiting this data leakage and would, therefore, be able to track users’ behaviour without having to rely on the data held by the users themselves. There is, therefore, a need for an open access personal data tracking platform that allows users to effectively manage their online identity. Without such a mechanism, this will remain a very abstract model that fails to realistically cater for the recent computing developments. Brown’s model does provide an interesting expansion of this idea, despite the fact that he does not quite extend his definition of property to include personal data. To incorporate privacy into the very design of the product could legitimately provide a strong basis for the future protection of users. This move towards device-specific protections could result in the development of an adequate response. Nevertheless, it should be noted that any move in this direction could be strongly opposed by manufacturers, ad networks and other advertising industry service providers.

IV. Code is Law

- 79 It is clear that the effective balancing of the respective interests is difficult. In order to make significant progress in relation to the protection of users, privacy will need to be incorporated into the design of devices. To focus too strongly on the implementation of legal requirements is inappropriate given the inflexibility of this form of regulation. It is important to remember Lessig’s classifications and, thus, the balancing of the modalities of regulation.¹⁴⁶ This refers to the notion that ‘Code is law’ and, hence, the effective balancing of the law, norms, architecture (code) and market. It is the mix of these modalities that is significant and any response needs to effectively consider the merits of each. Lessig proffers that code, in itself, has a regulatory dimension in that it can effectively direct the actions of the users. Indeed, he notes that code and law both play an important role in the information society. Significantly, code is preferable as it is not as easily ignored as legal rules. Use is restricted by the architecture of the system, whereas compliance with laws can be a matter of choice. In

applying this concept to OBA, ad networks could be restricted in their actions through the effective implementation of a code which effectively balances the modalities of regulation. The incorporation of privacy-enhancing defaults into the design of future technologies is perhaps the only means of ensuring the effective safeguarding of user privacy.

- 80 The key point from the above analysis is that the interpretation of consent will continue to be a sticky issue under the EU Data Protection framework unless decisive measures are taken. The development of the PETs have shown that, without the consideration of privacy from the outset, uncertainties regarding protection will remain. Accordingly, the concept of privacy by design holds the key to the development of future protections capable of adequately protecting personal data.

F. Conclusion

- 81 In a world of ones and zeroes, the traditional legal concepts of privacy and data protection struggle daily with advanced technological development. The current legal framework is ill-equipped to deal with modern computing. Privacy protection is of clear importance to modern society and a strong privacy framework is paramount. However, that is not to say that commercial interests should be disregarded. The economic benefits of an open internet that allows for behavioural advertising are clear and one should not simply arrest development. Technologists should be given the scope to commercialise their ingenuities. Nevertheless, just because an action is technologically possible does not mean that it should be legal or that it benefits society. From the analysis, it is clear that the use of cookies in the context of behavioural advertising invokes the applicability of the EU Data Protection Framework. Although there appears to be some uncertainty as to whether this practice amounts to personal data processing, it is clear from the analysis that this is the most probable interpretation. Nevertheless, the *lex specialis* rules in the E-Privacy Directive ensure some degree of protection for the users. The requirements elicited by these Directives are easy to decipher. However, the interpretation (and lack of a concrete definition) of the concept of consent has proven to be a serious impediment to progress. The proposed adoption of an explicit opt-in consent requirement is controversial. One has to question whether this will result in the dilution of the notion of consent and its benefits.
- 82 As outlined *supra*, the notion of ‘sticky defaults’ and the associated problems are the consequences of the focus on consent. The online advertising industry has taken advantage of this uncertainty. Nevertheless, it is also questionable whether a simple switch in

default position would effectively protect users. As noted by Mitchell:

‘While this approach certainly solves the dilemma of reasonable data privacy expectations, it does not address what I believe is the fundamental problem associated with modern internet use: in order to use the internet for any purpose, individuals must sacrifice their right to data privacy in some measure. Such conditional use always puts the user at a substantial disadvantage. The bargaining leverage websites enjoy in this regard borders on coercion, especially when considering the modern need of internet use and the substantial sacrifice associated with private data access.’¹⁴⁷

- 83 It is, therefore, apparent that in order to effectively guarantee the protection of users’ personal data, a change in approach is required. The development of future tracking technologies is something that regulators need to monitor closely. Browser Fingerprinting, Deep Packet Inspection and History Sniffing are all conceivable means of tracking users. Given the levels of development, it is likely that technologists will find other methods of tracking users. In the era of big data, anonymisation on the internet may be a thing of the past.¹⁴⁸ It should also be noted that this is aided by the tracking of users across multiple devices. The acknowledgement of this development is seen in the proposed Regulation’s specific provision on user tracking.
- 84 Privacy by design provides a potential solution that combines elements of code and law to solve this issue. To require software engineers to incorporate protections at the outset would enable the protection of users. From the lessons learned during the DNT debate, it is clear that system-specific PETs can only have a limited impact as the user is required to be aware and competent to ensure their installation. Moreover, self-regulatory approaches lack the teeth to truly have an impact. The Commission should require industry change and the incorporation of protections into the design of the devices. Although an economic or proprietary rights definition of Data Protection would yield some interesting benefits, it does not appear to be the most balanced approach for the EU. Instead, the future of protection lies with laws regulating manufacturing standards and the concept of privacy by design. As noted by Hildebrandt and Tielemans, ‘[t]his would incentivize technological innovation with regard to built-in data protection, because once such technology is state-of-the-art, it becomes the legal standard.’¹⁴⁹
- 85 Nevertheless, it must be acknowledged that any such change would be difficult. The EU is the forerunner in Data Protection development globally. As a consequence, there are clear disparities with countries outside the EU. This is reflected in the recent decision by the Irish High Court to refer questions regarding the legality of the Safe Harbour provision to the CJEU.¹⁵⁰ Hence, any further development would be in sharp contrast with countries outside of the EU and could further isolate

the EU’s standards from those of other countries. However, this should not prevent action where it is merited and it is clear that reform is required. The fate of the proposed regulation and the potential future amendment of the E-Privacy Directive must be watched closely.

- 86 Therefore, the legal realities surrounding OBA remain uncertain. Without clarification, the monitoring of the protection of personal data will be unclear and ineffective. In conclusion, the European Commission has wrongly focused on the issue of consent and should require more active protection in the design phase of the devices as provided for under the proposed Regulation.

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A manifesto for an e-lending limitation in copyright

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Abstract: In the European Union, lending is an exclusive right for copyright and related rights, but Member States can transform public lending to a right of remuneration and even exempt some establishments from any payment. The making available of works online is not covered by the public lending right regime of the Rental and Lending Directive but is considered as an act of making available governed by the InfoSoc Directive. As a consequence, libraries are currently not allowed to digitally transmit works to their patrons as lending, but have entered into licenses with publishers to develop an offer of lending of e-books, also called e-lending, with the intermediation of dedicated platforms operated by commercial actors. Compared to physical lending, e-lending is not based on ownership of the book by libraries but on its provision by this intermediary. This paper discusses how the objective of enabling libraries to engage in e-lending should be achieved, and what is the proper dividing line between a market-based solution, as developing today, and a limitation to exclusive rights. The impact of an extension of the public lending right to e-lending should be assessed, but not based on

a criterion of direct substitution of a book on loan at the library to a book bought at a retailer. By definition, libraries are substitutes to normal trade. Instead, the overall effect of lending to the commercialisation of books and other works should be verified. Particular conditions for a limitation in favour of lending are also addressed, and notably the modalities of lending (a limited duration, one simultaneous user per title, ...), not to make e-lending through libraries easier and preferable to the normal acquisition of an e-book. This paper argues in favour of some and controlled extension of the public lending right to cover the lending of e-books and other digital content. For the role of libraries is essential in providing access to works and culture to readers who would or could not rely only on normal acquisition of books or other items on the market, to works that are not provided by the market, and to material for research. Libraries are a third sector providing access to works, aside the market and non-market exchanges between individuals. This role should not lose its relevance in the digital context, or it would culturally impoverish future generations of readers.

Keywords: e-lending, public lending right, libraries, copyright limitation, licensing

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A. Introduction

1 With the outbreak of commercial exploitation of e-books due to the success of the Kindle by Amazon and, soon after, of tablets and other e-readers,

libraries have embarked on the practice of making e-books available to their patrons in what resembles the traditional activity of lending. Patrons are increasingly demanding to find e-books in their

libraries. While e-lending has become a reality in some countries-- such as the US, where thousands of libraries propose to download e-books-- experiments have started in many European States. In all of those cases, remote loans of e-books are organized by licensing between publishers and libraries, generally with the intercession of an intermediary offering a dedicated platform for e-lending. Indeed, the public lending exception that is known in the European *acquis communautaire* and allows the libraries to lend books in most countries does not apply to the on-line provision of an e-book, even for a limited time. Hence, offsite lending of digital content cannot, in principle, benefit from the regulatory frame that exists in most Member States and authorizes public libraries to engage in lending against a remuneration to authors (from which some establishments can even be exempted). Lacking an exception, libraries have chosen to develop e-lending that is based on licensing with copyright owners.

- 2 Not all libraries are satisfied with the interpretation against the coverage of off-site lending by the directive 2006/115 and its national transpositions. In the Netherlands, the Vereniging van Openbare Bibliotheken (Association of Public Libraries) has brought the matter before the courts. They started a test case against the collective management organisation in charge of the lending right to be allowed to provide e-books in libraries for download¹. Earlier this fall, the court of first instance of the Hague has referred preliminary questions to the European Court of Justice as to whether the making available of e-books by downloads by a public library can be considered as "lending"². It would be surprising if the UE court decides to include e-lending in the notion, save for an odd development around exhaustion (with the ECJ, you'll never know!). Only the European lawmaker could decide to open the field of public lending right to e-books.
- 3 This paper claims that the copyright limitation for public lending should be extended to the digital environment on the ground that it has too much democratic and cultural value to be left completely in the hands of market transactions. Due to the fact that copyright exceptions need to age and evolve with the digital transformations, public libraries should also embrace, to some extent, the shift from books to digital content. Otherwise, libraries will lose a great part of their role in society, and most of their soul.
- 4 E-lending that will be covered here stands for the making available of digital works by public libraries for a limited duration through the Internet or libraries' networks, by downloading, streaming, or similar modes of transmission³. It will not encompass the lending of e-books, by installation of e-books on devices of the user (tablets, smartphones or computers), that also occurs in libraries, nor by

lending an e-reader on which the library has loaded some content. Commercial book retailers have also started to develop e-lending services. A typical case is Amazon, that offers access to e-books for a premium yearly subscription⁴. Such business models have only the name of e-lending as they have not much to do with public lending right, but could rather be considered forms of rental. They will not be discussed further.

- 5 This paper is structured in three parts. It will start by giving a description of the context of the public lending, both in the practices of libraries and in a legal perspective (A.). Then, the shift to e-lending will be addressed (B.). The shortcomings of the current situation that leave too much leeway to the market will justify the need for an e-lending limitation in copyright, which we will develop in a last part (C.).

B. The context of public lending

I. Public lending in libraries

- 6 Libraries and other cultural heritage institutions carry out a discrete series of activities that, at different degrees, further the preservation and dissemination of knowledge, from acquiring and developing a collection, preserving it, indexing it, making it available on its premises, organising education activities, helping persons to find what they are looking for, to ultimately letting people checking out books to read, learn, and entertain themselves. As repositories for cultural artefacts produced by a society, libraries occupy a central place in the politics of access to culture, research and learning.
- 7 Public lending is one of the core activities of libraries⁵, but its intensity might significantly differ from one type of library to the other, with the consequence that the activity presents a varying impact on the practices of users, market of copyrighted works, and protection of rights holders.
- 8 Academic and research libraries, as institutions associated with universities or research establishments, aim at supporting scholarly or scientific research. Their main activity is to constitute a collection of scholarly books, journals, or databases that will be mostly consulted on the premises of the library. Acts of lending happen but are more limited than in general libraries. Researchers and students will check out books from those libraries when they need more time to search in the book. The objective of the lending is, thus, research and thorough consultation, without necessarily an extensive reading of the book. Academic and research libraries will also engage more often in interlibrary loans.

- 9 Similarly, in national libraries that are in charge of the legal deposit, the lending activity will be minimal compared to on-site consultation for research and the provision of materials to other institutions through the interlibrary loan. Besides, a significant part of their collection, consisting of documents, maps, manuscripts, newspapers, magazines, prints and drawings, music scores, photographs, or old publications, is not subject to lending, due to their historical importance, state of decay, or uniqueness.
- 10 On the contrary, general public libraries will largely engage in public lending, as their mission is to provide the public, with no discrimination, with materials for private study and entertainment. The consultation of their books or other items on the premises of the establishment is rather limited (except for reference books or magazines).
- 11 In addition to these two major categories, libraries can also serve special needs of a limited part of the public. For instance, social institutions such as hospitals, prisons, or schools might have a library that provides books or other works to the patients, inmates, or pupils. They will be reserved to a limited public. The main activity of such libraries will be to lend books to their specific users. Some libraries can also provide specialised documentation to professionals and no restricted conditions of admission. For instance, some libraries are operated by governments to the benefit of their civil servants, but can equally be open to individuals upon defined conditions. For example, the libraries of judicial courts generally admit professional lawyers who are registered at the bar. Usually, those types of libraries will not lend books beyond the members of the institution they serve. Other specialised libraries will not be open to the public, such as libraries of private companies or governmental libraries with restricted admission policies.
- 12 Within the public libraries, some distinction could also be drawn, depending on the type of cultural items subject to lending. Libraries generally refer to books in the general opinion, but public institutions deal with other types of content, as well, such as phonograms, DVDs, videogames, or audiobooks. Public libraries can have collections of different categories of works. Content other than books might be held and made available by dedicated multimedia libraries or *médiathèques*. Lending also occurs in those institutions, sometimes under adapted conditions.
- 13 The public that libraries target will depend on their category. In a broad sense, general public libraries, by definition, address the need of the general population to access cultural content, whereas academic and research libraries are primarily visited by the members of their institutions (students, professors, researchers for academic libraries) and researchers. They are, nevertheless, open to the

public and cater to the needs of professionals looking for specialised information (such as private lawyers visiting law libraries). Specialised libraries in social institutions will have a more limited audience. Public libraries also play an important role for people with reading disabilities. Dedicated libraries exist in many countries to provide books in Braille, audiobooks, or other adapted forms to visually-impaired people, but general libraries also try to have a collection of large print books and audiobooks.

II. Public lending in copyright law

- 14 Rental and lending rights were introduced as exclusive rights in the European copyright by a 1992 directive that has since been codified in the directive 2006/115⁶. Article 1 of the directive states that “in accordance with the provisions of this Chapter, Member States shall provide, subject to Article 6, a right to authorize or prohibit the rental and lending of originals and copies of copyright works, and other subject matter as set out in Article 3(1)”. The notion of lending contained in the directive only refers to acts of *public lending* since, according to its article 2 (1) b, “lending’ means making available for use for a limited period of time, and can not be for direct or indirect economic or commercial advantage when it is made through establishments which are accessible to the public”. The terminology of public lending right is, however, generally used to refer to the right of remuneration that the article 6 of the directive allows Member States to enact instead of the exclusive lending right stated as a principle. Certain categories of establishments can even be exempted from the payment of the remuneration.
- 15 Lending is covered by the directive when a work is made available for use⁷ for a limited period of time and not for direct or indirect economic or commercial advantage. This criterion distinguishes lending from rental and is further defined by the recital 11 of the directive that provides that “Where lending by an establishment accessible to the public gives rise to a payment the amount of which does not go beyond what is necessary to cover the operating costs of the establishment, there is no direct or indirect economic or commercial advantage within the meaning of this Directive”. Therefore, the payment of a fee for lending does not exclude the qualification of lending⁸. The last condition is that the establishment doing the lending is accessible to the public, a notion that is not defined in the directive⁹. The initial proposal for a directive included a list of the eligible establishments, encompassing “public libraries, research libraries, specialized libraries, school libraries, church libraries, collections of new media or of works of visual art, libraries organized or sponsored by public or private companies, and other collections of subject matter”¹⁰. The condition

of public accessibility should be broadly construed and include libraries open to a specified public.

- 16 Article 6 of the directive¹¹ allows Member States to replace the exclusive right by a remuneration right, and even to exempt certain categories of establishments from this remuneration, which has been done by most Member States¹². The exception for public lending right “reflects the compromise found at the time between complying with the Internal Market needs, on the one hand, and taking account of the different traditions of Member States in this area, on the other”¹³.
- 17 The objective of such derogation is, clearly, the promotion of cultural objectives, which is referred to in article 6(1) as justifying the leeway left to the States in determining the remuneration. Some establishments, e.g. university and school libraries, libraries in social institutions, or some public libraries, could be exempted from any remuneration, at the exception of lending of phonograms, films, or computer programs (if those categories of works are encompassed in the lending right). The European Court of Justice has, nevertheless, decided that Member States are not entitled to exempt all public libraries from the payment of the remuneration, as such a large-scale exemption would result in emptying the public lending right of any relevance¹⁴.
- 18 More recently, the European judges have decided that the remuneration to authors for public lending cannot be calculated solely on the basis on the number of borrowers of works, but that the amount of the remuneration should also take into account the works available to the public, so that the biggest public lending establishments pay more than the smaller institutions¹⁵.
- 19 The legal form of the derogation is left to the Member States¹⁶. The exemption of the exclusive right is often understood as creating an exception in the form of a statutory license, with a right to remuneration¹⁷. In other countries, the public lending right is just recognised as a remuneration right for the copyright and related rights owners. Books are always concerned with the exception but some States have extended the exception to other cultural content, such as musical or audio-visual works¹⁸.

C. From lending to e-lending

I. E-lending based on licensing

- 20 In many countries, libraries have started to make e-books available online to their members¹⁹. Lacking any legal authorization to undertake e-lending,

this development was made possible by licensing agreements with publishers and the intervention of dedicated platforms hosting and delivering e-books to libraries’ users.

- 21 Distribution models may vary, but the most common way of proceeding for a library is to have recourse to “an intermediary distributor (sometimes referred to as an ‘aggregator’), which sells access to e-books titles and copies of e-books, often from multiple publishers”²⁰. The distributor offers full-service packages to libraries, with the licensing rights to e-books and the hosting of the e-book collection²¹. Libraries can serve as an interface, through their websites, for their readers to get access to the collection of titles that are available for downloading. The e-book will then be sent by the platform operated by the distributor to the user that has requested it.
- 22 The primary model governing e-lending normally includes four actors: the publisher or copyright owner, the distribution platform, the public library, and the reader that is the end-user of the loan. The publishers license the rights for distribution with e-book distributors, a new type of actor on the book market that has emerged to provide services of e-lending to libraries²². They sublicense the rights to e-books to libraries for making them available online to their patrons, along with additional services, such as the operation of a web platform that hosts the e-books; provides a searchable interface for users; manages the availability to readers and the accounts of its library’s clients; and controls the conditions and duration of the loan. This requires the use of Digital Right Management tools embedded in the e-books that are made available; DRMs are generally developed and operated by the e-book aggregator. Platforms for lending are, for instance, “OverDrive” that dominates the English library market²³, NetLibrary, Ebscohost in the Netherlands²⁴, Dilicom in France, or Onleihe.net in Germany.
- 23 The relationship between the publishers and the distributors triggers the availability of the book on the platform. Publishers decide the format and conditions under which the book will be offered for lending in a way that tends to align the modalities of accessing e-books with the restraints usually endured by library readers. A license then applies to the relationship between the libraries and their patrons, and stipulates the conditions of access to e-content by the library and the terms of use. Due to the intercession of an intermediary, the public libraries do not host e-books as they do tangible books, for they are usually kept by the intermediary on its platform. The provision of a collection of downloadable titles can be organised in different models. The most common is the so-called ‘perpetual access’ model²⁵, by which libraries acquire an individual copy of an e-book title that

will be integrated in the e-collection of the library (in contracts with the subscription model where the access to the title terminates if the subscription is not renewed). In most cases, only one reader at a time can borrow the e-book (one copy/one user model)²⁶. It is a kind of “digital replication of the use pattern for a print-on-paper library book”²⁷.

- 24 Several licenses can be bought for popular works to be entitled to lend them to more users simultaneously. The number of licenses is the equivalent to the number of acquisitions of tangible books and its corresponding number of simultaneous readers. Other possibilities are the subscription model with unlimited number of loans per title and limited simultaneous users, or the pay-per-view model.
- 25 Books can be bought by individual titles or per packages by the library. Further conditions are laid down by the license and relate to the devices on which the e-book can be downloaded and read, the possibilities to print out and to what extent. Some licenses impose the renewal of the license after some delay or a certain number of loans (e.g. license valid for one year or for 30 circulations), so as to mimic the way tangible books wear out after a few readings and oblige libraries to buy a new copy. The e-books could be proposed in different formats, but they are usually in ePUB, which is a format dedicated to e-readers, or in pdf, which is readable on more devices.
- 26 The library owes a remuneration for the services performed by the e-book distributor and its platform, which is added to the remuneration agreed-upon remuneration for the loans, themselves.
- 27 The relationship between the library and the user follows the model put in place. The lending will generally be restricted to the users registered in a library. They will get access to the collection of available titles through the website of their library and can install the e-books on their computers or other devices (such as smartphones, tablets or e-readers). Only a maximum number of books for a determined period can be downloaded, and the book will be unavailable at the end of lending term—which is, generally, rather short (2 or 3 weeks). The duration is renewable if the book has not been reserved by another user. Once the book is installed on the device, it can be read offline. Usually, the readers only have access to the e-collection of their library, i.e. to the collection of titles for which the library bought a license. This is the model of the German Onleihe platform where patrons registered in one library only have access to the part of the platform hosting titles for which their library has a license. Other models include consortiums of local libraries (e.g. LibrariesWest in the UK) that have acquired a bulk license for e-books that they all propose to their registered patrons.

