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# Cut Out By The Middle Man

## The Free Speech Implications Of Social Network Blocking and Banning In The EU

by **Patrick Leerssen**, post-graduate student of Information Law at the University of Amsterdam, research assistant at the Institute for Information Law (IvIR)

**Abstract:** This article examines social network users' legal defences against content removal under the EU and ECHR frameworks, and their implications for the effective exercise of free speech online. A review of the Terms of Use and content moderation policies of two major social network services, Facebook and Twitter, shows that end users are unlikely to have a contractual defence against content removal. Under the EU and ECHR frameworks, they may demand the observance of free speech principles in state-issued blocking orders and their implementation by intermediaries, but cannot invoke this 'fair balance' test against the voluntary removal decisions by the social network service. Drawing on prac-

tical examples, this article explores the threat to free speech created by this lack of accountability: Firstly, a shift from legislative regulation and formal injunctions to public-private collaborations allows state authorities to influence these ostensibly voluntary policies, thereby circumventing constitutional safeguards. Secondly, even absent state interference, the commercial incentives of social media cannot be guaranteed to coincide with democratic ideals. In light of the blurring of public and private functions in the regulation of social media expression, this article calls for the increased accountability of the social media services towards end users regarding the observance of free speech principles.

Keywords: Social Media; Banning; Private Censorship; Removal Orders

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### A. Introduction<sup>1</sup>

1 Social media have taken up a central role in public discourse, and are often hailed as a boon to free speech. Social network services (SNS) such as Facebook and Twitter facilitate civic participation in numerous ways. Firstly, they can act as soapboxes for the 'average citizen' to voice his or her opinion, leading to high-profile expressions of political sentiment such as with the #jesuischarlie and #illridewithyou hashtags. Secondly, SNSs act as gateways for accessing external links and resources, with the average news website relying on Facebook and/or Twitter for over 25% of its traffic.<sup>2</sup>

Thirdly, they have also played an important role in the organisation of major 'real world' political manifestations such as the Arab Spring protests and the Occupy movement.<sup>3</sup> In comparison to the linear dissemination models of 'mass media' such as radio, press and television, SNSs have been praised for creating a more diverse and accessible public debate.<sup>4</sup> And yet, these networked systems also lead to a (re-)centralisation of power around a new set of privileged actors: the social network service providers themselves.

2 While we tend to view social media platforms as neutral carriers of information, their operators possess the technical means to remove information

and suspend accounts. As such, they are uniquely positioned to delimit the topics and set the tone of public debate. Increasingly, they have shown themselves prepared to apply these techniques in order to moderate their users and block undesirable information.<sup>5</sup> SNSs may take on this editorial role out of their own commercial interest, or as a matter of compliance with (perceived) legal duties or government orders. In both cases, this may lead them to stifle potentially legitimate forms of expression. This raises the question whether end users can legally contest SNS removal decisions, and protect themselves from such interference. To what extent are social network services required to observe free speech principles under the EU legal framework when removing end-user content from their services? Does this level of protection guarantee the effective exercise of the right to freedom of expression in practice?

- 3 This article will start by examining the Terms of Use and content moderation policies of two major SNS, Facebook and Twitter, in order to illustrate their handling of user-generated content and to examine whether end users can rely on contractual grounds to contest content removal. This will be followed by a review of European Convention of Human Rights (ECHR) case law regarding positive obligations to protect free speech and their application to intermediary content removal. Subsequently, it will review the EU's legal framework, focusing on its e-Commerce regime and the Court of Justice of the European Union's Charter-based case law. Finding that neither framework is likely to provide a defence against *voluntary* removal decisions by the SNS (as opposed to injunction-based measures), this article will explore the potential for abuse of this competence. Firstly, it will detail how EU governments have attempted to influence SNS content policies in the context of anti-terrorism efforts, allowing for the indirect exercise of state power and a 'privatisation' of censorship. Secondly, it will be argued that, even absent state interference, the commercial incentives of SNSs and their responsibilities towards end users and third parties do not guarantee the observance of free speech principles. In light of the blurring of public and private functions in the regulation of expression via social networks, this article calls for the increased accountability of the SNS towards end users as a means to protect online speech.
- 4 Depending on one's definition, the term 'social network service' can apply to a broad range of online services, from dating websites such as eHarmony to videohosting platforms such as Youtube. This article will focus on Twitter and Facebook as illustrations of this broader category, due to their unique popularity and global reach. Twitter currently serves over 250 million users and Facebook over 1 billion.<sup>6</sup> These numbers are rivalled only by the Chinese 'Weibo' and the Russian 'VKontakte', which, relatively

speaking, do not reach a major audience outside their country of origin.<sup>7</sup> Furthermore, Facebook and Twitter are not dedicated to one particular format or topic and often include highly political forms of discussion (in comparison to, say, eHarmony's online dating community or LinkedIn's professional networking model). Therefore, as gatekeepers to online political discourse, these two websites are especially deserving of scrutiny regarding the level of free speech protection provided to their users.<sup>8</sup>

## B. SNS Terms of Use

- 5 Specific rules on content removal can be found in social network Terms of Use (ToU), which govern the contractual relationship between end users and the service provider. Before delving into the general constraints imposed by fundamental rights and other public law sources, it is therefore worth examining the level of protection that has resulted from these private agreements. Contractual assurances can set conditions for content removal, and also contribute to its foreseeability by informing end users of their rights and responsibilities relating to their content. This section will examine the Facebook and Twitter ToU, assessing their level of protection against the removal of user-generated content ('blocking' or 'removing') and termination or suspension of service ('banning').
- 6 Article 5 of the Facebook ToU, titled 'Protecting Other People's Rights', starts with the following paragraphs:
  - *You will not post content or take any action on Facebook that infringes or violates someone else's rights or otherwise violates the law.*
  - *We can remove any content or information you post on Facebook if we believe that it violates this Statement or our policies.*<sup>9</sup>
- 7 Removal is thus permitted for those content categories prohibited by Facebook's policy, and for any content that infringes individual rights or violates the law. All forms of illegal content, such as criminal hate speech, child pornography or copyright infringement, are removable, but this also goes for breaches of Facebook's terms, which outline a large number of additional prohibitions. These include bullying, harassment, intimidation, and nudity, as well as the use of Facebook 'to do anything unlawful, misleading, malicious or discriminatory'.<sup>10</sup> Grounds for removal thus reach far further than the requirements of the law, and include some rather vague terms. What constitutes a misleading or malicious post is highly subjective, and could vindicate the removal of a broad range of content. To make matters worse, the Article 5 removal competence also covers cases where

Facebook *believes* that a violation of their statement has occurred. Strictly speaking, this would seem to relieve them of the burden of proving an actual infringement. Any slightly contentious content could easily be filed under the above prohibitions, and thus be susceptible to deletion.