II. e-lending in EU copyright law

- 28 The directive on rental and lending does not explicitly exclude e-lending or lending of digital items from its scope. However, some elements point in that direction. The article 1 that provides the exclusive right of lending applies to “the original and copies of copyright works, and other subject matter”. This formulation is usually interpreted as encompassing the “first materialisation” of the work and further reproductions thereof²⁸. Since the on-line lending includes a transmission of a digital file, and not of a tangible item, it should be considered as being outside of the scope of the lending right²⁹.
- 29 In the proposal for a rental and lending directive, the European Commission referred to “objects (...) which incorporate protected works or performances”³⁰, indicating that it had tangible items in mind³¹. The question was addressed in the Council Working Group, during which the Member States did discuss the coverage of electronic rental or lending but decided that they did not want to deal with it at the time, considering that the topic was still premature³². Some scholars consider that the purpose of the directive was to cover the entire situation of rental and lending, including electronic forms thereof³³.
- 30 Yet, the inclusion of digital products in the public lending right was not completely closed as demonstrated by later documents from the European Commission. In the Green Paper on Copyright and Related Rights of 1995, it was discussed whether the lending and rental rights may be applied by extension to digital transmissions³⁴. It seems that the starting point for the reflection was the application of the rental right to services on demand, such as video-on-demand, that were emerging at the time. In its comparison between traditional lending and new forms of making available on-line, the Green Paper went as far as stating that “the definition [of lending] does, however, cover digital lending by establishments accessible to the public and the on-line consultation of a work from a public library comes to the same thing as borrowing a copy of the work”³⁵. The Commission document nonetheless acknowledges that such an extension should be confirmed in legislation and its details should be spelled out in order to reconcile “the cultural and educational functions of bodies such as public libraries and universities, which have the aim of ensuring the widest possible dissemination of works and data, (...) with the legitimate protection of rightholders”³⁶. True, the Green Paper warned against new forms of uses within libraries, with respect to the protection of the interests of copyright holders, but still stressed the interests of the different parties concerned: “authors must be able to control the use of their works, libraries must ensure the transmission of available documents and

users should have the widest possible access to those documents while respecting the rights or legitimate interests of everyone”³⁷. The European Commission then came to the conclusion that “the application of the lending right to electronic transmission should also be reviewed with a view to maintaining a balance between the interests of public libraries and those of rightholders”³⁸.

- 31 Such a generous position in favour of libraries might seem surprising. It should be remembered that this Green Paper was released at a time prior to the mainstream development of the Internet and without any digital products yet commercially available on-line for consumers, such as e-books or movies. The economic impact or the development of digital libraries could not have been anticipated in 1995.
- 32 That view was given up in the Follow-Up to the Green Paper in 1996. Even though it was therein reiterated that on-demand transmissions, such as VOD, enter in the field of application of the rental right³⁹, the opinion of most Member States against an extension of the rental right and distribution right to on-line transmission was followed. No reference was made to on-line lending.
- 33 The European Commission preferred to cover all forms of on-line transmission, whether on-demand or not, under a broadly-defined right of communication to the public, and it was the direction that the discussion took that would become the WIPO Copyright Treaty of 1996, which opted for a right of making available that would cover on-demand services. The fate of on-line rental and lending as falling out of the box of those rights was sealed. The adoption of the Information Society Directive and its communication to the public right should then be considered as being a *lex specialis* for all forms of making available right and would prevail over an extensive interpretation of the rental and lending rights in the earlier directive of 1992⁴⁰.
- 34 The recital 40 of the Information Society Directive that recommends that acts of making works available on demand by libraries be subject to licensing with rights holders could also be interpreted as rejecting e-lending outside of the right to remuneration for which most Member States opted by transposing the lending directive⁴¹.
- 35 This interpretation will be challenged before the European Court of justice, thanks to the preliminary questions referred thereto by a Dutch court seized by libraries. Beyond the question as to whether or not the notion of ‘lending’ also covers the online downloading of e-books, the relationship between the lending and the principle of exhaustion is part of the referral. The Dutch court wonders whether the acquisition of an ebook by libraries is subject

to exhaustion and hence, gives them the privilege to distribute it to their patrons in lending. This detour by the principle of exhaustion is probably an offspring of the UsedSoft decision and follows a similar economic logic, more than a legal one. Indeed, it makes sense that the acquisition of a product, whether analogue or digital, entitles its owner to dispose thereof. That is what the EU court has decided for software whose owner could resell. In some legal systems such as the United States, the authorisation of public lending flows from the application of the first sale doctrine or exhaustion principle: once the book is bought by the library, its further distribution, including lending to library patrons is not an infringement of copyright. On the contrary, the European Union law interposes an exclusive right of lending, generally transformed at State level into a right of remuneration, that annuls the exhaustion rule. The act of distribution is legally qualified as an act of lending that is not exhausted but re-enters into the field of control of copyright owners (either through an exclusive right or a right to remuneration). This is clearly stated by the recitals 28 and 29 of the Information Society Directive that preclude the application of the distribution qualification and of the rule of exhaustion to rental and lending⁴².

- 36 The UK Government has also commissioned a review of e-lending that has resulted in a recommendation to extend the public lending right to remote e-lending⁴³. Following that report, the British Government has announced its intention to make libraries able to offer digital books to their readers, by revising the Public Lending Right in two stages⁴⁴. First, and it was started by the Digital Economy Act of 2010⁴⁵, the Public Lending Right Act 1979 was modified to include audio-books and e-books in the notion of “books”⁴⁶. However, this does not extend to the making available of an e-book by means of electronic transmission⁴⁷. Only the provision of e-books on readers have been included in the public lending right⁴⁸. More precisely, “copying or issuing a copy of the e-book as an act incidental to lending it” shall not be considered as infringing the rights conferred by copyright or related rights. In a second stage, the Government contemplates to enable public libraries to offer remote e-lending services to their readers and to recommend further legislative changes accordingly, while acknowledging that the EU directive 2001/29 probably stands in the way⁴⁹.

D. The need and challenges of a copyright limitation for e-lending

I. The democratic relevance of e-lending

- 37 The growth of e-lending experiments based on licensing between libraries and publishers, in lack of any certainty as to the status of e-lending, demonstrates that the market is capable of providing literary works, and sometimes other types of cultural content, to libraries and their readers. In our opinion and despite the capability of copyright owners to license their works for offsite lending by libraries, the public interest of entitling libraries to autonomously provide access to cultural content to the public would still beg for a legislative intervention to make a limitation of copyright prevail on or subsist aside market-based initiatives.
- 38 The cultural promotion objectives referred to in the provision of the Rental and Lending Directive authorizing Member States to limit the exclusive right of lending are rooted in the need to ensure circulation of works in the public sphere and beyond the mere operation of the market⁵⁰. Its democratic value is to ensure that people are offered access to culture, whatever their social situation.
- 39 Public lending right broadens access to works in different ways. Firstly, libraries provide access to works to a *larger public* of readers, enabling access by some populations who cannot afford buying all the works they read, view, or listen to. This lack of access can be grounded on, but is not restricted to, economic reasons. For instance, libraries will cater to the cultural needs of low-income populations, children, and teenagers, but also of people having difficulty traveling to a bookshop or living in remote places (public lending can then be ensured by mobile libraries or by post), as well as people staying in institutions (e.g. prisons, hospitals, nursing homes, etc.). More generally, libraries complement the commercial offer by making books available to the general public, whatever their financial means or access restrictions to books. They bring authors and readers together in a different way than the market. Many big readers often go to libraries to fulfil their reading habits, while equally buying many books in bookshops and retailers. Secondly, libraries provide *larger access to works* than the market. Whereas bookshops have only a limited percentage of published books in stock and the average life of a book in bookshops is less than one year, public libraries, through their preservation mission, might offer a more extensive collection, depending on their size and budget⁵¹. Another limitation of the market in providing books is absent in the way libraries operate.

Whereas the market will mostly obey to a demand-rule, libraries tend to choose the works they acquire on other criteria (namely cultural ones, notably a selection of local and national authors), or in an exhaustive way, if they are in charge of legal deposit, which can lead to more cultural diversity in the offer. Finally, libraries provide access to sources *for research* (mostly in academic and research libraries) as they hold extensive collections of publications on scientific topics. Researchers who need to consult many sources of documentation could not afford to buy all the relevant books published in their field and rely on consultation within the library, and, additionally, on lending to get access to the material they need. Academic libraries also provide scientific books to students to carry out research required for specific assignments or papers.

- 40 Transposed to e-books and e-lending, these objectives could still be sustained for the most part. Some segments of the libraries' readers will still need access to works by libraries, as they could not afford to access culture otherwise, or only partially. This is the case of younger people, low-income populations, or people in institutions with no access to culture but by the library of such institution (hospitals, prisons, ...), but also of 'big' readers. On the other hand, e-lending will require to get access to e-readers, which could constitute a new hurdle to access culture for some categories of people and increase the cost of access through libraries, except in the case where libraries also provide the device to read the e-book. Not all works will be offered by the market in e-book format or some e-books might not be commercialized after some time. Libraries could keep their role of preserving works and providing them to the public long after they have been put off the market, even though the development of e-books has also lengthened the period of availability of e-books in a catalogue of a publisher. As for access for research purposes, academic and research libraries are accustomed to dealing with digital resources. Besides, scientific books or textbooks might be amongst the types of content that will be more systematically proposed in an electronic format. The access to such works for research, that includes episodic lending to researchers or students, will not decrease with the shift to e-books.
- 41 Libraries argue for some preservation of their role as providers of culture and information and demand that they could offer e-books under reasonable terms and conditions⁵². The Sieghart Review on e-lending, commissioned by the UK Government, warns that "whatever analysis you make about the impact of remote digital borrowing on the physical footfall in libraries, it is plain that an inability to offer digital lending will make libraries increasingly irrelevant in a relatively short time"⁵³. Similarly, the Lescure Report in France acknowledges that libraries constitute a "third sector" for the dissemination of

culture and information, between the commercial sector of cultural industries and non-market exchanges between individuals⁵⁴. The key role of libraries in our societies is to guarantee some collective use and dissemination of creation and culture. That does not mean that an exception or limitation should necessarily cover e-lending but that the objectives of maintaining some alternative of provisions of books, by the channel of public libraries, is still justified for digital content. The second channel of dissemination of books cited by Lescore, i.e. the sharing between individuals, might also decrease as an e-book, at least in a proprietary format such as Kindle, can usually not be transmitted to someone else⁵⁵.

- 42 The public interest role of libraries justify, from our point of view, that public lending should not be completely left to the market operation. When discussing the public lending right in 1992, most Member States wanted to carve out some space for public libraries from the exclusive right conferred to copyright and related rights holders. It is doubtful that their position will change today and that the public space in which libraries operate be closed for e-lending. Should lending under a copyright limitation be reserved to books made of paper and ink, a large part of the cultural and scientific production will not enter in the privilege granted by copyright laws. E-books will form a significant part of the literary production of the years to come and will sometimes have no paper equivalent. Soon, some specialized books will only be commercialized in an electronic version. But e-books have also gone beyond the mere literary form and have been developed as multimedia products for smartphones and tablets. Early examples of such new types of digital creation, particularly children's books, include features that would not fit on paper, such as animated images or interactive narration⁵⁶. As far as music and movies are concerned, they might soon be released only as downloadable digital products. Excluding this new digital content altogether from the public mission of libraries to make cultural items available to the public in a non market-mediated transaction would deprive their users of a significant part of culture and creations.

1. A copyright limitation over a market-based licensing

- 43 Current projects of e-lending developed by public libraries and publishers demonstrate that the offer of e-books in lending is possible and not prevented by copyright law. So why not let the normal operation of the market prevail and organise, through licensing and the exercise of exclusive right of lending, the making available of e-books and other digital content to libraries' users? One could argue

that copyright does not need to assume the cultural value and cost of providing access to cultural content by libraries, but that this is an obligation and charge for the States towards their citizens.

- 44 That remark hides two issues: on one hand, the relationship between copyright exceptions and contract; on the other hand, the specific shortcomings of a market-based system of e-lending.

a.) The space left for exceptions by normal market operation

- 45 A difficult issue in copyright is the line that should be drawn between the market space where exclusive rights could lead to transactions over uses and the reserved space for exceptions where the use would not need an author's authorisation.
- 46 Without analysing the uneasy relationship between copyright exceptions and contract⁵⁷, this raises a more general question as to the borders between the statutorily defined exception and the exercise of copyright by the rightholders. A related issue is whether the exception could substitute the provision of works on the market. For some exceptions, copyright law carves out works that are still available on the market or could be provided by the rightholders, from the scope of an exception, as it is the case for the exception of on-site consultation benefiting libraries⁵⁸. This gives some preference to the market and the exploitation of works by rightholders over the exception. The recent diversification of rules and situations in the European and national copyright lawmaking between out-of-commerce and commercially available works also indicates that the ambit of the authorised uses varies according to the economic reality of the work exploitation and is increasingly thought in gradual shades, from works not available in the market to works that are still exploited.
- 47 The question is whether the exception should only occupy the space where the market cannot provide the benefit of the use. It could be read as a follow-up to the scrutiny by the three-step test that copyright exceptions should successfully pass, and notably the second step consisting in the absence of some harm to the normal exploitation of the work. This criteria of the normal exploitation should not however be construed as meaning that any market possibility would overcome the exception⁵⁹. To define the criteria of 'normal exploitation', the WTO Panel decision on the three-step test has referred to the ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains⁶⁰. It also points at the fact that the absence of a licensing system would not be determinant in deciding whether the

use in question does not take part to the normal exploitation of the work⁶¹, but it cannot be inferred that the provision of a license for a specific use would exclude the application of the exception⁶². This opinion is substantiated by the preparatory work of the Stockholm Conference that has introduced the three-step test into the Berne Convention. It mentions « all forms of exploiting a work, which have, or are likely to acquire, *considerable economic or practical importance* »⁶³, this formulation being found also in the WTO Panel Report⁶⁴. In our opinion, this indicates that the single possibility to provide the work to the user benefiting from the licence would not be enough in itself to consider that the exception counters the normal exploitation of the work. The scrutiny of the second step should rather look at the overall economic importance of the exploitation forms with which the exception would enter in economic competition.

- 48 It is only if the systematic use of the exception could divest authors from major sources of revenues that are significant within the overall commercialization of works, that it would contradict the normal exploitation of works. In our view, the fact that some works are commercially available is therefore not sufficient to include in the relevant exception a general exclusion of works that could be acquired through normal trade.
- 49 A reverse conclusion would mean that the exception is dictated by the functioning of the market and only answer to a market failure justification. Market failure has been regularly advanced, particularly in the writings of the Chicago school of law and economics⁶⁵, as a justification for exceptions. It could be defined as the principle according to which the exception would only be valid if the market is not capable, through provision of the work or licensing, to supply the demand of the user.
- 50 This justification, though it can apply to some exceptions, has now been rejected by the majority of scholarship that considers that exceptions are grounded on diverse reasons, which cannot be always solved by the market⁶⁶. The analysis of the market failure as a valid explanation of *fair use* in the United States has been particularly addressed by W. Gordon, who was regularly misunderstood in that regard⁶⁷. In a later paper⁶⁸, W. Gordon distinguishes two categories of justifications for *fair use*: the market failure or malfunction, when the market cannot license the use due to high transaction costs, and the market limitation when non-economic values prevent to rely solely on the market and on economics to enable the use, thereby justifying a rule of exception. The exception will fall in the second category if the exception pursues public interests that cannot be overcome by leaving the market decide on the use. Then the beneficiary of the exception should be transferred some control over the use⁶⁹.
- 51 Both the European and the international lawmakers refer to public interest as a key justification of copyright exceptions⁷⁰. This motive should imply that the relationship between the existence of the exception and the market, but also between the condition of the exception and the market, should be tackled with due care.
- 52 Therefore, a criterion of market substitution should not be the only guide to draw the boundaries of an exception, even though the triple test includes the consideration of an adverse market effect. We will come back to the assessment of the three-step test later on.

b.) Shortcomings of e-lending licensing

- 53 Another reason not to entrust e-lending completely to publishers and copyright owners is the different 'product' that publishers are offering to library patrons and its shortcomings compared to a publicly organised lending.
- 54 Relying only on the market to deliver e-books to library readers could potentially dictate unreasonable terms and conditions to libraries or transform public lending into another commercial service provided by the publishers. Apparently, this is not the case right now and all studies on the models of e-lending rather show an apparently balanced relationship between libraries, publishers and intermediaries and conditions that seem reasonable and fair both for libraries and for readers. In the United States, though, where the commercial model of e-lending is more developed, some concerns have been voiced about the independence of libraries from the intermediaries and the infringement of some key principles and values applied by libraries, notably concerning privacy issues⁷¹ and some terms imposed by the publishers to the intermediaries⁷². For instance, Amazon had achieved a deal with Overdrive that is the leader platform for e-lending in US libraries according to which a reader will receive an hyperlink towards the website of Amazon where the book she has borrowed would be available for sale. This will also enable Amazon to know which Kindle owners are library borrowers and possibly, which types of books they like to read, which is a very valuable information for the leader in the e-book market. This entails some processing of personal data of libraries patrons that would be strictly regulated under the European Union data protection law. Libraries have also a tradition of being very protective of the privacy of their readers.
- 55 Another consequence of leaving e-lending to the market is that it could limit the content available

for e-lending to e-books that are licensed for that purpose by publishers and would prevent to some extent libraries from deciding which books should be offered to their readers⁷³. Some publishers are also reluctant to allow e-lending by libraries and have not developed e-lending models yet.

- 56 E-lending also change the legal position of libraries. Traditional lending does not require any intervention from the right holder or intermediary. Libraries buy books from publishers, bookstores or specialised intermediaries and become full owners of those books. Even if the act of lending has to be authorised or compensated, the ownership of the copy by the library gives it some autonomy in the lending activities. The overall picture of e-lending is radically different. E-books are acquired under licensing conditions and digitally transmitted to libraries⁷⁴. They are usually not 'bought' and no transfer of ownership occurs at the benefit of the libraries. That explains that in the United States, e-lending could not be developed on the ground of the first sale doctrine⁷⁵ but that exclusive rights of copyright regained their primacy.
- 57 E-books are acquired by libraries from publishers or intermediaries that have emerged to play the role of 'e-books aggregators'. Models of purchase differ greatly depending on the type of the digital product, from electronic journals, scientific publications or textbooks to more mainstream e-books. Vendors propose either an outright purchase, that will result in the downloading of the e-book by the library, or a subscription model where e-books are stored on the intermediary's platform and can be downloaded by the user when the book is checked out. In all cases, a license agreement is entered into and defines the applicable terms of use, that are usually embedded in the digital file by digital rights management (DRM) features. In most cases, the library does not actually 'buy' books but acquires access to a platform and a number of book titles from various publishers.
- 58 Such recourse to a platform is useful for all the parties involved. Publishers, especially the smaller ones, are saved the cost of developing and operating a dedicated platform and technological tools (such as the DRM needed to secure the terms of use). Likewise, libraries do not have to develop a platform to make e-books available to their users. The users of the library can then access and search the titles covered by the license through a single interface, whatever the library they are subscribed to, and get access to e-book in a format compatible with their e-reader.
- 59 However, this change of model has consequences for libraries as the book remains in control of the intermediary or platform and largely escapes from library choices or control. The terms of use are enforced by digital rights management systems

embedded by publishers and intermediaries and not anymore by the rules and governance of the libraries⁷⁶. More importantly, not all published books are available for lending, but only the titles available as e-books (that will certainly increase in the future to cover the whole catalogue of publishers), formatted to a non-proprietary format⁷⁷ and compatible with the platform⁷⁸ (which in theory could limit the offer compared to the offer of traditional lending).

- 60 These differences rooted in the technical features of the digital format and digital transmission, are both a source of concern for publishers that fear that e-lending will potentially undermine their emerging business models related to e-books, and a new landscape where the legal rules and the traditional roles of libraries and publishers do not fit in the same way as for public lending. The case initiated by the Dutch libraries equally reflects such concern. To a similar end, the European Association of Libraries, EBLIDA, is advocating the adoption of "Fair Licensing Models" for e-lending⁷⁹.

2. Towards a public e-lending limitation to copyright

- 61 Adopting an exception for e-lending, probably in the form of a statutory license with fair compensation for authors, could be justified by the public interest that underlies the provision of access to works that is one key mission of libraries. No market failure happens here as the market is capable to organise and license e-lending, but the copyright limitation would be explained by a market limitation, for normative reasons related to the central role of public libraries.

a.) The form of limitation

- 62 The current system of lending is not conceived strictly as an exception in the *acquis communautaire*. The directive 1992/100, then codified in 2006, affirms the exclusive right of lending of authors and related rights owners, then allows Member States to reduce it to a right of remuneration. In a last movement, it also permits to national legislation to exempt certain public institutions from the payment of some remuneration.
- 63 The enactment of a limitation to the exclusive right is thus left to the discretion of national laws and could take several forms: a right of remuneration granted to authors, a legal license with fair compensation, or with no compensation for exempted libraries.
- 64 From a legislative point of view, the situation is exactly the reverse of the exceptions listed in the article 5 of the directive 2001/29. There, the

parameters and boundaries of the exception are imposed to the Member States that cannot extend the exception but could restrict its scope even further. Revising some exception of that list entails to spell out the details of the conditions of the exception that the national law should conform to, in order to increase harmonisation and ensure that the objective of the exception be attainable. Public lending right is slightly different. The conditions that are enumerated in the directive 2006/115 (as to the beneficiaries, the aim of the making available) are not strictly speaking related to the exception that Member States can opt for, but pertain to the definition of what lending is. It is only indirectly that they become conditions of the limitation/exception when the Member States decide not to implement the public lending right as an exclusive right. Precise conditions for the lending are then determined at national level with no overall European guidance.

65 As a consequence, the decision to extend the regulatory frame of lending to off-site lending (should this option be chosen) will probably require a legislative intervention that might need to transform the system of an exclusive right that can be qualified and attenuated by the Member States into a limitation of copyright and related rights with precise conditions. This will have some effect on the principle of subsidiarity and on the principle of a high protection of copyright and related rights that should not be neglected. Another target for revision might be the Information Society Directive as the off-site lending is most often considered as an act of making available covered by that later directive. Therefore, creating an exception to such right could be done by inserting a new exception of the list of article 5. However it would create a hybrid system of lending divided into two EU directives.

b.) The scrutiny of the three-step test

66 Whatever the legislative route taken, compliance with the three-step test should be addressed. The first criterion of a “special case” consists in verifying whether the exception or limitation corresponds to a clearly defined case and pursue some particular objectives⁸⁰. All opinions converge on the view that the requirement stems from a qualitative understanding and favours exceptions that are of public interest⁸¹. As regards the digital public lending, there is no doubt that public libraries act in the public interest when offering access to works to their readers. Public lending right is furthermore restricted to not-for profit institutions and should not aim at any direct or indirect economic or commercial advantage, which pleads in favour of the “special case”.

67 As to the possible harm to normal exploitation of works, it cannot be contested that public lending

has an impact on retail sales of books as readers can have access to books without buying them. However, this individual and potential impact of each act of lending needs to be substantiated and extended to an assessment of the overall impact of lending activities, including e-lending, on the market for e-books and their normal exploitation.

68 It might seem contradictory to admit that the market is capable to provide works for e-lending, as demonstrated by current collaborations between publishers and libraries, and afterwards verify whether e-lending by libraries does not interfere with the normal exploitation of works. Yet public lending right is a peculiar case, particularly when considering its extension to e-lending. Indeed most copyright exceptions authorize acts of reproduction or communication to the public that are ancillary to another legitimate activity. For instance, works are reproduced to enable their preservation by libraries, extracts of works are communicated to pupils to illustrate teaching or a work is transformed to perform a parody. The provision of the work is authorised under the exception to enable a broader legitimate activity. Comparatively, the very purpose of lending is to provide the work to the user and is thus in direct confrontation with the exploitation of the work on the market. Its normal effect is to replace the acquisition of the work. Users get access to works by public lending and are dispensed then to buy the work (even though they might still buy the work after having read it by a library loan).

69 Public lending by libraries aims at providing an alternative way of getting access to published works for reading, viewing, research, private study, or enjoyment. The assessment of the effect of the exception on the market and normal exploitation of copyrighted works is hence delicate, as some market substitution will necessarily flow from public lending. It is not sufficient, then, to affirm that borrowing a book avoids buying it and would necessarily decrease sales of that book⁸², for the very effect of public lending is to act as an alternative to the market. The economic assessment of the impact of public lending should, instead, focus on the overall competition between lending and retail market⁸³. The activities of lending by libraries should not go as far as making the access to books and other copyrighted works through libraries more convenient compared to access from the regular market for such content. The possibility for the copyright owners to deliver the work for lending is therefore not enough to preclude the public lending by libraries under the limitation of the exclusive right (with or without compensation). The lending activities by libraries could not conversely, due to their ease for the users, avert the public from buying works from commercial platforms and publishers.

70 This is why any extension of the public lending right to e-lending should carefully weigh its conditions to mitigate this impact on the market for books and reduce the possible attractiveness of e-lending over an acquisition of the work on the market⁸⁴.

71 The last test consists of the absence of an unreasonable prejudice to the legitimate interests of the right holder. With regards to digital public lending, the prejudice towards the right holders, as already explained, seems to be justified by the public interest the public libraries pursue. That being said, as for the analogue world and in order not to raise discrimination between analogue works and digital works, right holders should perceive remuneration for the public lending exception⁸⁵. Other conditions could apply to e-lending, if governed by a copyright limitation, so as to accommodate the legitimate interests of copyright owners, such as the imposition of release windows or embargo period, during which books could not be subject to lending in order to leave some head start to the market.

c.) The conditions of the limitation and the constraints of lending

72 The assessment of the three-step test and the extent of the substitution effect between lending and buying a book will depend on what e-lending actually allows readers to do.

73 In traditional public lending, there are differences between borrowing a physical book at a public library and buying it that still tilts the balance towards bookshops for the readers who can afford to buy a book; for instance:

- the need of a library membership;
- the need to physically go to a library during its opening hours to check out and, most of all, to return the book by its due date;
- the unavailability of books for lending due to simultaneous demands by other readers, to the number of copies owned by the libraries, or to the application of an embargo period. Getting the last novel of Harry Potter at the time of its public release might be easier in a bookshop than in a library;
- the number of simultaneous readers/listeners/viewers of the same book/CD/DVD depends on the number of copies of the work owned by the library, which diminishes the harm to the market for the work;
- the sometimes poor quality of books that have been frequently borrowed;

- the limited collection of the library, compared to the possibility to order any book from its publisher;
- the lack of unlimited possession and ownership of the book, which suggests that the comfort of reading it is not as great as that for an acquired book, due to the deadline for returning the book, or the impossibility to annotate the book or keep it for further reference.

74 Some of those differences between lending and buying, also called ‘frictions’, might be attenuated or may well disappear for e-books and on-line delivery⁸⁶. For instance, the journey to the library’s premises is not required anymore as the e-lending services will be available 24/7, and no specific act of returning the book will occur if it is automatically disabled at the expiration of the lending term. Due to their electronic format, e-books can be sent to several readers simultaneously, hence reducing the wait for the book to be available. Another consequence of the digital format is that e-books will not wear out by the number of readings. Finally, buying a book gives possession of a tangible good to its acquirer, whereas borrowing a book from a library is only for a limited time. Even though the same difference exists between a purchased e-book and a borrowed e-book, the immateriality of the e-book might reduce the perception of such a difference, as the acquisition of e-books give few elements of possession to the buyer, as well. From a legal perspective, the provision of an e-book by download could be defined not as a sale⁸⁷ but as the provision of a service, and no transfer of ownership would occur⁸⁸.

75 Therefore, in terms of comfort, the gap between e-lending and buying an e-book might be reduced, which would ultimately have an impact on sales if the modalities of e-lending are not constrained. This justifies to imposing some conditions on e-lending to maintain its lower attractiveness.

76 The extension of public lending privilege enjoyed by libraries in most Member States with regards to e-lending should consider these tensions and mimic, to some extent, the frictions brought by lending a tangible book that makes it only subsidiary to its acquisition on the market. E-lending should not be made as easy, in terms of comfort and ease, as downloading an e-book from a commercial website.

77 A number of constraints are already applied to the conditions of use in order to replicate such “frictions” in the e-lending developments based on licensing, with the objective to mitigate the impact that lending could have on the normal market for books and e-books. They are comprised of:

- *a limited duration*: this is a defining feature of lending that should apply for e-lending, as well;

- *the limitation of one user per title*: this is the model of one book / one user that prevails on current e-lending services. Libraries can only lend the book to one user at a time for each license it has concluded with the publisher or platform. It does create waiting lists, making the e-lending less attractive than the acquisition of the book at online bookstores. This could be a condition of a copyright limitation for e-lending;
 - *emulation of deterioration*: some providers of e-books force libraries to renew their license after a certain number of loans to replicate the deterioration of a paper book. This condition is not well-accepted by libraries. Its objective is dubious, as the price for an e-book could, instead, reflect the greater number of uses and loans without any loss of quality;
 - *recourse to technical protection measures*: e-books are products that have been developed and marketed with embedded DRM. Without such a technical protection, the e-lending initiatives developed between libraries and publishers would not have been possible. The digital format of an e-book exposes it to further copying, manipulation, and transmission. Therefore, securing and limiting the lending on-line should be aided by technical measures that prevent printing, copying, and further lending, and that enforce the principle of a limited duration by disabling the access to the book at the expiration of the term. If e-lending is authorized by a copyright limitation, some technical protection could be imposed to the libraries benefiting from the protection, even though that would create some difficulty and cost for libraries in implementing e-lending. The scope of technically prohibited acts might depend on the type of work (e-book, music or audio-visual file) and on the type of libraries. For instance, one can imagine that borrowing a scientific book for research or study from a research or academic library could allow for printing or copying of limited portions or making notes that could be then extracted from the book;
 - *application of an embargo or windows release period before a work can be available for e-lending*: the principle of a prohibition to lend the work during some period after its commercial release is applied in many national laws on public lending right. The idea is also known in the exploitation of audio-visual works that applies successive dates of availability from the release of the movie in theatres, in DVDs to VOD services. As 75% of the revenues yielded by a book are generated in the first six months after its publication⁸⁹, an embargo period of a few months makes the commercial exploitation of a work prevail. New e-books will not be immediately available on libraries' websites for download, and a significant part of readers will not wait for public lending to get access to their favourite authors. The fixation of an availability date applies in the e-lending models in many countries. For instance, in the United States, the publisher Penguin requires a delay of 6 months before making e-books available to libraries. In Sweden, the embargo is about 3 or 4 months and could be extended to 12 months; as in the Netherlands, it may vary from one to three years⁹⁰.
- 78 This principle has some downsides, though. Such windowing has namely been increasingly given up for audio-visual works, as the lack of availability of new releases has resulted in more piracy. However, a key difference between movies and e-books is that the film was not available in a legal downloadable format months after its release in cinemas. The first exploitation of a book would be in an e-book format that could be lawfully acquired by a reader. In the United States, the inclusion of recently published materials for e-lending has contributed to increase the demand from the public⁹¹. Besides, the rule of embargo might not be justified in all cases, namely for scientific works whose e-lending in academic and research libraries could occur sooner as such loans, as seen above, are not in the same competing relationship with sales.
- 79 Beyond those constraints that should reduce the impact of a limitation of exclusive right for public e-lending, and make this avenue to gain access to works only subsidiary to the market, the traditional conditions applicable to public lending would apply, as well, in terms of definitions of libraries benefiting from the limitation, the eligible type of works (only books or other types of works), and the modalities of a remuneration to rights owners⁹².
- 80 Digital libraries are also potentially transnational while libraries normally cater to the needs of the local population. When making e-books available on-line, they would offer their services to the whole world. That explains that current e-lending pilot experiments are restricted either to registered members of a library or to residents of a country. This requirement applies, for instance, in the Norwegian e-lending project in which the Norwegian literature of the 20th century is available on-line for lending to any resident of Norway upon verification of his or her IP address⁹³. This restriction to residents of a country or likely users of a local library even though it negates the non-territorial dimension of the Internet, could be justified by the cultural promotion and social objectives of public lending, as well as by the language of the cultural content proposed for lending. It could be imposed through a secure log-in.

- 81 A last remark pertains to the challenge of giving some autonomy to libraries to perform e-lending services in a technical context that impedes, to some extent, such autonomy. As said above, e-books are released in a DRM-protected format that secures the work on an authorised device and to an authorised user with no possibility of further installation on another e-reader. This makes it difficult for libraries to undertake acts of reproduction, distribution, and making available autonomously. Extending a possible existing limitation to e-lending, the exception might be vain if it cannot be exercised by the libraries without the collaboration of publishers or intermediaries. For the sake of technical compatibility, the exception might become irrelevant, and recourse to a licensed copy might be the sole option.
- 82 Such limitation to copyright should hence impose on publishers the provision of e-books in a format enabling their being made available on-line by libraries. That does not mean that such e-books will be devoid of any protection against further use. A non-proprietary or open format does not mean an unprotected format. At least the possibility of making the work available to several users successively should be possible. To achieve such an objective, the solution of the article 6(4) of the directive 2001/29 on copyright in the information society could be applied by analogy. This provision encourages the voluntary initiatives of rights holders to allow for some authorised uses of their works, despite the presence of DRM, and requires that Member States provide some remedies for the beneficiaries of the exceptions frustrated by DRM in lack of voluntary measures by rights holders⁹⁴. Publishers could be incited to provide interoperable and platform-neutral e-books to public libraries in order to be integrated in their information systems and be capable of online access by the public and reading by with many applications and e-readers.
- 83 A recent document of the International Federation of Libraries (IFLA) on the Principles of e-lending licensing further insists that eBook licensing/purchase options must respect copyright limitations and exceptions available to libraries and their users in national law, namely the copying of a portion of the work, the reformatting of the work for preservation purposes if licensed or purchased for permanent access or to enable access for people with print disabilities⁹⁵. This raises the issue of the contracting over copyright exceptions. But, fundamentally, this demand underlines that libraries are now increasingly acquiring e-books in licensing terms with the objective of making them available through lending and might have no other copies on which they can undertake their other tasks of preservation or archiving.

E. Conclusion

- 84 Libraries undergo dramatic changes in the digital environment and dream of an extended ambit to enhance accessibility of their collection that could challenge the models of exploitation by rights holders. Libraries used to be only limited competitors to the normal acquisition of works, as works could only be consulted on the site of the institution, or through public lending limited in time and availability. By making works available on-line, libraries could become cultural entrepreneurs, competing with copyright owners or providing users a substitute to gain access to works. To some extent, the lines between libraries' activities and on-line commercial exploitation of works can be seen as blurring, except for the different motive that still distinguishes both activities. This renewed confrontation between the public interest of preserving knowledge and access thereto and the protection of copyright and related rights owners and of the normal market for works, entails some reassessment of the dividing line between the exclusive rights and the limitations in favour of libraries. It would be too simple to entrust the market to provide cultural content to the public, as it would obliterate a key mission of libraries that is to provide works to all, irrespective of their financial means, age, or social status.
- 85 Copyright is not only a market creature. It is fundamentally rooted in the public sphere where works should circulate and provide meaning for all members of society⁹⁶. True, the shift to digital format entails new risks and fears, but digital works should not be taken away from democratic imperatives that force us to maintain some access thereto that would not be mediated by the market and the copyright owners. Copyrighted works are not mere commodities. Particularly at a time when rising precariousness and poverty in a Europe in crisis means, for an increasing number of people, saving the cost of culture to ensure more basic needs, the risk of creating a commodified culture that only the rich could afford would lead to an unjust fracture.
- 1 See www.informatieprofessional.nl/nieuws/9848-proefproces-om-uitlenen-van-ebooks-door-bibliotheken.html.
 - 2 Dutch Court refers preliminary questions on the lending of e-books to ECJ, *Future of Copyright Blog*, 4 September 2014, <http://www.futureofcopyright.com>.
 - 3 This definition is taken from R. van der Noll, K. Breemen, V. Breemen, B. Hugenholtz, M. Brom & J. Poort, *Online uitlenen van e-books door bibliotheken. Verkenning juridische mogelijkheden en economische effecten*, in opdracht van het Ministerie van Onderwijs, Cultuur en Wetenschap, Amsterdam, 2012, www.ivir.nl/publicaties/poort/Online_uitlenen_van_e-books.pdf, p.2.
 - 4 In the Amazon model, the 'lending' is not bound by a limited duration but one borrowed book can only be replaced by a new one when returned.

- 5 Other activities can be legally assimilated to lending, such as interlibrary loans or lending for an exhibition, as they imply the transfer of a tangible copy of the work for a limited duration. However, they have been excluded from the legal definition of public lending in the copyright context. See recital 10 of the Directive 2006/115 on Rental and Lending, that provides that lending “should not include making available between establishments which are accessible to the public”.
- 6 Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental and lending right and on certain rights Related to copyright in the field of intellectual property (codified version), *OJ*, L 376 of 27 December 2006, p. 8.
- 7 Recital 10 excludes from the lending (and the rental) right certain acts of making available such as for example “making available phonograms or films for the purpose of public performance or broadcasting, making available for the purpose of exhibition, or making available for on-the-spot reference use”.
- 8 J. Krikke, “Council Directive 92/100/EEC (Rental and Lending Right Directive) of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property”, in Th. Dreier and B. Hugenholtz (ed.), *Concise European Copyright Law*, Alphen aan den Rijn, Kluwer Law International, 2006, p. 244.
- 9 V.-L. Benabou, *Droits d’auteur, droits voisins et droit communautaire*, Bruxelles, Bruylant, 1997, n° 501 who explains that this condition excludes from the scope of the directive private lending which is not subject to the exclusive rights of the authors.
- 10 Article 1(4) of the Proposal for a Council Directive on rental right, lending right, and on certain rights related to copyright, COM(1990) 586 final. See M Walter & S. Von Lewinski, *European Copyright Law, A commentary*, Oxford, Oxford University Press, 2010, n° 6.1.30.
- 11 Article 6 « Derogation from the exclusive public lending right Member States may derogate from the exclusive right provided for in Article 1 in respect of public lending, provided that at least authors obtain a remuneration for such lending. Member States shall be free to determine this remuneration taking account of their cultural promotion objectives.
- Where Member States do not apply the exclusive lending right provided for in Article 1 as regards phonograms, films and computer programs, they shall introduce, at least for authors, a remuneration.
- Member States may exempt certain categories of establishments from the payment of the remuneration referred to in paragraphs 1 and 2 ». See the developments of M Walter & S. Von Lewinski, *op. cit.*, n° 6.5.8 and followings.
- 12 See The Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the Public Lending Right in the European Union, 12 September 2002, COM(2002) 502 final. For an analysis of the transpositions of the public lending right in a dozen of Member States, see J.-P. Triaille et al., *Study on the application of directive 2001/29/EC on copyright and related rights in the information society*, Study commissioned by the European Commission, October 2013, p.343-345.
- 13 **Report from the Commission of 12 September 2002 to the Council, the European Parliament and the Economic and Social Committee on the public lending right in the European Union**, *op. cit.*, n° 3.3. See also the history of this compromise as related by M. Walter & S. Von Lewinski, *op. cit.*, n° 6.5.1.-6.5.6.
- 14 E.C.J., 26 October 2006, C-198/05, *Commission / Italy*, ECR, 2006, I-107; E.C.J., 26 October 2006, C-36/05, *Commission / Spain*, ECR, 2006, I-10313; E.C.J., 6 July 2006, C-53/05, *Commission / Portugal*, ECR, 2006, I-06215.
- 15 E.C.J., 30 June 2011, *VEWA*, C-271/10, ECR, 2011, I-5815.
- 16 M. Walter & S. Von Lewinski, *op. cit.*, n° 6.1.16.
- 17 Ch. Alleaume, “Le droit de prêt public (en France et au-delà)”, *Propri. intell.*, 2004, n° 12, p. 726.
- 18 See the comparative analysis in J.-P. Triaille, *op. cit.*, p. 343 et seq.
- 19 See the following studies or a comprehensive overview of the e-lending situation in Europe and beyond: IDATE Consulting, *Etude sur l’offre commerciale de livres numériques à destination des bibliothèques de lecture publique*, Study elaborated for the French Ministry of Culture and Communication, Final Report, 2013, www.culturecommunication.gouv.fr/Disciplines-et-secteurs/Livre-et-lecture/Actualites/Etude-IDATE-sur-les-livres-numeriques-en-bibliotheque, 79 p.; R. van der Noll et al., *Online uitlenen van e-books door bibliotheken*, *op. cit.*; D. O’Brien, U. Gasser & J. G. Palfrey Jr., *E-books in Libraries : A Briefing Document Developed in Preparation for a Workshop on E-lending in Libraries*, Berkman Center Research Publication, n° 2012-15, 2012, <http://ssrn.com/abstract=2111396>, 29 p.
- 20 D. O’Brien, U. Gasser & J. G. Palfrey Jr., *op. cit.*, p. 8.
- 21 *Ibidem*, p. 10.
- 22 Some publishers do sell e-books to libraries and allow them to provide them directly to their members, but the proportion of sales is rather small compared to licensing and remote access for libraries.
- 23 IFLA, *Les fondements du prêt de livres électroniques (E-books)*, 2012, www.ifla.org/news/ifla-releases-background-paper-on-e-lending, p. 7.
- 24 R. VAN DER NOLL ET AL., *Online uitlenen van e-books door bibliotheken*, *op. cit.*, p. 5.
- 25 As explained by IFLA, *Les fondements du prêt de livres électroniques (E-books)*, *op. cit.*, p. 7: « in effect, the typical “in perpetuity” purchase of an eBook through a distributor such as OverDrive using this model only will provide access on an ongoing basis as long as the library maintains a relationship with the distributor or, indeed, as long as the distributor continues to operate ».
- 26 R. van der Noll et al., *Online uitlenen van e-books door bibliotheken*, *op. cit.*, p. 6.
- 27 P. Whitney, *EBooks and Public Lending Right in Canada*, submitted to the Public Lending Right Commission, 2011, www.canadacouncil.ca/en/council/research/find-research/2011/ebooks-and-public-lending-right, p. 12.
- 28 M Walter & S. Von Lewinski, *op. cit.*, p. 277.
- 29 See for a discussion of the different arguments, R. van der Noll et al., *Online uitlenen van e-books door bibliotheken*, *op. cit.*, p. 32-33.
- 30 COM (90) 586 final, p. 4.
- 31 R. van der Noll et al., *Online uitlenen van e-books door bibliotheken*, *op. cit.*, p. 35.
- 32 M Walter & S. Von Lewinski, *op. cit.*, « Chapter 6: Rental and lending rights directive », n° 6.1.28.
- 33 J. Reinbothe & S. von Lewinski, *The EC Directive on Rental and Lending Rights and on Piracy*, London, Sweet and Maxwell, 1993, p. 41-42.
- 34 Green Paper on Copyright and Related Rights, COM(1995), 382 final.
- 35 *Ibidem*, p. 58.
- 36 *Ibidem*.
- 37 *Ibidem*.
- 38 *Ibidem*, p. 59.