- 8 The ‘banning’ of Facebook users is governed by article 14, ‘termination’, which states the following: ‘If you violate the letter or spirit of this Statement, or otherwise create risk or possible legal exposure for us, we can stop providing all or part of Facebook to you’.<sup>11</sup> Uploading any prohibited content as described above is thus grounds for account termination. Furthermore, end-user conduct is further subject to a broad range of prohibitions, from egregious behaviour such as the operation of pyramid schemes, to relatively innocuous acts such as the sharing of one’s password, or making multiple accounts. Facebook also prohibits users from doing ‘anything else which might jeopardise the security of your account’. Moreover, users must use their real name and ‘keep contact information up to date’. Breaching any of these rules can result in account termination. Given the broad range of ToU prohibitions, as well as the prohibition of violations *in spirit*, users are faced with a far-reaching possibility of intervention. In short, while Facebook’s right to remove content and ban users is conditional upon some form of illegality or contractual infringement, the contractual prohibitions are defined so broadly as to provide a large degree of interpretive discretion for the intermediary, and almost no protection or foreseeability for end users.
- 9 While Facebook requires at least some illegality or an infringement of their terms to permit account termination and content removal, Twitter’s powers of intervention are completely unconditional. Article 8 of the Twitter ToU reads: ‘(...) We reserve the right *at all times* (but will not have an obligation) to remove or refuse to distribute *any* Content on the Services, to suspend or terminate users, and to reclaim usernames without liability to you.’<sup>12</sup> Reference is made to ‘the Twitter Rules’, which outline Twitter’s policy as to prohibited content.<sup>13</sup> In comparison to Facebook’s content rules, they seem more protective of the user: besides rules on security and commercial communications, all they explicitly prohibit is impersonation, violent threats, and ‘unlawful use’. Nevertheless, these rules are merely policy guidelines within a contractual framework which permits any and all removals and bans. While contracts determine the intermediary’s legal right to removal and tend to be rather broad or even unconditional, supplementary documents such as the *Twitter Rules* and Facebook’s *Community Guidelines* outline how the intermediary intends to exercise their removal powers in practice. They serve to inform users as to the limits of acceptable conduct and content in a more detailed and understandable

manner, but do not affect the intermediary’s legal position. While these statements of policy might contain balanced and reasonable principles, they do not amount to a contractual guarantee included in the platform’s terms of service. Even if SNSs could generally be expected to adhere to their self-imposed rules and guidelines as a matter of policy, thereby granting users a *de facto* enjoyment of their right to impart and access information, their Terms of Use reveal a refusal to guarantee such rights *de jure*.

- 10 End users’ acceptance of social network Terms of Use should not be misconstrued as to mean that these consumers are familiar with, or condone the degree of free speech protection they afford. As a recent study has pointed out, there are many factors which challenge the traditional view that competition between services and consumer choice can determine the appropriate level of protection.<sup>14</sup> First of all, research has shown that a majority of the online public neglects to even read (a significant portion of) online Terms of Service.<sup>15</sup> Furthermore, the minority that do take this effort, may lack the legal expertise and resources to properly assess the content of the ToU provisions.<sup>16</sup> As a result of this informational asymmetry, SNSs are not forced to compete fully with one another as to their relative level of free speech protection.<sup>17</sup> Furthermore, even informed consumers may have little choice due to the strong network effects exhibited by SNSs; switching to a more protective service might be unfeasible if all one’s friends and connections stay with the incumbent.<sup>18</sup> Moreover, SNSs require time and effort from users to establish their profiles and networks, which discourages them from switching between platforms – a phenomenon described by Chiu as the ‘stickiness’ of social media.<sup>19</sup> In light of these considerations, unwarranted or unexpected content blocking should not be seen as a possibility which end users knowingly and willingly subject themselves to as a result of free and informed choice between various online service providers.<sup>20</sup> End users may not be fully aware of removal conditions, or may simply lack suitable alternative options.

## C. State interference and private censorship under the European Convention on Human Rights

- 11 The European Convention on Human Rights’ right to free speech, laid down in article 10, is solely enforceable against Council of Europe Member States. As an international treaty, it does not have a direct effect on the legal relationships between private parties (‘horizontal effect’).<sup>21</sup> Rather, it creates State duties to refrain from interfering with fundamental rights (negative obligations), and duties to undertake specific actions in order to safeguard the effective enjoyment of these

rights (positive obligations).<sup>22</sup> In the context of SNSs, blocking injunctions issued by a court or administrative body might therefore be contested as a form of state interference with the right to free speech. Such a ‘state interference’ does not occur when SNSs remove content voluntarily. However, it will be argued that such private interferences can potentially trigger the State’s positive obligations to protect the free speech of end users. This section will examine the ECHR’s case law on freedom of speech, paying particular attention to the State’s positive obligations, in order to assess its effect on SNS content moderation.

- 12 Article 10 ECHR protects the freedom of expression as follows. Paragraph 1 guarantees a right of freedom of expression to everyone, while paragraph 2 allows for limitations of this right based on a limitative list of grounds such as national security, public security, the prevention of crime and the protection of the rights of others. However, these restrictions must be ‘prescribed by law’ and be ‘necessary in a democratic society’.<sup>23</sup> The former requirement speaks to the rule of law principle and demands that the exercise of state power is accessible and foreseeable.<sup>24</sup> The latter can be said to comprise a more general proportionality test, which weighs the interest in upholding freedom of expression versus other competing interests – the interference must ‘answer to a pressing social need’ and apply ‘necessary and sufficient’ means to that end.<sup>25</sup> In assessing these criteria, the Court seeks to strike a ‘fair balance’ between the conflicting rights and interests involved. In *Soering v UK*, the Court stated that ‘inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights’.<sup>26</sup>
- 13 The importance of the internet as a forum for public debate was recognised in *Yildirim v Turkey*. Subsequently, in *Animal Rights Defenders* the Court recognised that social media provide a platform for the exercise of free speech. Consequently, a blocking injunction compelling an SNS to remove content can be considered a form of state interference with the freedom of expression which would have to fulfil the requirements of Article 10(2). Affected social network users can thus contest orders which fail to adequately observe the right to freedom of expression as developed in the ECHR’s case law. In addition, such injunctions could also be considered an interference with the free speech of SNSs.<sup>27</sup>
- 14 When considering the necessity of these measures in a democratic society and the ‘fair balance’ between the interests involved, a number of factors must be taken into account, such as the nature of the speech affected; the public interest which the injunction serves; and the measure’s proportionality.<sup>28</sup> Concerning the nature of speech involved, a high level of protection is consistently awarded to political speech and ‘contributions to the public debate’.<sup>29</sup> This has led Jacob Rowbottom to conclude that much of social media speech enjoys a lower level of protection under the ECHR, as it commonly concerns more casual and amateur expression.<sup>30</sup> This may be true for a majority of content, but it also follows that injunctions affecting the social media activities of politicians, journalists and activists should be treated with greater scrutiny. The Court has also held that artistic expression is protected under the Convention.<sup>31</sup> Furthermore, while the right to free speech covers statements that ‘offend, shock or disturb’<sup>32</sup>, States have greater discretion in dealing with ‘gratuitously offensive’<sup>33</sup> speech acts such as holocaust denial.
- 15 State action can also fall foul of the ‘fair balance’ due to a lack of proportionality. This requirement could prohibit overly broad injunctions which go further than necessary to pursue their aim.<sup>35</sup> In the context of SNSs, the interests of copyright enforcement might require the removal of infringing images, but need not call for the suspension of accounts involved, or deletion of comments and responses associated with said images. Injunctions categorically prohibiting certain terms or files, or placing a duty of care such as a monitoring or filtering obligation on the intermediary, could also raise questions of proportionality (although this issue has been treated in greater detail under EU law, to be discussed in section E).
- 16 The above shows that the ECHR places limits on state orders compelling content removal by SNS companies. While the protection of end users against such interference is by no means absolute, the Convention can be relied upon to prohibit the most extreme and disproportionate interferences by public authorities. But what of *voluntary* content removal decisions, where the state is not directly involved? As stated, private actors are not directly bound by the Convention. Instead, the ECHR can also create positive State obligations, by which the State can be required to take action in order to ensure the effective exercise of Convention rights by its citizens.<sup>36</sup> Arbitrary or unwarranted removal by SNSs could therefore trigger such an obligation. After all, the Court has repeatedly stated that “[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.”<sup>37</sup> The remainder of this section will focus on positive obligations in the context of Article 10 ECHR, in order to determine whether they might provide protection against voluntary forms of content removal.
- 17 In ECHR case law, positive obligations to protect free speech have been identified under a broad range of circumstances. For example, in *Özgür Gündem* and *Dink*, the Turkish state was found to have breached