- 39 Communication from the European Commission, Follow-up to the Green Paper on Copyright and Related Rights in the Information Society, 20.11.1996, COM(1996) 568 final, p. 12.
- 40 M Walter & S. Von Lewinski, *op. cit.*, n° 6.1.29.
- 41 R. van der Noll et al., *Online uitlenen van e-books door bibliotheken*, *op. cit.*, p.37.
- 42 See recital 28 *in fine* (The distribution right provided for in this Directive is without prejudice to the provisions relating to the rental and lending rights contained in Chapter I of that Directive) and 29 (The question of exhaustion does not arise in the case of services and on-line services in particular. (...) Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter which are services by nature).
- 43 W. Sieghart, *An independent Review of E-Lending in Public Libraries in England*, 2013, www.gov.uk/government/publications/an-independent-review-of-e-lending-in-public-libraries-in-england, 24 p.
- 44 Department for Culture, Media & Sport, *Government Response to the Independent Review of E-Lending in Public Libraries in England*, 2013, www.gov.uk/government/publications/an-independent-review-of-e-lending-in-public-libraries-in-england.
- 45 Article 43 of the Digital Economy Act 2010, www.legislation.gov.uk/ukpga/2010/24/contents.
- 46 The definition of book has been modified as follows : “book” includes (a) a work recorded as a sound recording and consisting mainly of spoken words (an “audio-book”), and (b) a work, other than an audio-book, recorded in electronic form and consisting mainly of (or of any combination of) written or spoken words or still pictures (an “e-book”).
- 47 The Act states that the notion of “lent out” (a) means made available to a member of the public for use away from library premises for a limited time, but (b) does not include being communicated by means of electronic transmission to a place other than library premises.
- 48 That modification entered into force in June 2014.
- 49 Department for Culture, Media & Sport, *op. cit.*, p. 5-7.
- 50 See S. Dusollier, *Droit d’auteur et protection des œuvres dans l’univers numérique – Droits et exceptions à la lumière des dispositifs de verrouillage des œuvres*, Bruxelles, Larcier, 2005 n° 279 et seq.
- 51 This might read as an excessive statement as libraries will also need space on their shelves and might get read of some books quite regularly. Their collection will be based on the selection of the librarian and not offer everything that exists on the market. The development of on-line retailers, with a larger catalogue and with longer period of availability (and unlimited availability fo e-books) has also changed the comparison with libraries.
- 52 See IFLA, *IFLA Principles for Library eLending*, August 2013, www.ifla.org/node/7418, 3 p.
- 53 W. Sieghart, *op. cit.*, p.8.
- 54 P. Lescure, *Mission « Acte II de l’exception culturelle », Contribution aux politiques culturelles à l’ère numérique*, 2013, www.culturecommunication.gouv.fr/Actualites/Missions-et-rapports/Rapport-de-la-Mission-Acte-II-de-l-exception-culturelle-Contribution-aux-politiques-culturelles-a-l-ere-numerique, p. 185.
- 55 Except if the ECJ decides to extend its UsedSoft decision allowing transfer of second-hand digital copies of works to other works than software, which is probable. The market could also mitigate that untransferrability of the digital book, as demonstrated by Amazon that allows its readers to lend a book to a friend for 14 days (with the advantage of solving the problem of the friend who never returns your book!).
- 56 See the famous *Alice for iPad* by Atomic Antelope.
- 57 L. Guibault, *Copyright Limitations and Contracts. An Analysis of the Contractual Overridability of Limitations on Copyright*, The Hague, Kluwer Law International, 2002.
- 58 See the article 5(3) n of the Infosoc Directive that excludes the exceptions for works that are “subject to purchase or licensing terms”. On the interpretation of that condition, see ECJ, 11 September 2014, *Technische Universität Darmstadt*, C- 117/13, spec. §24-35; J.P. Triaille, *op. cit.*, p. 324-325.
- 59 See the analysis by M. Senftleben, *Copyright Limitations and the three-step test*, Kluwer Law International, 2004, p.181 et seq.
- 60 Report of the WTO Panel, *United States- Section 110 5) of the US Copyright Act*, 15 June 2000, WT/DS160/R, § 6.183.
- 61 *Ibidem*, § 6.188
- 62 See S. Dusollier, *op. cit.*, n° 595 et seq.
- 63 *Records of the Intellectual Property Conference of Stockholm*, Genève, OMPI, 1967, p. 112
- 64 Report of the WTO Panel, *op. cit.*, § 6.180.
- 65 W. Landes & R. Posner, “An Economic Analysis of Copyright Law”, *Journal of Legal Studies*, 1989, Vol. XVIII, p. 357 et suiv.; W. Gordon, “Fair Use As Market Failure: A Structural And Economic Analysis of the Betamax Case and its Predecessors”, *Colum. L. Rev.*, 1982, Vol. 82, p. 160; T. Bell, “Fair use v. fared use : the impact of automated rights managements on copyright’s fair use doctrine”, *N. C. L. Rev.*, 1998, Vol. 76, p. 558-618.
- 66 See B. Hugenholtz, “Fierce creatures – Copyright exemptions: Towards extinction ?”, in *Rights, Limitations and exceptions : Striking a proper balance*, Conference IFLA/IMPRIAMTUR, Amsterdam, 30-31 Octobre 1997, disponible sur <http://www.ivir.nl>
- 67 W. Gordon, “Fair Use as a Market Failure...”, *op. cit.*
- 68 W. Gordon, “Excuse and Justification in the Law of Fair Use : Commodification and Market Perspectives”, in N. Netanel & N. Elkin-Koren (eds.), *The Commodification of Information*, The Hague/London/NewYork, Kluwer Law International, Information Law Series, n°11, 2002, p. 149-192.
- 69 For a similar reasoning, see T. Dreier, “Musées, bibliothèques et archives : de la nécessité d’élargir les exceptions au droit d’auteur”, *Propr. intell.*, 2012, n° 43, p. 190.
- 70 See the Recitals of the Information Society Directive; Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled done in Marrakesh on the 27th of June 2013.
- 71 The role of Amazon in authorizing e-lending for Kindle has been regularly criticised as the commercial retailer technically seems to intervene in the operation and can thereby collect personal data of the people borrowing e-books, data related to the borrowed titles and connected to the identification of their Kindle device and Amazon account. See www.infodocket.com/2011/09/27/8350/.
- 72 <http://librarianbyday.net/2011/02/25/publishing-industry-forces-overdrive-and-other-library-ebook-vendors-to-take-a-giant-step-back/>.
- 73 IFLA, *Les fondements du prêt de livres électroniques (E-books)*, *op. cit.*, p. 7.
- 74 D. O’Brien, U. Gasser & J. G. Palfrey Jr., *op. cit.*, p. 10.
- 75 It seems improbable in the wake of the ReDigi decision of a District Court of New York (*Capital Records v. ReDigi Inc.*, S.D.N.Y., 30 March 2013, No. 12 Civ. 95) that the first sale doctrine be applied to digital products downloaded on the internet.
- 76 The extent of the negotiation capacity of libraries is difficult to assess, it could increase with time, as libraries will be more accustomed to e-lending practice.
- 77 ePub and pdf are non-proprietary formats that are accepted on most e-readers. Kindle on the contrary is a proprietary format that can only be read on Kindle and devices equipped with the Kindle application. For instance E-books are lent for Kindle

by OverDrive, one of the main e-lending platforms, due to an agreement with Amazon. It seems that part of the lending process is to be completed on the Amazon website which led to sever critics as the commercial platform processes personal data of e-borrowers.

- 78 The e-books made available for e-lending will not be generic but adapted to the conditions imposed on the lending.
- 79 EBLIDA, *European libraries and the challenges of e- publishing. An e-book policy for libraries in Europe*, May 2012, www.eblida.org/news/european-libraries-and-the-challenges-of-e-publishing.html.
- 80 Case C5/08, opinion delivered by Advocate General Trstenjak on 12 February 2009, *Infopaq International*, paragraph 135. See also Report of the WTO Panel, United States– Section 110 5) of the US Copyright Act, 15 June 2000, WT/DS160/R.
- 81 M. Senftleben, *Copyright Limitations and the three-step test*, Kluwer Law International, 2004, p. 137 ; M. Ficsor, *The Law of Copyright and the Internet*, op. cit., p. 133.
- 82 Economic studies could also assess whether users of libraries are not buying more books than non users and whether young people having acquired their reading habits in libraries will not become regular customers of bookshops and other retailers.
- 83 In a recent study on e-lending commissioned by the Dutch government (see R. VAN DER NOLL ET AL. *Online uitlenen van e-books door bibliotheken*, op. cit., spec. p.44), economists have distinguished four impacts of lending on the market that should be assessed: (1) the effect of a development of e-lending through licensing which would create new licensing revenues for publishers and authors; (2) the direct substitution between the buying of an e-book through an online commercial platform and its borrowing through public lending ; (3) the indirect positive effect of e-lending on sales of e-books, due to the increased diffusion of e-books in the general public; (4) the indirect substitution between e-lending and sale of published books (as tangible goods). The ‘direct substitution’ factor is understood as an investigation as to whether the lending of an e-book by a public library will offer an attractive alternative to its acquisition on the retail market. It will certainly for some people offer an alternative to the market, but the real question is whether, in general and not only theoretically for one book, the e-lending offer by public libraries would have a significant impact on the overall market. On that basis, an economic study should assess the real competition between libraries and booksellers and the overall effect of public lending on retail sales, notably by taking into account the attractiveness of lending versus buying.
- 84 In terms of the economic impact of e-lending, the differences between types of libraries could also matter. Indeed the situation of research and academic libraries is rather specific compared to general public libraries. Such libraries are the main market of scientific publishers, in contrast with general publishers who rely mostly on the retail market. This might have an effect of the extent of the substitution effect, as the readers of the research libraries do not constitute the major market for scientific publishers. Fears of piracy are also higher for mainstream books than for scientific ones and academic libraries have a long time habit of managing electronic resources licenses by scientific publishers, two reasons that might give more confidence to scientific publishers to allow for e-lending in research and academic libraries.
- 85 Such remuneration should compensate the harm done to the authors as reminded by the European Court of Justice (see E.C.J., 30 June 2011, *VEWA*, C-271/10, ECR, 2011, I-5815).
- 86 It will depend on the technical modalities that will be chosen for the e-lending model.
- 87 That could be challenged by the decision in the *UsedSoft* case (E.C.J., 3 July 2012, C128/11, *UsedSoft*), if one considers that its reasoning is not limited to computer programs but could be applied as well to e-books or other types of digital content provided online with no limited duration of use. In such a case, on a legal point of view, there would be some difference between a sale of an e-book and a lending in terms of ownership.
- 88 The transfer of ownership will depend of the terms of the contract, but it could be perceived in any case as not similar to the transfer of property in a physical object.
- 89 R. van der Noll et al., *Online uitlenen van e-books door bibliotheken*, op. cit., p. 28-29.
- 90 IDATE Consulting, op. cit.
- 91 IDATE Consulting, op. cit.
- 92 On the objectives, beneficiaries and other elements of a possible exception, see J.P. Triaille, op. cit., p.362 et seq.
- 93 K. Vevele, *Welcome to the library Anytime – Anywhere*, presentation at the workshop organized by FEP, Helsinki, 10th May 2013.
- 94 On that provision, see S. Dusollier, “Exceptions and Technological Measures in the European Copyright Directive of 2001”, *I.L.C.*, 2003, vol. 34, p. 62-83.
- 95 IFLA, *IFLA Principles for Library eLending*, op. cit.
- 96 On that argument see S. Dusollier, *Droit d’auteur et protection des oeuvres dans l’univers numérique*, op. cit., n°273 et seq.

Privacy as human flourishing

Could a shift towards virtue ethics strengthen privacy protection in the age of Big Data?

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Abstract: Privacy is commonly seen as an instrumental value in relation to negative freedom, human dignity and personal autonomy. Article 8 ECHR, protecting the right to privacy, was originally coined as a doctrine protecting the negative freedom of citizens in vertical relations, that is between citizen and state. Over the years, the Court has extended privacy protection to horizontal relations and has gradually accepted that individual autonomy is an equally important value underlying the right

to privacy. However, in most of the recent cases regarding Article 8 ECHR, the Court goes beyond the protection of negative freedom and individual autonomy and instead focuses self-expression, personal development and human flourishing. Accepting this virtue ethical notion, in addition to the traditional Kantian focus on individual autonomy and human dignity, as a core value of Article 8 ECHR may prove vital for the protection of privacy in the age of Big Data.

Keywords: Privacy, Big Data, Negative Freedom, European Convention on Human Rights

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A. Introduction

1 With the recent revelations by Snowden about the NSA, privacy and the value of privacy have once again moved to the center of public debate. While some argue that privacy is dead, others feel that it is now more than ever that privacy needs protection. What all agree upon is that the concept and value of privacy need careful rethinking, as the traditional approach to privacy seems unfit to address the threats posed by Big Data, cloud computing and profiling. Big Data, for the purpose of this study, is defined as gathering massive amounts of data without a pre-established goal or purpose, about an undefined number of people, which are processed on a group or aggregated level through

the use of statistical correlations. A reformulation of privacy and a shift in its underlying value would not be a novelty; privacy has changed its meaning, definition and scope many times. It is quite clear that in different epochs,¹ in different cultures² and in different situations,³ privacy plays a different role. What makes privacy even more difficult to grasp is that its value and meaning differs from person to person; what one would qualify as a violation of his privacy, the other would disregard as unimportant and trivial. Consequently, the value of privacy is difficult to grasp and define. Moreover, in contrast to autonomy, freedom, or dignity, which are commonly ascribed an intrinsic value, in literature,

privacy is almost without exception described as an instrumental value.⁴ Although there is no agreement among scholars in terms of which value privacy can be best defined, generally two concepts play an important role, namely negative freedom and autonomy.

- 2 The right to privacy was arguably first articulated by Warren and Brandeis, who coined the right to privacy as ‘the right to be let alone’.⁵ In the theories of Warren and Brandeis, as well as their contemporaries, the right to privacy is mostly described as instrumental to negative freedom. The right, for example, to be let alone in the privacy of one’s home ensures that one is free from interference from others, both individuals and the state. The ‘right’ to privacy is, in this sense, perhaps better defined as the ‘duty’ not to violate the privacy of others. Only if there are sufficient and concrete reasons for infringing on someone’s privacy- for example, by entering the home- can a person or state legitimately breach the protected sphere of negative freedom. This concept of privacy as instrumental toward negative freedom was dominant in the older privacy literature, but has many adherents nowadays, as well. Not surprisingly, privacy was and still is often defined as a doctrine related to the protection against abuse of power. For example, states were held not to infringe the privacy of individuals without sufficient reasons, without such interference being necessary, proportionate and effective. If they did disregard these requirements, they were simply held to abuse their powers.⁶
- 3 Another constant factor in privacy theories has been the suggestion that the protection of the private sphere is necessary for the development of the autonomous individual. Theories that link the respect for privacy to the development of autonomous individuals are dominant in the current privacy debate. They are defended predominantly by liberal scholars, who focus on the notion of control and informed consent of the individual. For example, Beate Roessler has built a theory around the argument that respect ‘for a person’s privacy is respect for her as an autonomous subject.’⁷ This focus on control and autonomy has been predominantly, though not exclusively, developed in privacy theories that focus on the processing of and control over personal information (informed consent).⁸ In medical cases, such as relating to abortion and euthanasia, this principle is known as ‘decisional privacy’; reference is often made to the decision by the US Supreme Court in *Roe v Wade*, in which a woman was granted the right to abortion as part of her right to privacy and bodily integrity.⁹ Finally, reference is often made to procedural requirements, such as access to information and a right to be heard, which strengthen a person’s autonomy and ensures that he can actively steer matters which affect his private or family life.

- 4 This article will discuss how the underlying value of privacy, and its scope, has changed considerably over time under the European Convention for Human Rights (ECHR). It will argue that the ECHR acknowledges both negative freedom (section 2) and autonomy (section 3) as important underlying values when discussing cases under Article 8 ECHR. It will then stress (section 4) that in more and more cases it goes beyond these classic notions and focuses, instead, on the protection of individual or group identity, personal development, and human flourishing. Finally, it will be discussed (section 5) that although human rights are often placed in a Kantian (deontological) framework, which focuses on individual autonomy and human dignity, it might be suggested that virtue ethics, to which the notion of human flourishing is connected, is a better framework to explain the Court’s focus on issues that go beyond the protection of negative freedom and autonomy. This shift towards virtue ethics might prove vital for privacy protection in the age of Big Data, in which two fundamentals of the current paradigm are increasingly put under pressure: the focus on individual rights and on individual interests. So is the remit of the paper both an explanation of the Strasbourg jurisprudence and a discussion of the potential value of virtue ethics for privacy protection in the age of Big Data.

B. Negative freedom

- 5 The European Convention on Human Rights was adopted in 1950 and in many respects arises from the ashes of the Second World War.¹⁰

*It ‘is a product of the period shortly after the Second World War, when the issue of international protection of human rights attracted a great deal of attention. These rights had been crushed by the atrocities of National Socialism, and the guarantee of their protection at the national level had proved completely inadequate.’*¹¹
- 6 Like the Universal Declaration on Human Rights, to which the European Convention makes explicit reference in its preamble¹² and on which it is based to a large extent,¹³ the Convention is primarily concerned with curtailing the powers of totalitarian states and fascist regimes. Not surprisingly, the travaux préparatoires of both documents, reflecting the discussions of the authors of both texts, are full of references to the atrocities of the holocaust and the other horrors of the past decades.¹⁴
- 7 For example, when discussion arose whether or not to include a right to marry and found a family, several delegates were outraged by the suggestion to delete such freedom from the Convention. ‘[The] majority of the Committee thought that the racial restrictions on the right of marriage made by the totalitarian regimes, as also the forced regimentation of children

and young persons organised by these regimes, should be absolutely prohibited.¹⁵ Later, when doubts were again casted, this line was confirmed:

*'The outstanding feature of the totalitarian regimes was the ruthless and savage way in which they endeavoured to wipe out the concept of the family as the natural unit of society. If we delete paragraphs 10 and 11, I submit that we are accepting the validity of that philosophy. We are declaring that the Nazis were justified in everything they did to prevent some human beings from perpetuating their race and name.'*¹⁶

- 8 The principle concern of both the Declaration and the Convention is to protect individuals from the arbitrary interference with their rights and freedoms by intrusive governments. This rationale is even more prominent in the Convention than in the Declaration, because the former document only embodies so called 'first generation' human rights.¹⁷ While first generation or civil and political rights require states not to interfere with certain rights and freedoms of their citizens in an arbitrary way, socio-economic rights such as the right to education, to property and to a standard of living require states not to abstain from action, but to actively pursue and impose such freedoms by adopting legal measures or by taking active steps.¹⁸
- 9 Consequently, the original rationale for the Convention as a whole was laying down negative obligations for national states and granting negative freedom to citizens. Of all articles contained in the Convention, these rationales are most prominent in the right to privacy under Article 8 ECHR. Already under the Declaration, it was this Article that was originally plainly titled 'Freedom from wrongful interference'.¹⁹ Likewise under the Convention, the right to privacy was originally only concerned with negative liberty, contrasting with other qualified rights in which positive freedoms are implicit, such as a person's freedom to manifest his religion or beliefs (Article 9), the freedom of expression (Article 10) and the freedom of association with others (Article 11). Likewise, the wording of Article 8 ECHR does not contain any explicit positive obligation, such as, for example, under Article 2, the obligation to protect the right to life; under Article 5, to inform an arrested person of the reason for arrest and to bring him or her promptly before a judge; under Article 6, the obligation to ensure an impartial and effective judicial system; and under Article 3 of the First Protocol, the obligation to hold free elections.²⁰
- 10 The original rationale behind the right to privacy was granting the citizen negative freedom in vertical relations, that is the right to be free from arbitrary interferences by the state. Along this line, the Court still holds that the 'essential object of Article 8 is to protect the individual against arbitrary action by the public authorities'.²¹ Indeed, this focus still forms a substantial part of the case law of the ECtHR, among

others in relation to police investigations, when wire-tapping telecommunication or controlling other means of correspondence and when officials enter private houses in order to arrest a habitant or to seize certain documents or objects.²² It also plays a role when a case 'concerns the security of the state and the democratic constitutional order from threats posed by enemies both within and without.'²³ Such cases regard, for example, general surveillance measures by secret service organizations²⁴ or matters in which the territorial integrity of the state is at stake.²⁵ In addition, restrictions may be imposed on the privacy of prisoners, their right to correspondence, and the freedom to have regular contact with family members.²⁶ Finally, the protection of negative freedom in vertical relations plays a role when a state wishes to expel an alien who has been convicted for criminal activities, and has established a family life in that country, from its territory for reasons of maintaining order and preventing crime.²⁷

- 11 However, the Court has gradually diverged from the original approach of the Convention authors by accepting both positive obligations for national states and granting a right to positive freedom to individuals under the right to privacy. The element of positive liberty was adopted quite early in a case from 1976: 'For numerous anglo-saxon and French authors the right to respect for "private life" is the right to privacy, the right to live, as far as one wishes, protected from publicity. [H]owever, the right to respect for private life does not end there. It comprises also, to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfillment of one's own personality.'²⁸ Likewise, from very early on, the Court has broken with the strictly limited focus of the authors of the Convention on negative obligations and has accepted that states may under certain circumstances be under a positive obligation to ensure respect for the Convention.²⁹
- 12 Consequently, while the original focus of the European Convention, in general, and the right to privacy, in particular, relied on negative obligations for states and the negative freedom of individuals, this rationale has weakened over time. The element of positive obligations for the state has brought with it that states are held, among others, to ensure adequate protection of privacy in horizontal relationships; for example, in relation to the prevention of violence and the protection of privacy in terms of data protection and family relations.³⁰ However, most prominently, it plays a role in matters in which the freedom of expression is used to infringe upon the privacy or reputation of another.