its positive obligation to protect journalists against harassment and assault by their fellow citizens (in the case of *Dink* even leading to the victim's death).<sup>38</sup> The positive dimension of the right to free speech would have required the Turkish government to actively investigate credible threats, and provided for the physical security of targets.<sup>39</sup> In *Fuentes Bobo*, the dismissal of a journalist for remarks made on television about his employer was also found to trigger positive obligations due to the chilling effects of such measures.<sup>40</sup> Accordingly, the Court found a positive obligation to apply labour law in such a way as to prevent its abuse for the limitation of free speech.<sup>41</sup>

- 18 By analogy, if a threat to free speech is identified in the removal of SNS content, a positive obligation for the state to protect end users' freedom of expression might entail the prevention of unfair content removal by the intermediary. Prohibiting some forms of content removal, would in effect require the uninterrupted provision of the social network's hosting service to the end user involved. In contrast to the cases described above, it does not concern the prevention of repercussions or retaliations following speech acts, but rather the facilitation or enabling of expression. In other words, it concerns the positive freedom *to* express rather than the negative freedom *from* interference with that right.<sup>42</sup> So far, the Court has been reluctant to identify such a positive obligation. For example, in the *Appleby* case, where activists were barred from protesting in a publicly accessible, yet privately owned shopping centre, the Court found that the right to free speech did not override the owner's property rights.<sup>43</sup> This outcome has been interpreted as a sign of reluctance on behalf of the European court of Human Rights to grant rights of access to specific private venues or forums.<sup>44</sup>
- 19 Despite this reluctance, a positive obligation to enable access to the media is not entirely without precedent in ECHR case law. In *Verein gegen Tierfabriken*, a Swiss private broadcaster refused to accept television commercials on animal rights due to a state-wide ban on political advertising, and the Court considered this a breach of the Swiss state's positive obligations.<sup>45</sup> Central to the Court's findings was the broadcaster's monopolistic position: it considered that, in order to reach the entire Swiss public, the NGO 'had no other means than the national television programmes of the Swiss Radio and Television Company at its disposal, since these programmes were the only ones broadcast throughout Switzerland'.<sup>46</sup> This decision shows that, at least for national television networks, the principle of media pluralism demands of States a positive obligation to ensure non-discriminatory and fair access to the audio-visual platform, even where this platform is operated by private actors. This is in line with previous case law from the

*Informationsverein Lentia* judgment, which found that a state monopoly on broadcasting, precluding access by private parties, is a disproportionate limitation on the freedom of expression.<sup>47</sup> When a private organisation dominates the market, a lack of viable alternatives may also trigger increased duties to guarantee access in the interest of media pluralism and public debate.<sup>48</sup> In such cases, the Court found, 'regard must be had to the "fair balance" that has to be struck' between the community interest and individual rights.<sup>49</sup>

- 20 It should be noted, however, that the precise scope of this positive obligation is unclear, since an almost identical policy on political advertising in the UK did not amount to a violation in *Animal Rights Defenders*.<sup>50</sup> In distinguishing the UK situation from the Swiss, the Court pointed to the availability of alternative media, and social media in particular, in order for NGOs to reach their audience: 'Importantly, the applicant has full access for its advertisement to non-broadcasting media including the print media, the internet (including social media) as well as to demonstrations, posters and flyers. Even if it has not been shown that the internet, with its social media, is more influential than the broadcast media in the respondent State, those new media remain powerful communication tools which can be of significant assistance to the applicant NGO in achieving its own objectives.'<sup>51</sup> While posters and flyers were not mentioned as viable alternatives to television advertising in *VgT*, they were proposed as such in *Animal Rights Defenders*. While it is not an outright reversal of the findings in *VgT*, the Court does seem to have steered in a different direction by de-emphasising the importance of equal access and highlighting the availability of alternative media.<sup>52</sup> To reconcile these judgments, one might conclude that the interchangeability of different media is to be determined on a case-by-case basis. Evidently, the strict monopoly on broadcasting in Switzerland triggered a positive obligation, but the more diverse media landscape in the UK did not necessitate positive state action.
- 21 In light of the above, a state obligation to prevent undue interference by SNSs could theoretically be construed in cases where such a platform provides the only viable expressive opportunity. There is an interesting discussion to be had as to the functional equivalences and differences between social media and other modes of expression<sup>53</sup>, which mostly falls outside the scope of this article. However, some unique characteristics of social media, which might rule out other alternatives, deserve mention. Firstly, social media are interactive forms of expression, allowing for community feedback, debate and organisation to a degree unseen in television or print. Secondly, social media can allow access to new audiences, both demographically and geographically. Thirdly, social media tend to have significantly lower financial

barriers; creating a user or organisation page, or contributing to the pages and groups of others, is generally free, whereas access to television or print media can involve substantial costs. These are but a few of the reasons why social media should not always be treated interchangeably with alternatives such as broadcasting or pamphleteering.<sup>54</sup>

- 22 It should be somewhat obvious that SNSs offer unique affordances absent in other media, but to construe a right to access one particular platform, one would also have to establish that SNSs are not interchangeable *inter se*. After all, end users wishing to contest the removal of their content from Facebook might find a suitable alternative in Twitter. An important element to consider here is that SNSs generally do not provide direct contact with an audience, but instead require users to build up a network of friends or followers who are interested in their activities.<sup>55</sup> If a committed Facebook user with thousands of friends finds himself suddenly constrained by content policies, other platforms on which he is less well established may not directly provide a viable alternative.<sup>56</sup> Furthermore, SNSs have varying purposes ranging from professional networking (LinkedIn) and online dating (eHarmony) to Facebook's social functions and Twitter's more public forms of exchange, with different audiences harbouring different expectations. It would follow that SNSs are not necessarily interchangeable, and that end users may lack viable alternatives if removed from a particular service.
- 23 Applied to social media, the test of 'viable alternatives' first mentioned in *Appleby* speaks to a very real concern regarding the position of online intermediaries. In the same way that duties and responsibilities were created for television monopolies in *Informationsverein Lentia* and *Verein Gegen Tierfabriken*, the remarkable influence and dominance of a few key players on the SNS market might justify a re-examination of their obligations towards the public. However, the more recent decision in *Animal Rights Defenders*, where pamphleteering and social media were proposed as alternatives to television advertising, suggests that the significance of functional differences between media has not (yet) had a strong effect on the Court's assessment of positive obligations to ensure access. Since this judgment, the importance of new media, and social networks in particular, has only increased, and yet we are left with no guiding principles to assess the unique (and diverse) characteristics of these platforms. If the Court is indeed inclined to treat such a broad range of communicative methods as functional or at least interchangeable equivalents, a right to access social network services would be difficult to support.
- 24 The 'living instrument' doctrine requires Convention rights to be interpreted dynamically in response to

societal and technological developments.<sup>57</sup> In this light, the rise of social media might warrant a re-assessment of case law on positive obligations which would extend its applicability beyond strict monopolies and place greater stock in the need for access to online forums. One problem with such an approach, however, is that it remains unclear exactly how this state obligation might be fulfilled in practice. The Court has always refrained from demanding specific forms of intervention. For instance, when the Swiss government argued in *VgT* that the claimant's demands were tantamount to claiming a 'right to broadcast', the Court simply responded as follows:

*"The Court recalls that its judgment is essentially declaratory. Its task is to determine whether the Contracting States have achieved the result called for by the Convention. Various possibilities are conceivable as regards the organisation of broadcasting television commercials; the Swiss authorities have entrusted the responsibility in respect of national programmes to one sole private company. It is not the Court's task to indicate which means a State should utilise in order to perform its obligations under the Convention."*<sup>58</sup>

- 25 Thus, while the Court could hypothetically conclude that certain content removal decisions trigger positive State obligations, it is unlikely to go so far as to outline specific remedies. The Council of Europe's standard-setting activities through the Parliamentary Assembly and Committee of Ministers could play an advisory role in setting out appropriate measures for the protection of social network users, but ultimately the responsibility for the implementation of effective safeguards, and the discretion as to their means, lies with the Member States themselves.
- 26 As stated above, the protection of end users against intermediary censorship would require the uninterrupted provision of these services, despite contractual grounds for termination or suspension thereof. As such, state action in this area would entail a limitation of the freedom of contract. Other fields where positive obligations for the protection of free speech have been identified, such as television broadcasting, or employment law, have traditionally had strong limits placed on contractual freedom in favour of sector-specific regulation: for instance, the labour law concept of 'unfair dismissal' at issue in *Fuentes Bobo* places limits on the conditions under which employers can terminate an employment relationship. The positive obligation at stake simply entailed the manner in which this existing rule was to be interpreted in light of free speech considerations. Similarly, the decisions by private broadcasters in *Tierfabriken* were also subject to *sui generis* regulation, and their refusal of certain content was due to a state prohibition on political advertising. Again, an altered interpretation or slight amendment of the existing rules would suffice to fulfil the State's positive

obligations. While the above cases could be treated within existing regulatory paradigms, it is unclear through what instrument a Member State might protect their citizens from intermediary censorship on the internet. Although this does not necessarily speak against the necessity for such intervention, the lack of tried and trusted regulatory tools for the protection of end user rights might discourage the Court from identifying a positive obligation in these scenarios.

- 27 In conclusion, a review of judgements reveals that the ECHR's level of protection for free speech rights in private relationships lacks clarity; the case law is limited to a handful of judgments, some of which were made prior to significant changes in the media landscape.<sup>59</sup> Cases such as *VgT* problematise the strict distinction between private and public forums found in *Appleby*. However, this more graduated approach based on viable alternatives has few other precedents and thus lacks sufficient clarity for a predictable application to social networks. Although an argument based on changes in the media landscape and the unique position of SNSs could support the protection of end users against arbitrary or unnecessary censorship, cases such as *Animal Rights Defenders* suggest that the Court has not yet arrived at such a nuanced treatment of functionally different forms of media, and is hesitant to call for free-speech based interventions in private relationships. Since the Convention cannot create horizontally enforceable rights, and rather operates through positive obligations, it is also unclear what precisely could be demanded of states in order to adequately safeguard end user rights.

## D. Blocking injunctions, third party notices and voluntary removal under the EU framework

- 28 European Union law plays an important role in regulating the content moderation policies of SNSs. The e-Commerce Directive sets out rules on content liability, which play an important role in shaping intermediary incentives for content moderation.<sup>60</sup> It also places limits on state interference through injunctive measures and (indirectly) provides the basis for notice and takedown procedures, which enable the enforcement of intellectual property rights and other third party interests online.<sup>61</sup> In addition, the Enforcement directive provides more specific guidance on IP-based injunctions. Through the CJEU's case law based on the Charter of Fundamental Rights of the European Union, this regime has also increasingly been made subject to fundamental rights considerations which can limit the competences of states and intermediaries in removing online content.<sup>62</sup> EU law can thus require, permit or proscribe content removal

by intermediaries. This section will explore this balance of rights and duties and evaluate the legal implications of content removal in the EU *acquis*.

- 29 Broadly speaking, when SNSs host content provided by their users, this activity qualifies as a 'hosting' service in the sense of Article 14 of the e-Commerce Directive. Recital 42 of the Directive indicates that intermediaries are eligible for this classification, so long as their activities are '*of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored*'.<sup>63</sup> The CJEU's decision in *SABAM / Netlog* shows that social media platforms are covered by this provision.<sup>64</sup> The most important consequence of this classification is that the intermediary cannot be held liable for illegal content uploaded by their end users.<sup>65</sup> Only once the intermediary obtains knowledge of illegal information, and then fails to expeditiously remove it, does he lose this protection for civil and criminal liability.<sup>66</sup> This rule applies to all forms of illegal information, whether it be copyright infringement, child pornography or extremist hate speech.<sup>67</sup> By protecting intermediaries from legal risks created by end user wrongdoing, this exemption can be seen as an important pre-condition for the viability of user-generated content business models, and by extension for the protection of online speech through SNSs.<sup>68</sup>
- 30 While the 'safe harbour' of Article 14 of the e-Commerce Directive protects intermediaries from liability for end-user content, this rule does not prevent the imposition of blocking injunctions through court orders or administrative orders. Recital 45 states that the safe harbours '*do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.*' In some cases, EU law demands the creation of injunctive relief, such as in the interest of copyright enforcement and related rights under the Directive on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (InfoSoc Directive) and the Directive on the enforcement of intellectual property rights (Enforcement Directive).<sup>69</sup> These directives also set more specific conditions for the application of such measures. However, the e-Commerce Directive's reference to 'any infringement' shows that national law may also allow for injunctions on other grounds, such as defamation or criminal hate speech. Recital 45 indicates that both courts<sup>70</sup> and administrative bodies may issue such orders.
- 31 These state-issued encroachments on the 'safe harbour' are in turn restricted by article 15 of the e-Commerce Directive. This provision prescribes