- 13 As discussed, the European Convention is based to a large extent on the Universal Declaration and likewise, Article 8 ECHR is based on Article 12 UDHR, which holds: ‘No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.’³¹ Although all other concepts that appear in Article 12 UDHR are transferred to the European Convention, the right to protection against attacks upon one’s reputation and honor was explicitly rejected from the scope of Article 8 ECHR. The motive for this was that the authors of the Convention focused on vertical relationships, while most cases concerning reputation revolve around horizontal disputes. The protection from the attacks upon a person’s honor and reputation by or through the media consequently fell outside the scope of Article 8 ECHR. Instead of accepting it as a subjective right of the individual under the right to privacy, it was transferred to paragraph 2 of Article 10 ECHR, so that it became one of the grounds on the basis of which states could legitimately restrict the freedom of expression.³²
- 14 This sharp distinction has been honored in the early case law on Article 8 ECHR, in which it was held time and again that ‘that the right to honour and good name as such is not protected’ under the scope of the right to privacy.³³ However, gradually, the Court has accepted that under certain circumstances, a person may successfully put forward a case in which the respect for his reputation and honor is the central element. First, by gradually accepting the doctrine of positive obligations, the Court has held that States may be under the obligation to limit the freedom of speech in order to ensure respect for a person’s reputation and honor; for example, by guaranteeing a fair balance between the different interests of the individuals involved.³⁴ In more recent cases, the Court has come to accept that individuals may invoke their right to privacy when the behavior of public authorities affect their legitimate concerns; for example, when courts or governmental organizations make public certain private and delicate details about their behavior, mental status, or physical disabilities.³⁵
- 15 Finally, from 2007 onwards, the Court accepts matters under the scope of Article 8 in which the applicant complains of an infringement with his honor and reputation in horizontal relations, either because the state did not allow him to prevent certain publications or because he was unable to get sufficient compensation for defamatory statements. In the first case in which it overturned its earlier case law and diverged from the intentions of the Convention authors, that of *Pfeifer v. Austria* (2007), the Court referred to its earlier case law and held ‘that a person’s reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological

integrity and therefore also falls within the scope of his or her “private life”. Article 8 therefore applies.’³⁶ In *A. v. Norway* (2009), the Court finally extrapolated its views to the right to honor: ‘In more recent cases decided under Article 8 of the Convention, the Court has recognised reputation and also honour as part of the right to respect for private life. In *Pfeifer*, the Court held that a person’s reputation, even if that person was criticised in the context of a public debate, formed part of his or her personal identity and psychological integrity and therefore also fell within the scope of his or her “private life”. The same considerations must also apply to personal honour.’³⁷ Consequently, besides the protection of negative freedom in vertical relations, Article 8 ECHR also protects citizens from the actions and expressions of other citizens and/or companies.

C. Autonomy

- 16 Besides negative freedom, autonomy has become an important value underlying the right to privacy. This value plays a role especially in relation to three topics, namely data protection, medical issues and the fairness of custodial disputes. One of the rationales underlying the right to data protection, though far from the only one, is that of individual autonomy, connected to the notion ‘informed consent’. Under the EU’s Data Protection Directive, personal data may only be processed on a legitimate basis, such as the unambiguous consent of the data subject, which is defined as any freely given specific and informed indication of a person’s wishes by which the data subject signifies his agreement to personal data relating to him being processed.³⁸ These data must be processed in a safe and transparent manner and the processing must be necessary and proportionate.³⁹ Finally, the data subject has a number of rights, among others relating to being informed about the processing of his data, access to these data and the rectification, erasure or blocking of his personal data.⁴⁰ In the proposed General Data Protection Regulation, this focus on access and individual control will be strengthened, inter alia, by tightening the conditions for consent and by introducing subjective rights to control data, such as a right to be forgotten and a right to data portability, allowing individuals to request the deletion of data and to transport their Facebook profile to another social platform.⁴¹
- 17 Although Article 8 ECHR does not contain a reference to the protection of personal data, following the living instrument doctrine, the Court has been willing to accept a number of the notions essential to the right to data protection under the scope of the Convention.⁴² It has accepted, for example, that storing personal data, such as transcripts of telephone conversations, photos, hospital records or

bodily material, triggers the application of Article 8 ECHR, it has held that if a large collection of sensitive personal data is in government hands, in principle, the individual has a right to access such information and the Court has laid down certain limits on the use and transfer of personal data by and to third parties. Similar to most data protection rules, the Court has accepted that personal data may only be collected for specific and legitimate purposes⁴³ and has accepted a positive obligation for states to lay down adequate data protection rules.⁴⁴ Moreover, following the line that private life also protects one's public and professional life (explained in more detail later), the Court has been willing to apply Article 8 ECHR when it regards processing public data and professional communications,⁴⁵ which has allowed it to find that the systematic collection and storing of data by security services on particular individuals constituted an interference with these persons' private lives, even if that data was collected in a public place or concerned exclusively the person's professional or public activities.⁴⁶

- 18 The Court has accepted a number of notions connected to the idea of informed consent and control over data, among others by recognizing the right to be informed about covert surveillance, to have access to personal data, to correct them if false or outdated, and, under certain circumstances, to delete them. 'Also the Court recognized the right of individuals to have control, to a certain extent, of the use and registration of their personal information (informational self-determination). In this respect, the Court has considered and recognized access claims to personal files, claims regarding deletion of personal data from public files, claims from transsexuals for the right to have their 'official sexual data' corrected. Moreover, the Court has insisted on the need for an independent supervisory authority as a mechanism for the protection of the rule of law and to prevent the abuse of power, especially in the case of secret surveillance systems. In other cases, the Court demanded access to an independent mechanism, where specific sensitive data were at stake or where the case concerned a claim to access to such data. In *Peck*, in *Perry* and in *P.G. and J.H.* the Court acknowledged the basic idea behind the fundamental principle of purpose limitation in data protection, viz that personal data cannot be used beyond normally foreseeable usage. In *Amann and Segerstedt-Wiberg* the Court demanded that governmental authorities only collect data that is relevant, and based on concrete suspicions. Finally, in the *Rotaru v. Romania* judgment of May 4, 2000, the Court acknowledged the right to individuals to financial redress for damages based on a breach of Article 8 caused by the data processing activities of public authorities.⁴⁷
- 19 Consequently, autonomy and informational self-determination have been accepted as core rationales

underlying Article 8 ECHR in cases regarding the processing of personal data. There are also other cases in which these notions are considered essential, such as in the medical sphere. Such claims often focus on either the bodily or psychological integrity of a person.⁴⁸ It has been stressed by the Court that notions of 'personal autonomy and quality of life' underpin Article 8 ECHR in the medical sphere⁴⁹ and it has held, inter alia, that 'the importance of the notion of personal autonomy to Article 8 and the need for a practical and effective interpretation of private life demand that, when a person's personal autonomy is already restricted [i.e. in medical cases], greater scrutiny be given to measures which remove the little personal autonomy that is left.'⁵⁰ This notion has been applied to a number of cases in the medical sphere. In a case which regarded the involuntary sterilization of a woman, the Court referred to the 'disregard for informed consent' and found a violation of Article 8 ECHR.⁵¹ In similar fashion, the notion of informed consent has played an important role in cases that regard the choice of the mother to get an abortion.⁵²

- 20 The Court has held that the desire to have a dignified end also falls under the scope of Article 8 ECHR. It emphasizes that, in these matters, self-determination and personal autonomy are essential principles for which regard should be had.⁵³ It accepted in this case that although 'no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.'⁵⁴ Moreover, the Court has found that a gynaecological examination was imposed on the applicant 'without her free and informed consent', leading them to find a violation of Article 8 ECHR⁵⁵, and it has 'underlined that it is important for individuals facing risks to their health to have access to information enabling them to assess those risks. It has considered it reasonable to infer from this that the Contracting States are bound, by virtue of this obligation, to adopt the necessary regulatory measures to ensure that doctors consider the foreseeable consequences of a planned medical procedure on their patients' physical integrity and to inform patients of these consequences beforehand, in such a way that the latter are able to give informed consent'.⁵⁶
- 21 Consequently, the rationale of self-determination, informed consent and autonomy are accepted in the Court's case law on data protection and medical issues. A final example of cases in which these principles play an important role is in judicial cases that regard custodial disputes. In these disputes, often between parents, it is the government's task to ensure a fair process; on numerous occasions, the Court deals with these elements not under Article 5 and 6 ECHR (guaranteeing the right to a

fair process), but directly under Article 8 ECHR. 'It is true that Article 8 (art. 8) contains no explicit procedural requirements, but this is not conclusive of the matter. The local authority's decision-making process clearly cannot be devoid of influence on the substance of the decision, notably by ensuring that it is based on the relevant considerations and is not one-sided and, hence, neither is nor appears to be arbitrary. Accordingly, the Court is entitled to have regard to that process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by Article 8 (art. 8). [] The decision-making process must therefore, in the Court's view, be such as to secure that their views and interests are made known to and duly taken into account by the local authority and that they are able to exercise in due time any remedies available to them.'⁵⁷

- 22 Most cases in which these procedural requirements play a role regard parental authority, such as with regard to the custody over a child by divorced parents or the placing in a foster home of children living in an unstable environment. It follows from the fact that the child's interest always prevails that if a parent is separated for an extensive period from his child, it is often not in the interest of the latter to be reunited with either his father, mother or both. From this fact follows an increased importance of a speedy and resolute process, since lengthy procedures may lead to the *de facto* determination of a case.⁵⁸ Moreover, a fair balance should be struck between the interests of the mother and the father. Although the Court has been reluctant to focus on substantive rights in such matters, it has granted both parents, *inter alia*, the right to be heard, to be informed in full about existing reports and documents, and to have their interests weighed in a fair and balanced manner.⁵⁹ The parents should thus be equally and fully informed and have an equal opportunity to defend their case before the national authorities and courts. The right to take part in the decision-making process regarding the future of his child enhances a person's autonomy and provides him with a possibility to exert control over and be informed about one's private and family life.
- 23 In the case law of the Court, however, these principles have also been increasingly adopted under the right to privacy in other matters, such as the loss of one's home due to destruction or expropriation,⁶⁰ cases in which immigrants are expelled⁶¹, and cases that regard the quality of the living environment. For example, the Court has held that where 'a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals'

rights and to enable them to strike a fair balance between the various conflicting interests at stake. The importance of public access to the conclusions of such studies and to information which would enable members of the public to assess the danger to which they are exposed is beyond question. Lastly, the individuals concerned must also be able to appeal to the courts against any decision, act, or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process.⁶² Consequently, under Article 8 ECHR, citizens now have a right to actively steer and influence decisions that affect their lives in general.

D. Human flourishing

- 24 Although negative freedom and autonomy are thus important fundamentals underlying the right to privacy in the European Convention on Human Rights, in more and more recent cases, the Court focuses on the right to individual and group identity, the development of one's personality and the right to human flourishing. The Court has provided protection to a range of activities under Article 8 ECHR that it sees as essential to the right to personal development.⁶³ The obligation to wear prison clothes has been held to interfere with a prisoner's private life due to the stigma it creates.⁶⁴ The refusal of the authorities to allow an applicant to have his ashes scattered in his garden on his death was held so closely related to his private life that it came within the sphere of Article 8 of the Convention 'since persons may feel the need to express their personality by the way they arrange how they are buried'.⁶⁵ The Court has accepted that a person has a right to live and work in a healthy living environment.⁶⁶ And so one could go on. It goes too far to discuss all these cases. Four matters will be discussed instead: the protection of and freedom to develop one's personal identity, minority identity, relational identity and public identity.
- 25 *Personal identity*: As a general principle, the Court has held that birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life as guaranteed by Article 8 ECHR.⁶⁷ It has on numerous occasions emphasized that respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for one's personality.⁶⁸ Thus, the Court has accepted in its case law that the right to privacy includes, *inter alia*, the right to obtain information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents.⁶⁹ The vital interest people have in

receiving the information necessary to know and to understand their childhood and early development may require states to adopt legislation facilitating a person's quest. Moreover, an adult may be forced to submit himself to paternity proceedings, for example, through DNA-tests, and sperm-banks may under certain circumstances be held to reveal the identity of a sperm-donor.⁷⁰

- 26 Besides the right to establish details of one's identity, it has been accepted that the right to respect for private life ensures a sphere within which everyone can freely pursue the development and fulfillment of his personality. 'The right to develop and fulfill one's personality necessarily comprises the right to identity and, therefore, to a name'.⁷¹ In forming, creating, and maintaining one's identity, the Court has held that personal names may be of pivotal importance. Consequently, it has assessed cases under the scope of Article 8 ECHR in which a spouse complained that she had to adopt the surname of her husband, even though she was known by her maiden name in her inner circle and in professional relationships. The Court has also accepted that, under certain circumstances, children have the right to choose their forename or their surname, and, finally, the Court has granted that individuals have the right to alter their birth-given name.⁷²
- 27 The right to alter one's name has been of special importance to those wanting to change their identity, such as transsexuals. In this sphere, the Court has accepted that Article 8 ECHR not only provides the individual with protection of his bodily integrity, the right to privacy also guarantees the psychological and moral integrity of the person, which encompasses aspects of his physical and social identity.⁷³ Deriving from this notion, the Court has accepted the right of transsexuals to personal development and to physical and moral security in the full sense. It has strongly condemned European countries that did not accept the newly adopted identity and gender of transsexuals, leading to the situation in which post-operative transsexuals lived in an intermediate zone as not quite one gender or the other.⁷⁴ The Court has argued that in the absence of legal recognition of this newly adopted identity, either through a change in social appearance or through medical procedures, a 'conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety'.⁷⁵ Besides being able to adopt a new name reflecting the new gender, the Court has accepted that governments have a positive obligation to recognize a transsexual's new gender in official documents and official correspondence. National states need to change the gender in either the birth register or in other civil registers, among other things in order to allow transsexuals to marry

a person of the opposite sex, as some European countries prohibit same sex marriages.⁷⁶

- 28 *Minority identity*: Not only with regard to transsexuals, but more in general, the Court is hesitant to allow national laws that have the aim or effect of creating inequality among certain groups in society. The Court stresses that the respect for and the right to develop and express one's minority identity is of pivotal importance for a person to prosper and flourish. That is why, in contrast to its general approach, the Court has accepted that in this field, applicants may not only successfully complain about concrete harm and individual injury, but also about general policies and laws as such (so called *in abstracto* claims), without them having been directly applied to the applicants.⁷⁷ In this sense, these types of cases do not regard the protection of harm to an individual's negative freedom or autonomy, as the laws did not have any concrete effect on his private life, but they may hamper a person's interest in exploring his identity or developing his personality, which may be hampered through a social or legal stigma.
- 29 For example, a case was assessed in which the national legislator had adopted a prohibition on abortion and the applicant neither was pregnant nor had been refused an interruption of pregnancy. Still, the Court accepted that the legal regulation of abortion as such had to be considered an interference with the applicant's private life, so that she could successfully claim to be a victim.⁷⁸ Likewise, when a difference was made in national legislation between the inheritance rights of children born in and those born out of wedlock, the Government pointed out that the laws had not been applied to the applicants nor would they be in the foreseeable future and that they could consequently not claim to be a victim. The Court, however, held that the applicants were challenging a legal position, that of an unmarried mother and of children born out of wedlock, which affected them, according to the Court, personally.⁷⁹
- 30 This doctrine of victimship through the mere existence of a legal provision has been applied specifically with regard to the regulation of homosexual practices. In general, such regulations have been found to interfere with the private life of individuals due to the general stigmatization of homosexuality, leading to reluctance to disclose their sexual orientation and having a chilling effect in relation to engaging in sexual activities and developing their personality to the fullest. The Court has held, for example, that 'the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8 par. 1. In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his

private life: either he respects the law and refrains from engaging – even in private with consenting male partners – in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution.⁷⁸⁰

- 31 Finally, the Court has also held that under certain circumstances, states may have a positive obligation to adopt wider liberties and freedoms for minorities in order to allow them to fully experience and develop their minority identity. For example, the Court has accepted that caravans and other mobile homes fall under the concept of ‘home’, which has had important consequences for Gypsies and other nomadic groups,⁸¹ who generally do not possess a fixed shelter or home.⁸² Subsequently, Article 8 ECHR has been interpreted to provide protection to the traditional life styles of minority groups.⁸³ Inter alia, the Court has been willing to accept ‘that the applicant’s occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle. This is the case even though, under the pressure of development and diverse policies or by their own choice, many Gypsies no longer live a wholly nomadic existence and increasingly settle for long periods in one place in order to facilitate, for example, the education of their children. Measures affecting the applicant’s stationing of her caravans therefore have an impact going beyond the right to respect for her home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition.’⁸⁴
- 32 What is more, states may be under the positive obligation to take active measures to respect and facilitate the development of these minority identities. The Court has emphasized the ‘[] emerging international consensus amongst the Contracting States of the Council of Europe, recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves, but also to preserve a cultural diversity of value to the whole community.’⁸⁵ This right to respect for minority life requires states to accept ‘that special consideration should be given to their needs and their different lifestyle, both in the relevant regulatory framework and in reaching decisions in particular cases’ in order to allow them to fully explore, develop and express their identity, and that governments ‘should pursue their efforts to combat negative stereotyping of the Roma’, among others, because ‘any negative stereotyping of a group, when it reaches a certain level, is capable of impacting the group’s sense of identity, the feelings of self-worth, and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group’.⁸⁶
- 33 *Relational identity*: Furthermore, not only is the formation of one’s identity and the development of one’s personality essential under Article 8 ECHR, but also particularly pertinent to the right to privacy under both the Declaration and the Convention is that it provides protection for family life. Although the Declaration and especially the Convention primarily contain individual rights, the protection of the family sphere is best described as a ‘relational’ right which can only be enjoyed in association with others.⁸⁷ This element was heavily discussed by the authors of both documents, as the right to privacy was considered the most ‘private’ of all human rights and the relationships with the outside world would, according to some, be asymmetric to the right to protection of one’s private life, home, and correspondence.⁸⁸ Moreover, this element was seen as redundant as both documents contain a separate provision, Article 16 UDHR and Article 12 ECHR, laying down the right to marry and to found a family.⁸⁹ However, the protection of the family life was finally accepted as part of both Article 12 UDHR and Article 8 ECHR both because it was seen as essential to the right to privacy and because, in contrast to Article 16 UDHR and Article 12 ECHR, it granted protection to the already-existing family life, instead of founding it, emphasizing the character of a negative right.
- 34 Following the doctrine of the Convention as a living instrument, the Court has also provided protection under Article 8 ECHR to non-traditional families, including the relationship between non-biological parents and bastard or adoptive children, between parents and children who do not live together, and it has also provided protection to family life between children and grandparents or third parties, if there exist special emotional and psychological bonds.⁹⁰ Parents also have a right to maintain a family relationship with their children and states may have a positive obligation to ensure *de facto* contact between parent and child.⁹¹ The right to have access to one’s child is highly regarded by the Court, as it has held that the mutual enjoyment by parent and child of each other’s company constitutes a fundamental element of family life, which is pivotal to the mutual exploration and development of their personalities.⁹² Prisoners have also been granted rights to maintain and develop family ties; for example, to have regular visiting hours to see their spouse and children. The Court has stressed that the right to establish and to develop relationships with other human beings also extends to the sphere of imprisonment⁹³ and that Article 8 ECHR requires states to assist prisoners as far as possible in creating and sustaining ties with people outside prison in order to promote prisoners’ social rehabilitation.⁹⁴ Such ties may extend beyond that of a traditional family, and includes contact and correspondence with friends and professional relationships. According to the Court, the respect for private life may include the encouragement of and

assistance to a prisoner to lead a good and useful life, to maintain his self-respect and a sense of personal responsibility, and to establish and maintain such relations with persons and agencies outside prison as may best promote the interests of his family and his own social rehabilitation.⁹⁵ Furthermore, although not yet accepting it as a subjective right under Article 8 of the Convention, the Court has expressed its favorable opinion towards prison systems that allow for conjugal visits.⁹⁶