that States may not impose on hosting providers any ‘*general obligation (...) to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity*’. As such, blocking injunctions must be limited to specific content and cannot apply to the service as a whole. For instance, the Court ruled in *SABAM / Netlog* that Belgium’s imposition of a general filtering obligation on a social media service, aimed at detecting and preventing copyright infringements throughout the entire network, fell afoul of this provision.<sup>71</sup> The neutral position of intermediaries is thus protected under EU law, and intermediaries cannot be compelled to actively search for illegal content on their networks.<sup>72</sup>

- 32 More specifically, in the context of intellectual property claims, the Enforcement Directive shows that I.P. injunctions directed at third parties “must be ‘effective, proportionate and dissuasive’ and that the national rules governing them must be ‘designed in such a way that the objective pursued by the Directive may be achieved’.”<sup>73</sup> At the same time, however, the measures they impose must be ‘fair and proportionate and must not be excessively costly’ and must ‘not create barriers to legitimate trade’.<sup>74</sup>
- 33 The above provisions show that undue state interference with online intermediary services may be contrary to the EU’s aim of market competition. In addition, their preambles show that these requirements must be read in light of fundamental rights considerations. Recital 9 of the E-Commerce Directive states that ‘The free movement of information society services can in many cases be a specific reflection in Community law of a more general principle, namely freedom of expression as enshrined in Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which has been ratified by all the Member States; for this reason, directives covering the supply of information society services must ensure that this activity may be engaged in freely in the light of that Article.’ Furthermore, Recital 2 of the Enforcement Directive states that ‘[the protection of intellectual property] should not hamper freedom of expression, the free movement of information, or the protection of personal data, including on the Internet.’ Thus, the EU law on intermediary injunctions calls for state orders to be grounded in a minimum level of free speech protection.
- 34 The need to weigh the purposes of blocking against competing fundamental rights has been further crystallised in the CJEU’s case law. Borrowing from ECHR’s terminology (see above, section III), they have made injunctions aimed at copyright enforcement subject to a ‘fair balance’ requirement: ‘where several fundamental rights are at issue, the Member States must, when transposing a directive, ensure that they rely on an interpretation of the directive

which allows a fair balance to be struck between the applicable fundamental rights protected by the European Union legal order.”<sup>75</sup> This concept was first introduced in the case of *Promusicae*, and later repeated in cases such as *Scarlet / SABAM*, *Netlog / SABAM* and *UPC Telekabel*.<sup>76</sup> In these cases, injunctions against internet service providers aimed at copyright enforcement were struck down for requiring general filtering measures by the intermediary, thereby impinging on end users’ right to privacy and freedom to receive or impart information, as well as the intermediary’s freedom to conduct a business. The Court found that, in order to strike a fair balance, injunctions must not “unnecessarily deprive internet users of the possibility of lawfully accessing the information available”.<sup>77</sup> While these cases all concerned the enforcement of intellectual property rights, the Court’s generalised formulation does not seem to suggest that this ‘fair balance’ test would be absent for injunctions on the basis of, for instance, defamation claims. When commanding removal by intermediary services, state authorities and courts must take end users’ fundamental rights into consideration, including their right to free speech.

- 35 The Court in *UPC Telekabel* decided that, insofar as state injunctions do not specify the technical measures required, the targeted intermediaries themselves must also attempt to strike a ‘fair balance’ between the public interest and their end users’ fundamental rights.<sup>78</sup> Furthermore, *locus standi* must be granted to affected end users wishing to have such implementing actions assessed as to this ‘fair balance’.<sup>79</sup> This judgment is somewhat groundbreaking in applying the ‘fair balance’ test not only to state actors, but also to private intermediaries.<sup>80</sup> However, the ‘fair balance’ requirement has not yet been applied to strictly voluntary acts of removal, where the intermediary acts independently to moderate content on its services.<sup>81</sup>
- 36 The free speech implications of content removal in the absence of direct state interference have not yet been examined by the Luxembourg court. However, such intermediary interventions are not uncommon on social media: they may occur as a matter of policy, such as Facebook’s ban on nudity, but may also be instigated by third parties through the process known as ‘notice and takedown’. Under the e-Commerce Directive, intermediaries incur liability for content through knowledge of its illegality, and third parties can trigger a removal obligation through notification: once informed of illegal content on their servers, hosting providers must then ‘expeditiously remove’ said information, or render themselves liable for its illegality.<sup>82</sup> The major social networks have put in place procedures to facilitate this process, with specific pages and forms intended for the reporting of illegal or infringing content.<sup>83</sup> Thus, the EU’s e-Commerce regime still forces SNSs to moderate

end-users for illegal content and infringements, even absent direct state interference. The notice and takedown procedure allows third parties to trigger content removal duties, backed up by the threat of subsequent litigation. If intermediaries must take into account their end users' fundamental rights when implementing court orders, does this duty also apply in the takedown phase preceding judicial enforcement? In other words does the 'fair balance' requirement also apply to the handling of takedown notices?

- 37 'Notice and takedown' can be seen a consequence of the e-Commerce Directive's conditions for liability, but is not directly mentioned or specified. The 'takedown notice' has no independent meaning under the EU *acquis communautaire*, and is not subject to any substantive or formal requirements. As such, the act of 'notification' does not necessarily provide evidence of actual knowledge. While notices can indeed be a factor in establishing the intermediary's knowledge they may lack sufficient (correct) information for the intermediary to identify an illegality: the CJEU decided in *L'Oréal v. Ebay* that notices 'cannot automatically preclude the exemption from liability provided for in Article 14 of Directive 2000/31, given that notifications of allegedly illegal activities or information may turn out to be insufficiently precise or inadequately substantiated'.<sup>84</sup> Thus, the intermediary is expected to make an independent assessment of the facts available to him in order to determine the legality of hosted information. The Directive permits Member States to set further rules or procedures for notification, but a majority have not implemented formal notice procedures for hosting intermediaries.<sup>85</sup>
- 38 Due to the non-formalised nature of takedown procedures, it is difficult to distinguish in practice between content removal instigated through third party notices, and voluntary interventions based on the platform's Terms of Use. SNSs may decide to comply with a meritless defamation claim because the flagged content breaches their ToU prohibition of bullying or harassment. Thus, notices may result in the removal of legal content.<sup>86</sup> Conversely, risk-avoidant intermediaries may decide to remove illegal content, even though the referring notice contains insufficient information to render them liable. In other words, SNS content removal instigated through the notice and takedown process does not always correspond to a legal duty. It cannot be distinguished *a priori* from the 'voluntary', policy-based conduct moderation. It would therefore be difficult to argue that implementations of takedown requests are categorically subject to a different fundamental rights standard than other forms of voluntary content moderation by SNSs.
- 39 Admittedly, recital 46 of the e-Commerce Directive requires that the removal of or disabling of access to

illegal content has to be undertaken in the observance of the principle of freedom of expression. However, in the absence of more concrete implementation in national procedures, or an operative EU provision to the same effect, this notion has not been translated into a directly effective safeguard. Currently, the identification of direct state interference remains key for an appeal by end users to their free speech rights under the EU framework.

- 40 I argue that this strict distinction between public and private forms of intervention is problematic. After all, while no state action is necessary to complete a notice and takedown process, its efficacy is dependent on the possibility of subsequent state enforcement through litigation. Furthermore, these possibilities are created by the limitations on content illegality and intermediary liability enacted by Member State legislators and interpreted by its judiciary. While state powers are not being *exercised* to achieve content removal in such instances, they are at least being *invoked*. Conversely, the discretionary powers of private SNSs can be, and have been, applied to further governmental interests (as will be further explored in section VI). Through this legal realist perspective a strict distinction between publicly enforced and 'voluntary' removal becomes incoherent.<sup>87</sup> State responsibility for private behaviour is not a binary distinction, but a matter of degree.
- 41 An adequate protection of online expression therefore requires a more nuanced approach than a strict public / private distinction can provide. The ECHR's case law on positive obligations could provide such a method: To the extent that the EU framework can result in the neglect of end users' free speech rights by intermediaries, one could argue that Member States are breaching their positive obligation to ensure the effective exercise of this right.<sup>88</sup> Safe harbour provisions – as a precondition for the viability of SNS business models – can then be seen as an indirect protection of online expression. Limitations and exceptions thereto, such as the 'actual knowledge'-based takedown regime, should then be limited in scope so as to curb third party influence on content moderation policies. The EU regime allows states to negotiate this balance between third party claimants and the protection of intermediaries. Where it may currently be lacking, however, is the protection of *end users* against voluntary forms of removal; lacking meaningful contractual safeguards, they have little ground to contest the decisions of SNSs and have them reviewed as to their compatibility with free speech principles.
- 42 The protection of end users against content removal is currently not significantly greater under the EU framework than under the Convention. Both place strict requirements on interferences by public

authority, but leave the freedom of private online services largely intact. A significant difference, however, is that the Charter elevates this freedom to the status of a fundamental right. The ‘freedom to conduct a business’ under Article 16 states that ‘*The freedom to conduct a business in accordance with Community Union law and national laws and practices is recognised*’. Voluntary content removal, as a business practice otherwise in accordance with Union law, therefore falls under the protective scope of this right.<sup>89</sup> Accordingly, the ‘fair balance’ to be achieved under EU law would have to take into account not only the interests of end users, and the interest in restricting certain forms of speech, but also the interest in protecting the SNS operator’s freedom to conduct its service. Although the Charter must provide an equivalent minimum level of protection to free speech as its Convention counterpart, this additional provision suggests that EU Member States must exercise restraint when limiting the content moderation competences of SNS companies.

## E. Voluntary removal and State Censorship

- 43 The above examination of intermediaries’ rights and obligations shows that there are few legal limitations placed on the moderation and removal of end user’s SNS content. While official state action aimed at restricting speech is subject to judicial review under a developed case law on freedom of speech, the private nature of SNSs allows them a far greater range of discretion. The current fundamental rights framework does not seem to imply a right for end users to have their speech carried by SNSs. Barring an even further expansion of the Charter’s ‘fair balance’ duties for intermediaries or the Convention’s positive obligations, end users are thus left with a lack of protection against unwarranted, unforeseeable or arbitrary censorship by intermediary actors. This lack of safeguards against voluntary content removal creates two distinct, but closely related threats: Firstly, it can allow state censors to circumvent existing safeguards through systems of informal pressure. Secondly, intermediaries may find it in their own interest to remove content and at times disregard free speech principles (to be discussed in section VII). These two explanations of content removal decisions may often coincide or overlap, and this article does not intend to provide a monocausal account for specific incidents. Nevertheless, they provide a useful heuristic to discuss the threats caused by the lack of accountability for voluntary removal, as well as possible regulatory solutions.
- 44 To start with a form of state interference which EU law prohibits: governments outside the EU have placed great pressure on SNSs through the threat of ISP-level blocking. Not to be confused with injunctions on end user content directed at the SNS itself, these orders are directed at local Internet Service Providers and block local audiences access to the website as a whole. The Turkish government has twice used this measure. Firstly, Twitter was blocked in 2014 when it was used to spread a torrent of audio recordings implicating the prime minister and his inner circle in an alleged corruption scandal.<sup>90</sup> Secondly, Twitter, Facebook and YouTube were all blocked in 2015 for hosting photos of a prosecutor who was taken hostage by militants in Istanbul.<sup>91</sup> The injunction was revoked eight hours later when the companies complied with the order.<sup>92</sup> These incidents show how, even where companies hold no local assets, ISP-level blocking can be applied to demand compliance with national laws or rules and alter their community policies.<sup>93</sup> In the EU, ISP-level blocks are common practice in the context of copyright enforcement, and have recently also been applied for anti-terrorist purposes.<sup>94</sup> However, no EU state has yet directed such measures against major SNS websites. Furthermore, EU law seems to preclude this option: the blocking of an entire website would affect a high volume of legitimate traffic, and is therefore unlikely to strike a ‘fair balance’ required under the Charter.<sup>95</sup>
- 45 Although EU states cannot strong-arm SNSs in the same way that other governments have done, they have found other ways to influence content policies. Described by Benkler as ‘regulation by raised eyebrow’, and by Birnhack and Elkin-Koren as ‘the invisible handshake’, approaches where governments aim to shape private policy indirectly, can achieve a largely similar result.<sup>96</sup> This soft power approach involves a combination of publicly-voiced appeals to corporate responsibility by senior officials, and close, intransparent ties between intermediaries and law enforcement agencies.<sup>97</sup> Ostensibly voluntary measures by intermediaries may then be applied to further government interests, without revealing state involvement or triggering constitutional safeguards.<sup>98</sup>
- 46 Examples of political pressure on SNS companies have been frequent, in particular in the context of anti-terrorist activities. In the wake of the Rigby murders, the UK Security Committee called on Facebook to proactively monitor its community for terroristic content in cooperation with law enforcement.<sup>99</sup> Following the *Charlie Hebdo* attacks, and in response to an increased online presence of extremist organisations such as the Islamic State, heads of government throughout Europe have made public statements calling on SNSs to contribute to anti-terrorism efforts. At the World Economic Forum in 2015, President Francois Hollande called on corporations to “fight terror,” stating: “The big operators, and we know who they are, can no longer close their eyes if they are considered accomplices

of what they host. We must act at the European and international level to define a legal framework so that Internet platforms which manage social media be considered responsible, and that sanctions can be taken.”<sup>100</sup> Broad governmental support for an increased responsibility of online intermediaries in the fight against terrorism was reaffirmed in a Joint Statement of EU ministers, which stated that: ‘the partnership of the major Internet providers is essential to create the conditions of a swift reporting of material that aims to incite hatred and terror and the condition of its removing, where appropriate/possible.’<sup>101</sup> These are but a few examples of government officials publicly calling for SNSs to take a specific course in their content moderation policies.