- 35 The positive rights of citizens and positive obligations for states under Article 8 have led to a fast marginalisation of Article 12 ECHR, which is increasingly redundant. Article 8 provides protection to homosexual couples and families founded through adoption or artificial insemination, which are denied protection under the right to marry and found a family.⁹⁷ Subsequently, the right to found a family and establish legal modes of cohabitation are primarily approached from the perspective of Article 8, such as the desire to found a family through *in vitro* fertilisation⁹⁸ and in cases regarding the legal incapacity to marry.⁹⁹ Finally, not only do states have a negative obligation to protect the right to found a family under Article 8, they may under certain circumstances have a positive obligation to facilitate artificial insemination; for example, if this is a prisoner's only way to fulfill his desire to found a family with his spouse.¹⁰⁰
- 36 *Public identity*: The Court stresses that the right to establish and develop relationships with other human beings, especially in the emotional field for 'the development and fulfillment of one's own personality',¹⁰¹ is not limited purely to the private realm¹⁰² or the protection of one's sexual identity¹⁰³ as 'it would be too restrictive to limit the notion [of private life] to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle.'¹⁰⁴ The Court has held on numerous occasions that the right to privacy also provides protection to the full fulfillment and development of a person's identity in the public sphere. The Court has increasingly suggested that the private life and the public life, the private sphere and the public sphere and private activities and public activities are so intrinsically intertwined that both are provided protection under the scope of the right to privacy if this is essential to the development of an individual's public identity. Thus, especially in the case of a person exercising a liberal profession, his work in that context may form part and parcel of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given moment of time. The Court has held that a search conducted at a private individual's home which was also the registered office of a company run by him amounted to an interference

with his right to respect for his home within the meaning of Article 8 of the Convention.¹⁰⁵

- 37 Similarly, the Court has accepted that correspondence over business telephones and conversations regarding professional affairs fall under the scope of the right to privacy.¹⁰⁶ This is so, according to the Court, because private life 'encompasses the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature'¹⁰⁷ and because Article 8 of the Convention 'protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world'.¹⁰⁸ Consequently, the notion of private life embodied in Article 8 ECHR includes 'activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world'.¹⁰⁹
- 38 This notion of personal development in external relationships and professional affairs has led the Court to accept many cases which solely or primarily regard professional conduct under the right to privacy. Among others, it has held that restrictions imposed on access to certain professions may have a significant impact on a person's private life¹¹⁰ and dismissal from office has been found to interfere with the right to respect for private life.¹¹¹ For example, the Court has held that the dismissal 'from the post of judge affected a wide range of his relationships with other persons, including the relationships of a professional nature. Likewise, it had an impact on his "inner circle" as the loss of job must have had tangible consequences for material well-being of the applicant and his family.'¹¹² Consequently, the protection of the working space and the personal development in the professional sphere have been accepted under the realm of privacy as protected by Article 8 ECHR.

E. Analysis

- 39 This article has discussed which value underlies Article 8 ECHR. Although there is no agreement among scholars in terms of which value privacy can be best defined, generally two concepts play an important role, namely negative freedom and autonomy. Negative freedom is the situation in which one is free from being acted upon by others. Autonomy revolves around a form of control, active influence or informed consent. In this article, three points have been made. First, that the origins of the Convention as a whole and the right to privacy in particular lie in defending a concept of negative freedom in vertical relations, that is between the state and the citizen. In this line, the Court still

holds that the ‘essential object of Article 8 is to protect the individual against arbitrary action by the public authorities’. This rationale is most apparent in security-related cases-- when wire-tapping telecommunication, when officials enter private houses in order to arrest a habitant or to seize certain documents or objects, with regard to general surveillance measures by secret service organizations, or matters in which the territorial integrity of the state is at stake. However, the Court has gradually diverged from the original approach by the Convention authors by accepting both positive obligations for national states and granting a right to positive freedom to individuals under the right to privacy. Consequently, states are held, among others, to ensure adequate protection of privacy in horizontal relationships. Most prominently, this development plays a role in matters in which the freedom of expression is used to infringe upon the privacy or reputation of others. Although the right to reputation and honor had been explicitly omitted from Article 8 ECHR by the authors of the Convention, in its case law from 2007 onward, the Court has nevertheless accepted it as a subjective right falling under the protection of privacy.

- 40 The second point is that more and more emphasis has been placed on the concept of autonomy. Although the Convention does not contain a right to data protection as such, the Court has accepted many of the core concepts that enhance the individual’s control over his personal data under the scope of Article 8 ECHR. Moreover, in matters in the medical sphere, such as relating to euthanasia, abortion and sterilization, the Court has stressed that the notions of ‘personal autonomy and quality of life’ underpin the right to privacy. ‘Informed consent’ is the basic concept with which it works. Finally, the ECtHR has also accepted that Article 8 ECHR contains implicit procedural requirements that enhance a person’s autonomy and control in (national,) judicial or administrative judgments that affect his private or family life. These requirements play an especially important role in cases revolving around parental authority and custody. The Court has granted parents, among others, the right to be heard, to be informed in full about existing reports and documents, and to have their interests weighed in a fair and balanced manner.
- 41 Finally, it has been argued that more and more cases concern a form of positive freedom, such as the right to explore, develop and express one’s identity, to found a family and maintain and develop family relations, to develop contacts with others, to experiment with one’s personality, and to flourish as a human being both in private and in professional environments. These matters seem to go beyond the traditional concepts of autonomy and negative freedom. For example, the idea that private life ‘encompasses the right for an individual to form

and develop relationships with other human beings, including relationships of a professional or business nature’, that it also ‘protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world’ and that activities of a professional or business nature fall within the scope of the right to privacy as it is in ‘the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world’, seem too far removed from negative freedom and autonomy, or even human dignity, to be able to explain the Court’s approach in a satisfactory manner.

- 42 It has been suggested that the notion of human flourishing, a key concept in virtue ethics, might instead be able to provide a solid theoretical explanation for the broad approach taken by the ECtHR.¹¹³ Human flourishing is directed at the optimal personal development a person can attain – it therefore knows virtually no boundaries, as almost everything could be instrumental to maximum flourishing, especially as what it is for a human to flourish may differ from person to person. For example, John Finnes has suggested that human flourishing embodies the protection of, inter alia, life itself; for example, in relation to health and safety, knowledge, excellence in work and play, friendship and self-expression.¹¹⁴ Consequently, it should be noted that human flourishing does not only focus on positive freedom, but sees negative freedom and autonomy-- for example, through safeguarding health and security-- as a precondition for personal development. This broad list of categories already comes quite close to the different matters the Court has provided protection to under the scope of Article 8 ECHR. Moreover, the specific focus on ‘the development and fulfillment of one’s own personality’, both in the private and in the public realm, seems aligned to the teleological approach of virtue ethics in which the focus lies on the inherent development toward optimal ends. Finally, the increased focus on positive obligations for the state, which already make up a substantial part of the cases concerning Article 8 ECHR, fits well in the virtue ethical paradigm, in which the state may have a duty to facilitate the human flourishing of its citizens (it might even be called its *raison d’être*). In contrast, such an active role by the state seems difficult to reconcile with the rationale of negative freedom and only in partial harmony with a focus on individual autonomy.
- 43 If it is accepted that human flourishing could provide a satisfactory explanation for the Court’s approach, this would mean that the established idea that human rights are grounded primarily in a Kantian (deontological) paradigm, which provides protection for human dignity, negative freedom, and personal autonomy, should be complemented

with the notion of human flourishing central to virtue ethics. Although Kant has often been called the father of human rights,¹¹⁵ Aristotle, the founder of virtue ethics, and virtue ethics may become a new and important addition to understanding the background, value, and scope of the right to privacy. This is not only of theoretical importance; it has practical significance for privacy protection in the age of Big Data. Adequate protection currently suffers from two important aspects of the present privacy paradigm. First, the current privacy paradigm is focused on individual rights. Second, it is focused on individual interests.

- 44 However, in Big Data processes, it becomes increasingly difficult to demonstrate harm to one's interests. Often, an individual is simply unaware that his personal data is gathered by either his fellow citizens (e.g. through the use of their smartphones), by companies (e.g. by tracking cookies), or by governments (e.g. through covert surveillance). But even if a person would be aware of these data collections, given the fact that data gathering and processing is so widespread and omnipresent, it will quite likely be impossible for him to keep track of every data processing which includes (or might include) his data, to assess whether the data controller abides by the legal standards applicable, and if not, to file a legal complaint. And if an individual does go to court to defend his rights, he has to demonstrate a personal interest, that is personal harm, which is a particularly problematic notion in Big Data processes. For example, what concrete harm has the data gathering by the NSA done to an ordinary American or European citizen? This also shows the fundamental tension between the traditional legal and philosophical discourse and the new technological reality – while the traditional discourse is focused on individual rights and individual interests, data processing often concerns structural and societal issues. Connecting these types of processes to individual harm to one's autonomy, dignity, or negative freedom proves increasingly difficult. In reality, it seems that more structural and abstract interests are at stake.¹¹⁶
- 45 Virtue ethics could provide alternatives on both points. First, as has been stressed above, virtue ethics is not focused on individual rights or claims but on virtue-duties. It thus shifts from, what is called, a patient-based theory, in which the focus lies on the one being acted upon through, for example, a privacy violation, to an agent-based theory, which assesses the behavior of the actor of, for example, a privacy violation. The correlation between rights and duties (if you have a right, I have a duty to respect it) is broken. Agents should act in a virtuous manner and possess a virtuous character, whether somebody else has a right to it or not. The focus on character is especially important in virtue ethics. Not only are the consequences of actions assessed,
- the intentions and responsibilities of the agent also play an important role. Thus, if an agent acted in a way which may be called unvirtuous, for example negligent or uninterested, without any concrete damage or harm following from it, virtue ethics may still find that person culpable.
- 46 It takes a broader perspective on the responsibilities of the agent and takes as starting point the optimal or best behavior imaginable of an agent. For the state, this might lead to a number of positive obligations, not only to avoid actual and concrete harm but also to avoid abuse of power (connected to the virtue of temperance) and to be fully transparent about the use of power (connected to the virtue of honesty). Consequently, it shifts the focus from the citizen, having a subjective right, to the state, having an obligation to make sure that it acts in a good and transparent manner. Thus, even if Big Data processes, such as the data collection by the NSA or other intelligence services, do not amount to any concrete and actual harm of citizens, they may still conflict with virtue duties if the use of power was disproportional and intransparent (which indeed seems the case with the NSA). This solves the problem, signaled earlier, that it is becoming increasingly difficult to claim and invoke an individual right in the new technological environment.
- 47 Consequently, there is a shift from rights to obligations. This obligation is principally connected not to the interests of others but to the need to act as a responsible and virtuous agent (independent of any right or claim by others). Still, this does not mean that the consequences for others are excluded from virtue ethics. If a person wants, for example, to help his handicapped neighbor (as a virtuous agent should) by mowing the lawn and, though genuinely and thoughtfully goes about, fails at it (e.g. ruins the lawn), a virtue ethical theory would not judge that agent culpable. However, if he does not learn from his mistakes and ruins the lawn a second time, he may be culpable, as 'in an important sense agent-based moralities do take consequences in account because they insist on or recommend an overall state of motivation that worries about and tries to produce good consequences.'¹¹⁷ Consequently, the agent needs to improve himself if he is genuinely concerned with producing good results; it may even be so that a particular clumsy person or a person particularly bad at a certain task (e.g. mowing the lawn) needs to abstain from acting, even though the intentions are good. Furthermore, a person should obtain sufficient information to be able to make a careful and reasoned judgment. If an agent acts without making a reasonable effort to gather relevant facts, he is not qualified a virtuous agent.
- 48 Thus, the consequences of actions and the interests of others are partially taken into account. Still, these interests are different from the traditional

interests central to privacy theories and practice. Reference can be made to Feinberg who, defining harm as a setback to interests, distinguished between two types of interests. 'According to one of these, a person's more ultimate goals and aspirations are his more important ones: such aims as producing good novels or works of art, solving a crucial scientific problem, achieving high political office, successfully raising a family []. By a quite different and equality plausible standard, however, a person's most important interests are by no means as grand and impressive as these. They are rather his interests, presumably of a kind shared by nearly all his fellows, in the necessary means to his more ultimate goals, whatever the latter may be, or later come to be. In this category, are the interests in the continuance for a foreseeable interval of one's life, and the interests in one's own physical health and vigor, the integrity and normal functioning of one's body, the absence of absorbing pain and suffering or grotesque disfigurement [].'¹¹⁸ Consequently, the first category of, what Feinberg calls, ulterior interests are interests that protect the individual's desire to attain the maximum gratifying life possible. By contrast, the second category of, what Feinberg calls, welfare interests protect everyone's concerns regarding the minimum necessities of human life.

- 49 Privacy protection has always been linked to the protection of welfare interests. It is said to protect either a person's negative freedom, autonomy, his human dignity or the 'person as a person', meaning his capacity to choose as a rational individual.¹¹⁹ These interests are the minimum conditions of a human (worthy) life, as without autonomy, dignity or respect for their rational capacity, people are treated not as humans but as animals. By contrast, human flourishing protects the individual's interests in striving for the maximum gratifying life. Not only is there a difference between the character of these two rights, there is also an important difference on the matter of defining harm. Welfare interests, those connected to the minimum standards of human life, are shared (to a large extent) by every human being. They thus contain a relatively objective and verifiable component. Ulterior interests, by contrast, differ from person to person. What person A regards as a maximum gratifying life-- for example, hiking mountains-- may sound ridiculous to person B, who's dream it is to write a novel. Ulterior interest are thus highly subjective and only the subject itself can reasonably assess whether these interests are hampered and to what extent.
- 50 Not surprisingly, many scholars increasingly focus on harm to ulterior interests, instead of welfare interests, when discussing privacy violations following from Big Data processes. Neil Richards has, for example, held that 'surveillance is harmful because it can chill the exercise of our civil liberties. With respect to civil liberties, consider surveillance

of people when they are thinking, reading, and communicating with others in order to make up their minds about political and social issues. Such intellectual surveillance is especially dangerous because it can cause people not to experiment with new, controversial, or deviant ideas.'¹²⁰ He argues that in order to protect our intellectual freedom to think without state oversight or interference, we need, what he calls, "intellectual privacy."¹²¹ Intellectual privacy protects a person's freedom to develop one's identity and personality to the fullest, by experimenting freely in private and in public, offline and online. The interests of a person to flourish to the fullest extent is clearly an ulterior interest. Richard also stresses the need for a subjective standard for determining harm, as he criticizes the American courts.

'In Laird v. Tatum, the Supreme Court held that it lacked jurisdiction over the claims that the surveillance violated the First Amendment rights of the subjects of the program, because the subjects claimed only that they felt deterred from exercising their First Amendment rights or that the government could misuse the information it collected in the future. The Court could thus declare that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.'"¹²²

- 51 On this point, the ECtHR seems to have an advantage. It grants protection to a wide variety of matters related, in general, to the development of one's personality and identity, it accepts not only the protection of welfare but also of ulterior interests and it increasingly refers to abstract harm-- for example, following from a social or legal stigma-- to determine whether complainants have suffered from particular privacy violations, and to subjective harm. A move to virtue ethics could explain and facilitate this move. Of course, such a move triggers a number of questions and remarks. - Law is about actions and consequences. How can notions such as character and virtues play a role in this? - Can amorphous creatures, i.e. legal persons such as states, have a character or be called virtuous? - Who decides what virtuous behavior is and is it not dangerous to impose on others such an ideal? - Privacy is about autonomy and negative freedom, a theory that focuses on human flourishing should simply not be called a privacy doctrine. - Law should be codifiable and enforceable, virtue ethics is neither. - As always, further research is needed to determine how far these types of critiques are valid and, if so, insurmountable. Still, it needs to be pointed out that many of these question could also be directed at the case law of the Court, as its current approach to Article 8 ECHR already includes many virtue ethical notions as discussed in this contribution.

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- 13 The authors of the Convention began their deliberation on the basis of a 'short list' of the rights and freedoms contained in the Declaration. A.H. Robertson, 'Collected edition of the 'travaux préparatoires' of the European Convention on Human Rights = Recueil des travaux préparatoires de la Convention Européenne des Droits de l'Homme. Vol. 1 Preparatory Commission of the Council of Europe Committee of Ministers, Consultative Assembly, 11 May-8 September 1949', The Hague, Nijhoff, 1975.
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Permission to Link

Making Available via Hyperlinks in the European Union after Svensson

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Keywords: Svensson, WCT, WPPT, CJEU, Making Available

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A. Introduction

- 1 Digital technologies, online communications and electronic commerce have destabilized the global copyright system. The 1996 WIPO Internet Treaties – World Intellectual Property Organization Copyright Treaty (WCT)¹ and the WIPO Performances and Phonograms Treaty (WPPT)² – were an early response to this sea change, which subsequently triggered a wave of even further-reaching implementation actions, both nationally and in other venues.
- 2 The state of the political economy and geopolitical compromises during the negotiation of the WIPO Internet Treaties, however, made the agreements that were adopted fairly agnostic about certain details and deferred some of the hard questions to member states' law-makers who were tasked with implementing the treaties.³ While the desire for certainty in international intellectual property (IP) law is understandable, especially for rights holders, leaving the resolution of complex or controversial questions to domestic law-makers and allowing the tailoring of law to economic conditions, technological developments and local priorities may ultimately be preferable to locking in premature or possibly ill-conceived international IP norms. Some eighteen years after the WIPO Internet Treaties were signed, this article looks more carefully at their implementation and interpretation
- in the EU. It examines one particular, and arguably less thematized, subset of rights and looks at the European law and practice of “making available” as a mode of communication to the public. The specific focus is on the recent case of *Svensson v. Retriever AB*,⁴ brought before the Court of Justice of the European Union (CJEU) as a preliminary ruling with regard to making available via hyperlinking, which clarified some of the critical issues in this context.
- 3 There is no doubt that international law forms an important part of the context in which courts interpret and apply national legislation. In this sense, before turning to the specific case study, a look at the origins and contents of the WIPO Internet Treaties' provisions is essential – first, so as to understand their basic structure and flexibility, and second, to contextualize the evolution of the copyright regime and its incessant, albeit not necessarily successful, struggle to cope with the digital challenge.

B. The Origins of “Making Available” in the WIPO Internet Treaties

- 4 The 1996 WIPO Internet Treaties were adopted as “special agreements” under the Berne Convention

on Artistic and Literary Works⁵ and sought to modernize global copyright law and make it fit for the Internet age by providing “adequate solutions to questions raised by new economic, social, cultural and technological developments”.⁶ Admittedly, the goal was fairly ambitious, especially as, at the time of the treaties’ adoption, the dynamics of the digital networked space were largely unknown and there was little or no understanding of the fundamental and often disruptive ways in which digital technologies would change the conventional modes of creating, distributing, accessing, using and re-using cultural content and knowledge.⁷ The constituencies behind the treaties’ adoption, overrepresented by the entertainment industries,⁸ were largely preoccupied with other implications of digital media, such as the ability to make perfect copies, or to distribute and consume copyrighted content without the limitations of distance and space.⁹

- 5 In sync with this inherent utilitarianism and despite the rhetoric of “the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information”,¹⁰ the WIPO “treaties were intentionally far less concerned with enabling new modes of creative enterprise than preserving the existing presumptions in favor of authorial prerogative”.¹¹ Overall, and with the benefit of hindsight, it appears that, “[g]iven the unrestrained versatility of innovation in the digital arena, the WIPO Internet Treaties have fallen considerably short in what was to be their central mission: namely, to provide a relevant and credible source of norms to facilitate knowledge creation in the global digital context”.¹² It is also evident that the impact of the WIPO Internet Treaties has long been overshadowed by national implementation initiatives and the emergence of further-reaching implementation models, notably that of the *Digital Millennium Copyright Act* (DMCA)¹³ in the United States and the *Information Society Directive*¹⁴ in the European Union (EU). Such models have also been replicated in subsequent preferential trade agreements in bilateral and regional fora, in particular where industrialized countries are partners to the deal.¹⁵
- 6 Scholarly literature offers extensive coverage of the WIPO Internet Treaties, their implementation and overall effect on the conditions for creativity in the digital networked environment, paying particular attention to the introduction of technological protection measures (TPMs) and the ban on circumventing such measures, which may, in effect, have limited the scope of fair use in digital media.¹⁶ One change, however, has received comparatively less academic attention – that is, the expansion of copyright to cover merely “making available”, as opposed to copying or transmitting works and other subject matter.

- 7 This piece looks at this subset of rights as they may have crucial implications for creativity online and for the sustainability of the digital space itself.¹⁷ We deem it also important, especially considering the fuzziness of some of the WIPO Internet Treaties’ norms, to conduct not only textual and conceptual analyses of these provisions but also a jurisprudential analysis that considers the treaties’ practical impact on the outcome of litigated cases. We hope in this manner to complement the existing literature.¹⁸
- 8 Making available is mentioned in two separate articles of the WCT – Articles 6 and 8.