- 47 These calls have not fallen upon deaf ears. In 2015, Facebook officially expanded its content removal policy to a broader range of terrorist activities: in a statement to the BBC, Monika Bicket, Facebook’s global head of content policy, explained that ‘we now make clear that not only do we not allow terrorist organisations or their members within the Facebook community, but we also don’t permit praise or support for terror groups or their acts or their leaders, which wasn’t something that was detailed before.’<sup>102</sup> For its part, Twitter also undertook efforts to purge their network of ISIS beheading videos<sup>103</sup>: In 2015 they tripled the size of their content moderation team<sup>104</sup>, expanded their definition of prohibited ‘violent or threatening’ behaviour<sup>105</sup>, and began experimentation with automated algorithms for the filtering of abusive or inappropriate content.<sup>106</sup> While France’s ban on the glorification of terrorism is soon to be contested before courts by civil rights groups, and a Dutch proposal to the same effect failed to secure parliamentary support<sup>107</sup>, Facebook or Twitter can make such changes without any true accountability. For governments, the advantage of ‘raised eyebrow’ methods is clear: Why go to all the effort of passing a law – with all the constitutional, political and procedural hurdles this involves – when intermediaries can be persuaded to adopt such rules unilaterally and with no clear form of oversight?
- 48 The power of public statements made by government actors is also evident in the controversy surrounding Wikileaks’ diplomatic cables revelations. Yochai Benkler has convincingly documented how the US government made a concerted effort to ostracize Julien Assange as an enemy of the state, with vice-president Biden describing him as a ‘high tech terrorist’ and a senator publicly calling on other governments and corporations to distance themselves from their ‘illegal, outrageous and reckless acts’.<sup>108</sup> Not long after, a large number of intermediaries such as hosting providers and payment platforms withdrew their services to Wikileaks.<sup>109</sup> Rather than issuing binding orders, which would be subject to free speech and due process safeguards, states can
- play on the responsibility of intermediaries such as SNSs to do the dirty work, which many will be willing and legally permitted to do ‘at the mere whiff of controversy’.<sup>110</sup>
- 49 Concurrent to these publicly voiced emphases on the responsibility of intermediaries and the editorialisation of online content policies, we also see initiatives for closer cooperation between law enforcement and SNS content moderators. Echoing the EU Ministers’ focus on intermediary responsibility and the need for swift reporting mechanisms, the EU’s counter-terrorism coordinator, Gilles de Kerchove, proposed to have experts from member states flagging terror-related content, stating “We have to help them, and refer to them, and signal content (...) Each member state should have a unit with people trained to do that.”<sup>111</sup> He cited the UK’s Counter-Terrorism Internet Referral Unit (CTIRU) as a best practice for other Member States to emulate: ‘Member States should consider establishing similar units to the UK CTIRU and replicate relationships with the main social media companies to refer terrorist and extremist content which breaches the platforms’ own terms and conditions (and not necessarily national legislation).’<sup>112</sup> Quite unambiguously, this statement shows how Terms of Use and community policies are coming to supplant legislation as a means to regulate online speech, and that governments are eager to make use of this method. Furthermore, the terminology of ‘helping’ and ‘referring’, rather than ordering or demanding, implies the intention to hold intermediaries responsible for such decisions, rather than law enforcement itself. This ‘voluntaristic’ approach championed by Kerchove and the CTIRU has proven to be highly effective in achieving content takedown. According to the same statement, SNSs have voluntarily removed 72,000 pieces of terrorist content following referrals from the CTIRU because they have agreed that the content represents a breach of their rules.<sup>113</sup> However, as the above has shown, it is precisely this non-statutory and voluntary quality, exacerbated by the politically-charged and non-specific aim of ‘counter-terrorism’<sup>114</sup>, which renders these systems susceptible to abuse.<sup>115</sup> Especially in the current political climate, intermediaries may find their demands difficult to refuse.
- 50 An important source of information regarding governmental pressure on SNSs has been the release of so-called ‘transparency reports’. Since 2012, Twitter has published data on the governmental information and removal requests they receive worldwide, and the manner in which they have been processed.<sup>116</sup> Facebook, LinkedIn and a range of other significant online intermediaries have since followed suit.<sup>117</sup> Twitter’s reports distinguish between court-ordered injunctions and other government requests, showing that, for example, Germany issued one court order and forty-two removal requests,

and that Twitter blocked content in 37% of these instances.<sup>118</sup> Twitter's reports confirm the trends of increased interference described above, with total annual requests worldwide increasing from 48 in 2012 to 1099 in 2014. While Russia and Turkey are chiefly responsible for this explosive increase, they are quickly followed by the EU member states. For 2014, Twitter reported 11 court orders and 249 government requests from EU member states.<sup>119</sup> Facebook does not make a categorical distinction between these interactions, and reports a total of 72 EU Member State removal requests for the second half of 2014.<sup>120</sup>

51 By drawing attention to government interference, these reports could encourage states to exercise restraint in policing online communities. However, they lack a clear definition of what constitutes an extra-judicial removal request, and seem to omit the work of referral units such as the CTIRU. While Facebook and Twitter report a total of 15 and 44 removal requests from the UK since 2012<sup>121</sup>, the CTIRU claims to have achieved 29,000 content removals by 'social media and other parts of the internet industry', which explicitly include Twitter and Facebook.<sup>122</sup> Are we to conclude that these referrals do not fall under the definition of government requests for the purpose of these reports? If so, an essential element of government influence on online speech is being omitted, illustrating a limited interpretation of what constitutes state interference in the attitudes of social media companies.<sup>123</sup>

52 Individual examples of undue government influence on SNS policies are inherently difficult to illustrate with concrete examples, since they are aimed at denying state involvement and deferring responsibility to private parties. However, there are certain incidents which can serve to illustrate the vulnerability of the current system. For instance, in the run-up to the UK royal wedding in 2011, controversy arose surrounding Facebook's decision to remove a number of pages dedicated to organising protest rallies.<sup>124</sup> These removals coincided with the arrest of involved activists, and some alleged that Facebook had suppressed legitimate political dissent in cooperation with law enforcement authorities.<sup>125</sup> Facebook denied these allegations, and claimed that the removal decision was due to the protestor's use of pseudonyms - a breach of the Facebook Terms of Use. The removal was simply part of a 'routine check' for such compliance, unrelated to coinciding law enforcement measures or the controversial, political nature of the content involved.<sup>126</sup> Admittedly, direct government ties have not been proven in the above case, but it highlights the potential for abuse present in the current system. So long as end users cannot establish that Facebook's removal is the direct consequence of state interference, rather than a voluntary decision based on community policy, governments could stifle political speech without

direct accountability. And if governmental influence on SNSs policy is informal, non-transparent and non-binding, establishing this link could be very difficult indeed.