Article 6

Right of Distribution

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.

Article 8

Right of Communication to the Public

Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

- 9 The agreed statements accompanying Article 6 clarify that it applies, at a minimum, to copies that can be circulated as tangible objects. However, nothing prevents countries from applying the right of distribution *also* to intangible copies, as an additional and/or alternative means of providing authors the exclusive right to authorize the making available of their works.¹⁹ The WPPT provides for similar protection of performers and record makers in Articles 10 and 14, respectively – under different headings, “Right of Making Available of Fixed Performances” and “Right of Making Available of Phonograms”.
- 10 A key point about these provisions is that the particular headings under which the treaties refer to making available are not that important. Indeed, the WIPO Internet Treaties provide for a flexible approach to making available – the so-called “umbrella solution” – which permits different domestic implementations through various new or existing rights or combinations of rights. “It is important *that* treaty member states protect making available, not *how* specifically they do so”.²⁰

- 11 This constructive ambiguity facilitated an agreement between jurisdictions with different conceptions of the bundle of rights that constitute copyright, and could allow countries implementing the umbrella solution to choose to characterize making available as an authorization, communication, distribution, reproduction, or *sui generis* activity, or some combination of those possibilities.²¹
- 12 The following section looks at the case law of the CJEU on the qualification of communication to the public in general, and then pays particular attention to the long-awaited judgment in the Case C-466/12, *Nils Svensson and others v. Retriever AB*. This allows us to put the entire development of the EU case law on the topic into perspective, and to sketch out the potentially far-reaching repercussions for digital copyright law.

C. “Making Available” in EU Copyright Law

- 13 The European Union has implemented the making available provisions of the WIPO Internet Treaties through the *Information Society Directive*. The relevant Article 3 thereof reads as follows:

Article 3

Right of communication to the public of works and right of making available to the public other subject-matter

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

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

(b) for phonogram producers, of their phonograms;

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

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

- 14 Upon this basis, the CJEU has over the years sought to delineate the boundaries of the right of communication to the public and to establish a coherent interpretation across the Member States’ jurisdictions. Interestingly, prior to *Svensson*, it had

not encountered a case that dealt directly with the question of whether hyperlinking constitutes a communication to the public in the sense of Article 3 of the *Information Society Directive*; a number of other cases have nonetheless dealt with communication to the public through other technological means. In the following section, we summarize the court’s practice and, in this sense, also explain the jurisprudential context of *Svensson*.

I. Relevant case law prior to *Svensson*

- 15 It is admittedly hard to write a clear summary of the CJEU’s practice on communication to the public, as there have been some disparities and issues that have yet to be clarified, especially as different cases refer to different technological platforms. An early seminal case in the jurisprudence is Case C-306/05, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*²² that concerned a hotel that made broadcasting signals available over the hotel’s closed network. There, the CJEU adopted a broad interpretation of “communication to the public” under the *Information Society Directive*. It argued that “while the mere provision of physical facilities does not as such amount to communication [...], the distribution of a signal by means of television sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes communication to the public within the meaning of Article 3(1) of that directive”.²³ Further, the Court pointed out that the “private nature of hotel rooms does not preclude the communication of a work by means of television sets from constituting communication to the public within the meaning of Article 3(1)”.²⁴ In a more recent case, *SCF Consorzio Fonografici*, however, the CJEU maintained that the free-of-charge broadcasting of phonograms in private dental practices does not fall under the definition of “communication to the public”, as the number of persons was small, the music played was not part of the dental practice, the patients “enjoyed” the music without having made an active choice, and in any case patients were not receptive to the music under the dental practice’s conditions.²⁵ Equally important, the CJEU found in the case of *BSA* that the television broadcasting of a graphical user interface (GUI)²⁶ does not constitute communication to the public because the viewers are passive and do not have the possibility of intervening.²⁷
- 16 Overall, despite some fuzziness in the case law, it appears that several elements must be present to establish a “communication to the public” in accordance with Article 3(1) of the *Information Society Directive*, which is, as we saw earlier, an almost *verbatim* implementation of Article 8 of the WCT.²⁸ First, there must be a “transmission” of a protected

work, although this transmission can happen irrespective of the technical means.²⁹ This has been made clear by the *Information Society Directive* itself, which explicitly states in the preamble that the, “... right [of communication to the public] should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover *any such transmission or retransmission of a work* to the public by wire or wireless means, including broadcasting. This right should not cover any other acts”.³⁰

- 17 Second, the communication must be an additional service that is not caught merely by coincidence by the users, and also aims at making some profit. Later case law has clarified, however, that “a profit-making nature does not determine conclusively whether a retransmission [...] is to be categorised as a ‘communication’ within the meaning of Article 3(1) of Directive 2001/29”, nor is the competitive relationship between the organizations.³¹
- 18 Third, it appears that the courts require a “fairly large number”³² of potential listeners or viewers. The Court has recently also clarified that a one-to-one service, such as streaming, qualifies, too, as it does not prevent a large number of persons of having access to the same work at the same time.³³
- 19 There also has to be a so-called “new public”. In *SGAE*, the Court referred to Article 11 bis (1)(ii) of the Berne Convention and noted that the transmission is to be “made to a public different from the public at which the original act of communication of the work is directed, that is, to a new public”.³⁴ The Court further specified in the case of *Football Association Premier League* that this is a public “which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public”.³⁵ It may well be that the original public is, in fact, broader than the new one (but it would not have had access without an intervention). This assertion has been maintained by a series of cases.³⁶
- 20 In *Airfield* – a case concerning satellite package providers – the Court stressed that “[s]uch activity [...] constitutes an intervention without which those subscribers would not be able to enjoy the work’s broadcast, although physically within that area. Thus, those persons form part of the public targeted by the satellite package provider itself, which, by its intervention in the course of the satellite communication in question, makes the protected works accessible to a public which is additional to the public targeted by the broadcasting organisation concerned”.³⁷
- 21 This last criterion, however, seems to depend on the facts of the case, as the most recent CJEU judgment

in *ITV Broadcasting Ltd & 6 Ors v TV Catchup*³⁸ shows. In this case, the CJEU stated that it was not necessary to examine the requirement for a “new” public. While the Court justified such an examination in older cases, such as *SGAE, Football Association* and *Airfield*, it found the analysis irrelevant to the case at hand. The CJEU stated that, “In those cases, the Court examined situations in which an operator had made accessible, by its deliberate intervention, a broadcast containing protected works to a new public which was not considered by the authors concerned when they authorised the broadcast in question”.³⁹ The present case, however, concerned the transmission of works included in a terrestrial broadcast and the making available of those works over the Internet. The CJEU found that “each of those two transmissions must be authorised individually and separately by the authors concerned given that each is made under specific technical conditions, using a different means of transmission for the protected works, and each is intended for a public”.⁴⁰ *TV Catchup* was a swift and confident judgment by the CJEU confirming the rights of broadcasters and clearly classifying online streaming as a restricted copyright category, which requires the right holders’ authorization.⁴¹

II. Anticipating Svensson

- 22 Despite the evolution of the EU case law with regard to the scope of communication to the public, there was no clear-cut template applicable to all situations. It was, for instance, unclear how the different criteria that the CJEU has come up with related to each other,⁴² and, even more critically for our discussion, how the test applies to hyperlinking, and whether hyperlinking qualifies as the copyright-relevant act of communication to the public. The academic discourse pending the decision of *Svensson* has been intense and often controversial. The European Copyright Society (ECS), which brings together renowned scholars to discuss and critically evaluate developments in EU copyright in an effort to promote the public interest, took the opportunity offered by *Svensson* to advise the Court on its legal classification of hyperlinking.⁴³ In particular, it suggested, based on the existing case law (but before *TV Catchup*), that hyperlinking should not be qualified as a communication to the public because (i) there is no transmission involved; (ii) even if transmission is not necessary for there to be a “communication”, the rights of the copyright owner apply only to communication “of the work”, and whatever a hyperlink provides, it is not “of a work”; and (iii) the “new public” requirement is not fulfilled.
- 23 This position has been endorsed by a large body of scholarly literature – based, on the one hand, on interpretation of the law and, on the other hand,

on considerations of the vital role of hyperlinks in the architecture and the functioning of the web.⁴⁴ Developments in other jurisdictions were also largely supportive of such a standing – for instance, the US jurisprudence provides a clear precedent with regard to Internet links,⁴⁵ and recent developments in Canada go in a similar direction.⁴⁶

- 24 The International Literary and Artistic Association (*L'Association Littéraire et Artistique Internationale* – ALAI) also adopted an opinion on hyperlinking and how it affects the right of communication to the public.⁴⁷ The ALAI, however, made a different case. It argued that what really matters in finding a communication to the public is that, “(i) the act of an individual person, directly or indirectly, (ii) has the distinct effect of addressing the public, irrespective of the tool, instrument, or device that the individual has used to bring about that effect, and (iii) that elements protected by copyright or material protected by related rights thus become available to the public in a way that is encompassed by the discrete rights granted under copyright”.⁴⁸ The ALAI stresses the notion of the public and finds that links that lead directly to specific protected material, thereby using its unique URL, would fall within the framework of a copyright use. The ALAI deems this kind of linking to be a “making available” regardless of whether the link takes the user to specific content in a way that makes it clear to the user that he/she has been taken to a third-party website, or whether the linking site retains a frame around the content, so that the user is not aware that he/she is accessing the content from a third-party website. While this is a strong statement, the ALAI softens it somewhat by saying that a mere reference to a source where protected material can be accessed would not constitute a copyright-relevant act.⁴⁹ The ALAI also acknowledges the burden so placed upon actors on the Internet using hyperlinking, and deems that legislative or court action may find a different assessment appropriate.⁵⁰
- 25 Next to settling these scholarly disputes and providing some legal certainty at the EU level, the decision in *Svensson* also appeared to be crucial with regard to addressing some divergences in Member States’ case law on hyperlinking and liability under copyright law. It is important to stress here that Article 3(1) of the *Information Society Directive* fully harmonizes “communication to the public” as one of the palette of economic rights of the copyright holder,⁵¹ and thus also of how Article 8 WCT is to be implemented and interpreted throughout the EU. In contrast, while creating hyperlinks could trigger different types of liability, such as: (i) accessory liability, in particular with respect to knowingly facilitating the making of illegal copies;⁵² (ii) unfair competition; (iii) moral rights’ infringement; or (iv) liability for circumvention of technological protection measures, only the latter has been subject

to harmonization at the European level, and thus falls within the CJEU’s competence.⁵³

- 26 Three national court judgments appear important in the context of the present discussion. Two of them have not classified hyperlinking as a communication to the public. In Germany, the highest federal court (*Bundesgerichtshof*) found that the “paperboy search engine”, which searched newspaper websites and provided search results including hyperlinks to the original sources, did not constitute communication in the sense of German law and the *Information Society Directive*, and did not infringe copyright.⁵⁴ In the case of *Napster.no*,⁵⁵ the Supreme Court of Norway held that posting hyperlinks, which led to unlawful uploading of MP3 files, did not constitute an act of making the files available to the public. The Court dismissed the argument that the linking involved an independent and immediate access to the music. Additionally, it stressed that, “[i]t cannot be doubted that simply making a website address known by rendering it on the internet is not making a work publicly available. This must be the case independent of whether the address concerns lawfully or unlawfully posted material”.⁵⁶ The case was decided on the basis of secondary liability, which is not harmonized at the EU level, and referred to unlawful content of the target website, as well as to the knowledge of the person posting the particular link.⁵⁷
- 27 These rulings, however, contrast with the Dutch decision in *Sanoma and Playboy v GS Media*.⁵⁸ There, the Dutch District Court vaguely referred to the existing EU case law on communication to the public and found that a company is liable for a communication to the public when that company puts a hyperlink on its website.⁵⁹ The Court found all three elements of the test (which it had itself extracted somewhat frivolously from the CJEU’s jurisprudence) – that is, an intervention, a (new) public, and the intention to make a profit – present. With regard to the first element, the Court stated that, “the placing of a hyperlink which refers to a location on the internet where a specific work is made available to the public is, in principle, not an independent act of publication. The factual making available to the public occurs on the website to which the hyperlink refers.” Yet, in that specific case, the website containing the photographs was not indexed by search engines, and the Court believed that in order to be able to see the pictures, users would have to type in the specific URL, so that without the additional intervention of hyperlinking, the public would not have had access to the photographs. The Court supported its view with the fact that the defendant’s website attracted substantial traffic (some 230,000 visitors per day) and the hyperlink had ensured that the public knew about the photographs even before they were published in the claimant’s magazine, *Playboy*. The Court also found that the criterion of “new public”

was fulfilled as initially only a very small audience had known about the series of photographs (not all of which had been published), and the placing of the hyperlink had enabled a large and indeterminate circle of people to find out about the series of photographs – a public other than the one the copyright holder had in mind when giving consent for the publication of the photo story.⁶⁰

III. The Judgment in Svensson

- 28 Against this backdrop, one can understand why *Svensson* was so eagerly anticipated and hotly debated, and what its significance for EU and national copyright law, as well as more broadly for access and use of works on the Internet, might be. Case C-466/12, *Svensson*, was referred to the CJEU by the Swedish Court of Appeal for a preliminary ruling, and the Court issued its judgment on February 13, 2014. In essence, it addressed one key question: whether putting a hyperlink on a website constitutes a “communication to the public” under the EU’s *Information Society Directive*.⁶¹
- 29 The claimants, Nils Svensson and a few other Swedish journalists, had written articles for a Swedish newspaper (*Göteborgs-Posten*) that published them in print, as well as made them available on the newspaper’s website. Retriever Sverige AB, the defendant in the case, offers a subscription-based service, whereby customers can access newspaper articles through the provision of a clickable link that directs clients to the third-party source – the original website where the requested content is freely accessible.⁶² Svensson sued Retriever for “equitable remuneration”, arguing that Retriever had made his article available through the search-and-alert functions on its website. This, he maintained, falls within the copyright relevant acts of either communication to the public or the public performance of a work, neither for which he had given consent. Retriever denied any liability to pay equitable remuneration. Retriever’s basic argument was that the linking mechanisms do not constitute copyright-relevant acts, and therefore no infringement of copyright law occurred. The Swedish District Court rejected the claimants’ application. The applicants in the main proceeding then brought an appeal against the judgment of the District Court before the Swedish Court of Appeal, which referred the case for a preliminary ruling to the CJEU asking for a clarification on the interpretation of Article 3 of the *Information Society Directive*.
- 30 Fortunately, the CJEU was able to match the relatively simple facts of the case with a relatively straightforward decision. In a 42-paragraph-long judgment, and without an opinion of the Advocate General, the Court decided that “Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of May 22, 2001, on the harmonisation of certain aspects of copyright and related rights in the information society, must be interpreted as meaning that the provision on a website of clickable links to works freely available on another website does not constitute an ‘act of communication to the public’”.⁶³
- 31 The Court did apply the test as developed in the case law, so far, and went through the different criteria of “act of communication” of a work and the communication of that work to a “public” that must be “new public”.⁶⁴ Following on from *SGAE*,⁶⁵ the Court found that for there to be an “act of communication”, it is sufficient, in particular, that a work is made available to a public in such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity.⁶⁶ In this sense, the Court found that in the case before it, “the provision of clickable links to protected works must be considered to be ‘making available’ and, therefore, an ‘act of communication’”.⁶⁷ It then went on to examine the criterion of “public” and while finding that the requirements of “an indeterminate number of potential recipients and [...] a fairly large number of persons” were satisfied,⁶⁸ it firmly stated that there needs to be a “new public,” too.
- 32 This new public that “was not taken into account by the copyright holders when they authorized the initial communication to the public”⁶⁹ was, however, not given in *Svensson*. The public targeted by the initial communication consisted of all potential visitors to the site concerned, since, given that access to the works on that site was not subject to any restrictive measures, all Internet users could have free access to them.⁷⁰
- 33 The court went on to clarify that this finding cannot be called into question, even when the work appears in such a way as to give the impression that it is appearing on the site on which that link is found, whereas, in fact, the work in question comes from another site,⁷¹ thereby addressing indirectly the so-called “embedded” or “framed” links, as well.⁷²
- 34 The case will be different, however, where a clickable link makes it possible for users of the site on which that link appears to circumvent restrictions put in place by the site on which the protected work appears in order to restrict public access to that work to the latter site’s subscribers only. Then, the link constitutes an intervention without which those users would not be able to access the works transmitted, and all of those users must be deemed a “new public”. The Court stated that the copyright holders’ authorization would be required for such a communication to the public.⁷³ This is the case, in particular, where the work is no longer available

to the public on the site on which it was initially communicated or if it is henceforth available on that site only to a restricted public, while being accessible on another Internet site without the copyright holders' authorization.

- 35 Finally, the court addressed the fourth question asked by the Swedish Court: namely, whether it is possible for a Member State to give wider protection to authors' exclusive rights by enabling "communication to the public" to cover a greater range of acts than those provided for in Article 3(1). The Court ruled in the negative – EU Member States cannot deviate and extend the scope of protection for copyright holders further by broadening the concept of "communication to the public" to include a wider range of activities than those referred to in Article 3 of the *Information Society Directive*.⁷⁴ The Court weighted, in particular, the perils of legislative differences and legal uncertainty that would have triggered, while leaving aside the broader but certainly underlying questions of balancing between private and public interests and allowing for creativity in the digital space.

D. Conclusion: Permission to Link and Some Open Questions after *Svensson*

- 36 The preliminary ruling of the CJEU in *C-466/12, Svensson v Retriever AB*, addressed the question of whether hyperlinking constitutes communication to the public and what sort of copyright liability it triggers. It clarified the scope of Article 3(1) of the *Information Society Directive*, which fully harmonizes "communication to the public," thus also making clear how Article 8 WCT is to be implemented and interpreted throughout the EU. The judgment has made an important contribution to achieving a higher level of legal certainty, particularly against the backdrop of the rather fuzzy and, at times, unsettled practice of the CJEU with regard to communication to the public through other technological means, and the emerging national cases. The "new public" criterion appeared critical in the court's assessment. The finding that *Svensson* does not satisfy it permitted hyperlinking as a copyright-irrelevant act to operate as it presently does. In broader terms, this outcome accommodates both the essential functions of the Internet as a network of networks in the technical sense, as well as its function as a comprehensive cognitive database with substantial societal implications.
- 37 In the latter sense, the "permission to link" granted through *Svensson* is by no means trivial despite the relatively straightforward facts of the case. It enables future innovation on the Internet, which is not excessively focused on copyright holders. It

is in this sense evident that, although an important goal of resolving copyright issues is to protect right holders, courts also need to take into account the overall sustainability of the digital environment and protect broader public interests. Enhancing creativity in this sense may no longer mean ensuring absolute authorial control over digital content. Rather, creativity may increasingly require flexible systems that embrace hybrid collaborative modes and the new modes of peer production that characterize the networked information economy.⁷⁵ The drafters of the WIPO Internet Treaties discussed the possibilities that digital technologies might offer, but could not have been fully aware of all the deep societal effects of the Internet. For that reason, and very fortunately, the Treaties leave room for purposive interpretation, flexible implementation and sensible application.

- 38 *Svensson* is an affirmative reaction and an intimation as to how this may work. Its importance as a precedent has only been augmented by the more recently decided case of *BestWater*.⁷⁶ Similarly to *Svensson*, the latter stemmed from a request for a preliminary ruling, this time from the German Federal Court (Bundesgerichtshof), and concerned the interpretation of Article 3(1) of the *Information Society Directive*. The essential question asked was: "Does the embedding, within one's own website, of another person's work made available to the public on a third-party website [...] constitute communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC, even where that other person's work is not thereby communicated to a new public and the communication of the work does not use a specific technical means which differs from that of the original communication?"⁷⁷ Or, to put it in layman's terms, the question was whether we can embed videos available on other websites, such as YouTube, on our own websites. The facts of the case were slightly more complicated than those behind *Svensson*, and related to a dispute between a water filtering company, BestWater International, and two commercial agents working for a competitor. They had embedded a short advertising video on their website that was produced by BestWater but uploaded on YouTube, seemingly without BestWater's consent. BestWater claimed copyright infringement and asked for the removal of the video as well as for compensation.⁷⁸ After the video was taken down, the questions of the compensation and the trial costs remained relevant and the first and second instances decided them differently – the first court to the benefit of the BestWater, while the second to the benefit of the two agents, Mebes and Potsch (while distributing the trial costs between the parties).⁷⁹ BestWater took the case to the highest court, Bundesgerichtshof, and it referred the key "embedding" question to the CJEU.

- 39 The CJEU was rather swift and pragmatic in its approach, and this is despite the factual uncertainties with regard to whether there was a permission by the copyright owner for the distribution of the short film and in this sense communication to the public. The Court found notably that: "... the embedding of a protected work which is publicly available on a website in another website by means of a link using the framing technology, as was in the main proceedings at issue, does not by itself constitute communication to the public within the meaning of Article 3 (1) of Directive 2001/29, to the extent that the relevant work is neither communicated to a new public nor is it communicated using a specific technical means, which is different from that of the original communication".⁸⁰ The CJEU explicitly referred to *Svensson* and the therein used criterion of a "new public".⁸¹ It clarified in addition the particularity of the framing technology, which while allowing access to a work, does not necessarily mean that the copyright protected work is made available to a new public.⁸² The court went on to note that, "... if and to the extent that this work is freely accessible on the website to which the Internet link leads, there is an assumption that the copyright holders have, when they permitted this communication, considered all Internet users as the public".⁸³
- 40 In this sense, one could say that *Svensson* has already been tested and its argumentation seems to hold. On the other hand, despite the substantially increased legal certainty, there are still a number of questions open and we should not be fooled into believing that the relationship between copyright liability and Internet links in EU law has been settled once and for all.
- 41 First, it is noteworthy that it was the "new public" condition that really saved the case. This is in contrast to more liberal interpretations, which argue that with hyperlinking no *transmission*, regarded as a prerequisite for the communication to the public, occurs,⁸⁴ and tend to agree with the German Supreme Court's reasoning in *Paperboy* that a hyperlink is a mere reference, comparable to a quotation, in particular as the operator of the target website still possesses full control over the making available of the works. Jane Ginsburg has furthermore argued that the so-applied "new public" condition can be conceived as a kind of implied license, and that this condition should then apply differently if the content on the source website is infringing – that is, if it should not have been made available to any public in the first place. Ginsburg argues that, if the content were infringing, there will have been no license, implied or otherwise.⁸⁵
- 42 In addition, the "new public" criterion may be controversial as it may, in effect, instruct source website owners to install a paywall or other type of restricted access that would mean that any

further hyperlinking happens to a "new public".⁸⁶ Also, as Ginsburg suggests, with the wider spread of aggregators, which in essence function as automated information generators,⁸⁷ the link aggregator may not be providing access to a public that would not otherwise have had access, but as a practical matter is increasing access for those members of the public who may otherwise have had difficulty finding the source websites. In this sense, she rightly asks whether the viewers of the aggregated content should not be considered as a "new public".⁸⁸ Numerous further questions with regard to advertising, remuneration, competition, and other types of embedded hyperlinks are as yet unanswered, and we are likely to see a more complex and nuanced case law emerging post-*Svensson*, as *BestWater already proves*.⁸⁹ For now, the permission to link remains.

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- 1 *WIPO Copyright Treaty*, 20 December 1996, WIPO Publication No. 226, (1997) 36 ILM 65, entered into force 6 March 2002 [hereinafter WCT].
- 2 *WIPO Performances and Phonograms Treaty*, 20 December 1996, WIPO Publication No. 227, (1997) 36 ILM 76, entered into force 20 May 2002 [hereinafter WPPT].
- 3 R. L. Okediji, "The Regulation of Creativity under the WIPO Internet Treaties", *Fordham Law Review* 77:5 (2009), pp. 2379–2410.
- 4 Case C-466/12, *Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB*, Judgment of the Court of 13 February 2014, OJ (2014) C 93/12 [nyr].
- 5 Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, revised at Paris, 24 July 1971 and as amended 28 September 1979, 828 U.N.T.S. 221. Article 20 of the Berne Convention allows its member states to enter into copyright agreements if "such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to [the] Convention". See Article 1(1) WCT; also Okediji, supra note 3, at pp. 2387–2392.
- 6 WCT, Preamble, at para. 2.
- 7 See e.g. Y. Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven, CT: Yale University Press, 2006); J. Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven, CT: Yale University Press, 2008).
- 8 See e.g. N. W. Netanel, 'Why Has Copyright Expanded? Analysis and Critique' in F. Macmillan (ed), *New Directions in Copyright Law: Vol. 6* (Cheltenham, UK: Edward Elgar, 2007), pp. 3–34; D. J. Halbert, *The State of Copyright: The Complex Relationships of Cultural Creation in a Globalized World* (Abingdon, UK: Routledge, 2014).

- 9 Okediji, *supra* note 3.
- 10 WCT, Preamble, at para. 5.
- 11 Okediji, *supra* note 3, at p. 2381.
- 12 *Ibid.*, at p. 2380.
- 13 Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998) [hereinafter the DMCA].
- 14 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, [2001] OJ L 167/10 [hereinafter the Information Society Directive].
- 15 See e.g. U. Gasser, *Copyright and Digital Media in a Post-Napster World: International Supplement* (Cambridge, MA: Berkman Center for Internet and Society, 2005); A. Abdel Latif, “From Consensus to Controversy: The WIPO Internet Treaties and Lessons for Intellectual Property Norm Setting in the Digital Age”, in M. Burri and T. Cottier (eds.), *Trade Governance in the Digital Age* (Cambridge: Cambridge University Press, 2012), pp. 367–395.
- 16 See e.g. Okediji, *supra* note 3; P. K. Yu (ed), *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age, Vol. 4, International Intellectual Property Law and Policy* (Westport, CT: Praeger Publishers, 2007); N. Lucchi, *Digital Media and Intellectual Property: Management of Rights and Consumer Protection in a Comparative Analysis* (Berlin: Springer, 2006).
- 17 L. Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin Press, 2008); J. Zittrain, *The Future of the Internet and How to Stop It* (New Haven, CT: Yale University Press, 2008); I. Brown and C. T. Marsden, *Regulating Code: Good Governance and Better Regulation in the Information Age* (Cambridge, MA: MIT Press, 2013).
- 18 See e.g. S. Fitzpatrick, “Copyright Imbalance: US and Australian Responses to the WIPO Digital Copyright Treaty”, *European Intellectual Property Review* 22:5 (2000), pp. 214–228; M. Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation* (Oxford: Oxford University Press, 2002); J. Reinbothe and S. von Lewinski, *The WIPO Treaties 1996: The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty, Commentary and Legal Analysis* (London: Butterworths LexisNexis, 2002); J. Ginsburg, “The (New?) Right of Making Available to the Public”, in D. Vaver and L. Bentley (eds), *Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish* (Cambridge: Cambridge University Press, 2004), pp. 234–247; A. Christie and E. Dias, “The New Right of Communication in Australia”, *Sydney Law Review* 27 (2005), pp. 237–262; D. Fewer, “Making Available: Existential Inquiries”, in M. Geist (ed), *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005), pp. 267–284; D. Carson, “Making the Making Available Right Available”, *Columbia Journal of Law and the Arts* 33 (2010), pp. 135–164.
- 19 Ficsor, *ibid.*, at pp. 499–500.
- 20 J. de Beer and M. Burri, “Transatlantic Copyright Comparisons: Making Available via Hyperlinks in the European Union and Canada”, *European Intellectual Property Review* 2 (2014), pp. 95–105 (emphasis in the original).
- 21 De Beer and Burri, *ibid.*
- 22 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, CJEU, Case C-306/05, [2006] ECR I-11519 [SGAE].
- 23 *Ibid.*, at para. 47, also in reference to Recital 27 of the *Information Society Directive*.
- 24 *Ibid.*, at para. 54. Similar conclusions have been reached in other cases: in *Organismos Sillogikis Diacheirisis Dimiourgou Theatrikon ki Optikoakoustikon Ergon v Divani Acropolis Hotel and Tourism AE*, CJEU, Case C-136/09, [2010] ECR I-37 [OSDDTOE], the CJEU said that a hotel owner who installs TV sets in hotel rooms that are connected to an antenna undertakes an act of communication to the public; in *Phonographic Performance (Ireland) v Ireland*, CJEU, Case 162/10, [2012] ECR I-0000 [*Phonographic Performance (Ireland)*], the same applied for a hotel operator who provided televisions and radios to which it distributed a broadcast signal, or other apparatus and phonograms in physical or digital form, which may be played on or heard from such apparatus. While the first case fell under the *Information Society Directive*, the second was under the *Rental and Lending Directive 2006/115/EC*. Also, in *Football Association Premier League v QC Leisure*, the Court held that the transmission of the broadcast works through a TV screen and speakers to the customers in a public house is covered by “communication to the public” (Joined cases *Football Association Premier League v QC Leisure*, Case C-403/08, and *Karen Murphy v Media Protection Services*, Case C-429/08, [2011] ECR I-0000 [*Football League and Karen Murphy*]).
- 25 *Società Consortile Fonografici (SCF) v Marco Del Corso Case*, C-135/10, [2012] ECR I-0000, at paras 90 et seq [SCF].
- 26 Graphical user interface (GUI) is a type of user interface that allows users to interact with electronic devices using images rather than text commands.
- 27 *Bezpečnostní Softwarová Asociace v Ministerstvo Kultury*, Case C-393/09, [2010] ECR I-13971 [BSA].
- 28 The Court said that Article 3(1) “is inspired by Article 8 of the WCT, the wording of which it reproduces almost verbatim” in *SCF, supra* note 25, at para. 72. The Court therefore considers Article 8 WCT as guidance on defining “communication to the public”. See *SGAE, supra* note 22, at para. 35; *Peek & Cloppenburg KG v Cassina SpA*, Case C-456/06, [2008] ECR I-2731, at para 31; *SCF, supra* note 25, at paras 51–55.
- 29 Joined cases *Football League and Karen Murphy, supra* note 24, at para. 193.
- 30 *Information Society Directive*, at Recital 23 (emphasis added).
- 31 *ITV Broadcasting Ltd & 6 Ors v TV Catchup*, Case C-607/11, [2013] ECR I-0000, at paras 43 and 46 respectively [*TV Catchup*].
- 32 *SGAE, supra* note 22, at paras 38–39.
- 33 *TV Catchup, supra* note 31, at para. 34.
- 34 *SGAE, supra* note 22, at para. 40; see also *OSDDTOE, supra* note 24, at para. 38.
- 35 *Football Association and Karen Murphy, supra* note 24, at para. 197; referring also to *SGAE, supra* note 22, at paras 40, 42, and *OSDDTOE, supra* note 24, at para. 38.
- 36 *SGAE, supra* note 22, at paras 41–42; Joined cases *Airfield and Canal Digitaal v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam)*, C-431/09, and *Airfield NV v Agicoa Belgium BVBA*, C-432/09, [2011] ECR I-0000 [*Airfield*], at para. 79; *Football Association and Karen Murphy, supra* note 24, at paras 98–99.
- 37 *Airfield, ibid.*, at para. 79. The case was decided under *Satellite and Cable Directive* (Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248/15). It concerned situations where the supplier of a digital satellite television service does not transmit its own programme but either receives the programme-carrying signals from a broadcasting station or instructs a broadcaster to transmit programme-carrying signals to a satellite from which they are beamed to subscribers to the digital television services. The CJEU decided that even indirect transmission requires authorization, unless the right holders have agreed beforehand with the broadcasting organization that the protected works will also be communicated to the public through that provider, and when the provider does not make those works accessible to a new public.
- 38 *TV Catchup, supra* note 31. *TV Catchup (TVC)* operates an online platform that retransmits intercepted terrestrial and

satellite TV channels, enabling subscribers to watch “near-live” television on their computers, tablets, mobile phones and other devices. TVC’s service is funded by advertising before the live stream is viewed, as well as by “in-skin advertising”. Several UK commercial broadcasters (including ITV, Channel 4 and Channel 5) brought proceedings before the English High Court contending that the streaming of their broadcasts is an unauthorised “communication to the public”. The High Court took the view that it was not clear from previous CJEU case law that there was a “communication to the public” under circumstances such as this where works are streamed to subscribers who are already entitled to access the original broadcast signals via TVs in their own homes, and referred this question to the CJEU. The English Court also asked whether it made a difference to the CJEU’s response if subscribers were only allowed a one-to-one connection to the TVC server, and whether the fact that TVC was acting in direct competition with the commercial broadcasters, both in terms of viewers and advertising revenues, should have any effect on the decision.

- 39 *Ibid.*, at para. 38.
- 40 *Ibid.*, at para. 39; see also paras 24–26.
- 41 Streamlining the practice in this regard after a somewhat different opinion expressed by Advocate General Kokott in the *Football Association* case, where she found that the FAPL’s copyright in the broadcast of live football matches had been exhausted. See joined cases *Football Association and Karen Murphy*, *supra* note 24, for the opinion of AG Kokott at para. 200.
- 42 A. Kur and T. Dreier, *European Intellectual Property Law: Text, Cases and Materials* (Cheltenham, UK: Edward Elgar, 2013), at p. 299.
- 43 European Copyright Society, “Opinion on the Reference to the CJEU in Case C-466/12 *Svensson*” (15 February 2013), also published as L. Bently, E. Derclaye, G. Dinwoodie, T. Dreier, S. Dusollier, C. Geiger, J. Griffiths, R. Hilty, P. B. Hugenholtz, M.-C. Janssens, M. Kretschmer, A. Metzger, A. Peukert, M. Ricolfi, M. Senftleben, A. Strowel, M. Vivant, R. Xalabarder, “The Reference to the CJEU in Case C-466/12 *Svensson*”, *Cambridge University Legal Studies Research Paper* 6 (2013) [hereinafter ECS, “Opinion”].
- 44 See e.g. J. Litman, *Digital Copyright* (Amherst, NY: Prometheus Books, 2001), at p. 183; T. Aplin, *Copyright Law in the Digital Society: The Challenges of Multimedia* (Oxford: Hart Publishing, 2005), at p. 151; L. Bently and B. Sherman, *Intellectual Property Law*, 3rd edn (Oxford: Oxford University Press, 2008) at p. 151.
- 45 ECS, “Opinion”, *supra* note 43, at pp. 10–11, citing *Perfect 10 v Google*, 487 F (3d) 701 (9th Cir 2007).
- 46 *Ibid.*, at pp. 8–9, citing *Crookes v Newton*, 2011 SCC 47, [2011] 3 SCR 269, at paras 26, 30.
- 47 ALAI, *Report and Opinion on the Making Available and Communication to the Public in the Internet Environment – Focus on Linking Techniques on the Internet*, adopted unanimously by the Executive Committee, 16 September 2013.
- 48 ALAI, *ibid.* (emphasis in the original).
- 49 ALAI, *ibid.*, at p. 9.
- 50 ALAI, *ibid.*, at p. 10.
- 51 A. Ohly, “Economic Rights”, in E. Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Cheltenham, UK: Edward Elgar Publishing, 2009), pp. 212–241.
- 52 See e.g. *Brein v Techno Design* [2006] ECDR 21 (Netherlands); *Universal Music v Cooper* [2006] FCAFC 187 (Full Federal Court of Australia); *Napster.no* [2005] IIC 120 (Norway). See also Ohly, *ibid.*
- 53 ECS, “Opinion”, *supra* note 43, at p. 2.
- 54 *Ibid.*, at pp. 9–10, excerpting from *Paperboy*, Case I ZR 259/00 (17 July 2003), [2005] ECDR (7) 67, 77: “The Information Society Directive [...] has not changed the assessment of hyperlinks, as are in question here, under copyright law ... According to Art. 3(1) of the Information Society Directive Member States are obliged to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, including the making available to the public of their works in such a way that members of the public may access them from a place and a time individually chosen by them. This provision refers to the use of works in their communication to the public. The setting of hyperlinks is not a communication in this sense; it enables neither the (further) keeping available of the work nor the on-demand transmission of the work to the user”.
- 55 *Ibid.*, at p. 10, citing *Tono et al v Frank Allan Bruvik d/b/a Napster*, (2006) IIC 120 (Supreme Court of Norway, 27 January 2005).
- 56 *Ibid.*
- 57 See also similarly, Amsterdam Court of Appeal, 15 June 2006, *BREIN v. Techno Design*, [2006] ECDR 21.
- 58 Stephen Vousden, “Case C-466/12, *Svensson* – Hyperlinks and Communicating Works to the Public” (20 January 2013), available at <http://eulawradar.com/case-c-46612-svensson-hyperlinks-and-communicating-works-to-the-public/>.
- 59 The defendant’s website had a hyperlink that directed users to a website in Australia. The Australian website had a set of copyright-protected photographs – a series of nudes of a person who appears on Dutch television.
- 60 Vousden, *supra* note 58.
- 61 The actual questions referred to in *Svensson*, are the following:
1. If anyone other than the holder of copyright in a certain work supplies a clickable link to the work on his website, does that constitute communication to the public within the meaning of Article 3(1) 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?
 2. Is the assessment under question 1 affected if the work to which the link refers is on a website on the Internet which can be accessed by anyone without restrictions or if access is restricted in some way?
 3. When making the assessment under question 1, should any distinction be drawn between a case where the work, after the user has clicked on the link, is shown on another website and one where the work, after the user has clicked on the link, is shown in such a way as to give the impression that it is appearing on the same website?
 4. Is it possible for a Member State to give wider protection to authors’ exclusive right by enabling ‘communication to the public’ to cover a greater range of acts than provided for in Article 3(1) 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?
- 62 It should be noted that Retriever’s customers needed to log in to the website. Upon search, customers were then provided with a list of hyperlinks to relevant articles. Clicking on a hyperlink opened a new window, which showed the article’s text as retrieved from the websites of third parties.
- 63 *Svensson*, at para. 42.
- 64 *Svensson*, at paras 16, 24.
- 65 SGAE, *supra* note 22, at para. 43.
- 66 *Svensson*, at para. 19.
- 67 *Svensson*, at para. 20.
- 68 *Svensson*, at para. 21.
- 69 *Svensson*, at para. 24, by analogy to SGAE, *supra* note 22, at paras 40, 42, and OSDDTOE, *supra* note 24, at para. 39.
- 70 *Svensson*, at para. 26.
- 71 *Svensson*, at para. 29.
- 72 This has been relevant for a later case, Case C-348/13, *BestWater International Request* for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 25 June 2013 –

BestWater International GmbH v Michael Mebes, Stefan Potsch, OJ (2013) C 325/8; see next section below.

blog, available at <http://qmjip.wordpress.com/2014/02/14/case-c-46612-svensson-cjeu-saves-the-internet/>

- 73 Svensson, at para. 31.
- 74 Svensson, at paras 33–41, 42(2).
- 75 See e.g. Benkler, *supra* note 7; also J. E. Cohen, “Creativity and Culture in Copyright Theory”, *UC Davis Law Review* 40 (2007), pp. 1151–1205; J. E. Cohen, “The Place of the User in Copyright Law”, *Fordham Law Review* 74 (2005), pp. 347–374; Y. Benkler and H. Nissenbaum, “Commons-based Peer Production and Virtue”, *Journal of Political Philosophy* 14:4 (2006), pp. 394–419.
- 76 Case C-348/13, *BestWater International GmbH v Michael Mebes, Stefan Potsch*, judgment of 21 October 2014, nyr, text available only in German and French: <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-348/13&td=ALL>
- 77 *Bestwater*, *supra* note 72.
- 78 *Bestwater* judgment, *supra* note 76, at para. 6.
- 79 *Ibid.*, at paras 7 and 8.
- 80 *Ibid.*, at para. 19 (author’s own translation). In the original: “...dass die Einbettung eines auf einer Website öffentlich zugänglichen geschützten Werkes in eine andere Website mittels eines Links unter Verwendung der Framing-Technik, wie sie im Ausgangsverfahren in Frage steht, allein keine öffentliche Wiedergabe im Sinne von Art. 3 Abs. 1 der Richtlinie 2001/29 darstellt, soweit das betreffende Werk weder für ein neues Publikum noch nach einem speziellen technischen Verfahren wiedergegeben wird, das sich von demjenigen der ursprünglichen Wiedergabe unterscheidet“.
- 81 *Bestwater* judgment, *supra* note 76, at para. 15.
- 82 *Ibid.*, at paras 17 and 18.
- 83 *Ibid.*, at para. 18 (author’s own translation). In the original: “Denn sofern und soweit dieses Werk auf der Website, auf die der Internetlink verweist, frei zugänglich ist, ist davon auszugehen, dass die Inhaber des Urheberrechts, als sie diese Wiedergabe erlaubt haben, an alle Internetnutzer als Publikum gedacht haben”.
- 84 See also ECS, “Opinion”, *supra* note 43.
- 85 J. C. Ginsburg, “Hyperlinking and Infringement: The CJEU Decides (sort of)”, *The Media Institute Blog Post*, 17 March 2014, at <http://www.mediainstitute.org/IPI/2014/031714.php>. In the concrete case of *Svensson* too, the national court will need to follow up and determine on remand whether the journalists’ articles were on the source websites with the journalists’ authorization, as this appears to be somewhat disputed. If the journalists had already invited the general public to view their articles without restriction, the “new public” criterion would not be met.
- 86 The issue of technical restrictions in the context of linking will be addressed in more detail in the CJEU’s upcoming decision in the Request for a preliminary ruling from the Högsta domstolen (Sweden) lodged on 22 May 2013 – *C More Entertainment AB v Linus Sandberg* (C-279/13). See the comments of EU Law Radar, “Case C-279/13, *C More Entertainment – Skating on Thin Ice with Embedded Links in EU Copyright Law*”, 7 July 2014, available at <http://eulawradar.com/case-c-27913-c-more-entertainment-skating-on-thin-ice-with-embedded-links-in-eu-copyright-law/>
- 87 See e.g. P. Miel and R. Farris, *News and Information as Digital Media Come of Age* (Cambridge, MA: The Berkman Center for Internet and Society, 2008); also C. Sunstein, *Echo Chambers: Bush v. Gore Impeachment, and Beyond* (Princeton, NJ: Princeton University Press, 2001); E. Pariser, *The Filter Bubble: What the Internet Is Hiding from You* (London: Viking, 2011)
- 88 Ginsburg, *supra* note 77.
- 89 See e.g. Pedro Malaquias, “Case C-466/12 *Svensson* – CJEU Saves the Internet”, *Queen Mary Journal of Intellectual Property*

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