53 Through the self-regulatory body known as the Global Network Initiative (GNI), some SNSs and other online intermediaries have taken it upon themselves to limit governmental influence and protect their end users' privacy and freedom of expression. Founded in 2008, this organisation, which counts Facebook and LinkedIn among its members, established principles and guidelines for the fair and transparent processing of removal requests.<sup>127</sup> Their principles include the following:

- Require that governments follow established domestic legal processes when they are seeking to restrict freedom of expression.
- Interpret government restrictions and demands so as to minimise the negative effect on freedom of expression.
- Interpret the governmental authority's jurisdiction so as to minimise the negative effect on freedom of expression.
- Seek clarification or modification from authorised officials when government restrictions appear overbroad, not required by domestic law or appear inconsistent with international human rights laws and standards on freedom of expression.<sup>128</sup>

54 The GNI demands that intermediaries minimise the harmful effect of government requests, and resist non-formalised and voluntary measures (i.e. those not required by law).

55 The visibility and transparency of these requests towards the end user are further preconditions for effective protection of their rights. After all, end users must be made aware of the fact that content removal has been caused by government intervention before they can consider appealing these actions. To quote Baudelaire, "the finest trick of the devil is to persuade you that he does not exist".<sup>129</sup> The GNI prescribes that end users must be given 'clear, prominent and timely notice to users when access to specific content has been removed or blocked by the participating company or when communications have been limited by the participating company due to government restrictions.'<sup>130</sup> Furthermore, 'Notice should include the reason for the action and state on whose authority the action was taken.'<sup>131</sup>

56 While the GNI principles, if fully observed, would go a long way in protecting SNS end users, the organisation's main shortcoming is its lack of enforcement competences. The GNI does carry

out compliance reviews of its members, yet it does not have the competence to sanction breaches or otherwise enforce their guidelines. So far, only one such assessment has been carried out, in which all three companies reviewed – Yahoo!, Microsoft and Google – were found to be in compliance. It is unclear, however, what the consequence of a negative outcome would have been. In the absence of binding self-regulatory safeguards, the GNI principles might therefore best be seen as a set of best practices.<sup>132</sup> In any case, while Facebook and Twitter have embraced the GNI's stance on end users' speech rights, section II has shown that this is not reflected in their end user contracts.

- 57 Another non-binding document which outlines guiding principles for the treatment of takedown requests is the recently published Manila Principles, drafted by a worldwide coalition of digital rights NGOs as a set of guidelines for the protection of freedom of expression in communications facilitated by internet intermediaries.<sup>133</sup> Its recommendations are similar to those of the GNI. However, where the GNI recommends that 'governments follow established domestic process when they are seeking to restrict freedom of expression', the Manila Principles go even further by prohibiting any extra-judicial measures: "Governments must not use extra-judicial measures to restrict content. This includes collateral pressures to force changes in Terms of service, to promote or enforce so-called "voluntary" practices and to secure agreements in restraint of trade or in restraint of public dissemination of content."<sup>134</sup> Even more so than the GNI, these principles take a hard stance on the 'regulation by raised eyebrow'. And even more so than the GNI, they are of a strictly normative nature and create no guarantees for end users in practice.
- 58 The principles embraced by SNSs and civil society in these documents, with their emphasis on codified, transparent government request procedures, is quite different from the government methods described above. Governments have proven themselves willing, and often able, to appeal to SNSs' corporate responsibility and their voluntary removal capacities in order to further such goals. Rather than operating through referral or assistance which would rely on SNSs' voluntary removal competences, interaction with law enforcement agencies should be formalised so that requests result in binding, specific and transparent removal *orders*. This approach places the responsibility with law enforcement authorities to follow national legal processes, and with SNSs to resist non-binding demands.
- 59 An emphasis on rule of law principles and transparency requirements could go some way in curbing the circumvention of vertical free speech safeguards. However, it seems impossible to rule out this risk completely. What motivates intermediary removal decisions is fundamentally

difficult to ascertain, and government demands may inevitably play a role in these deliberations. Can we really prohibit figures such as prime ministers from publicly mentioning their dislike of violent content online? This seems neither feasible nor desirable (it would sooner be a restriction of the politicians' free speech). Comments such as these play out in a broader context of public discourse, where the perceived preferences of the social network community, or the public as a whole, can be as much a motivating factor as the demands of state authorities. Although states undoubtedly have powerful voices in affecting these deliberations, they must be seen in a broader context of a multiple actors who can influence SNSs through the mercurial process known as a 'public debate'. Instead of focusing solely on the role of government in SNS content moderation, the online speech would also benefit from increased accountability for the SNSs themselves.

## F. Voluntary Removal and Private Censorship

- 60 The previous section has focused on states and their governments as the principal drivers of censorship, and on SNS operators as their occasional partner in these endeavours. However, it would be a mistake to assume that the SNS services are otherwise neutral parties that will moderate content only to the extent that governments can persuade them to. Their own commercial goals and incentives may also lead them to stray from strict non-intervention. Indeed, many common forms of content moderation do not correspond to a legal duty, such as the prohibition of pornography or bullying. And yet, these rules are largely accepted - even expected - by social network users. Voluntary content removal is often legally and commercially viable for intermediaries, and is linked to the community's needs and demands as well as the leverage of other private parties. This section will consider how the commercial incentives of SNS operators relate to the free speech rights of their users.
- 61 In some cases, such as online extremism, governments' political aims and intermediaries' commercial incentives can be seen to overlap. To start with an example: what motivated Twitter's large-scale effort to fight IS-related content on its network? From the previous section, it appears that government demands may have influenced Twitter's behaviour. However, it can also simply be seen as a response to user demand. This seems to have been the Guardian's interpretation, when it reported that '*people do not want to see this imagery, and media platforms are responding.*'<sup>135</sup> The low popularity of ISIS' political programme and the shocking nature of their propaganda content contributed to an environment where the Twitter community readily accepted, and

in many cases actively called for, their exclusion from the network.<sup>136</sup> In this light, voluntary content removal might be explained primarily as a part of their service, or as a means of PR, rather than as government-backed suppression.

- 62 End users' demands and expectations should not necessarily forestall free speech concerns. After all, the fundamental right of free speech serves to protect not only majoritarian consensus, but also minority positions.<sup>137</sup> These might not be as favourably treated where intermediaries simply respond to the whims of 'the public'. The freedom of SNSs to determine their own content policies has allowed them to respond decisively to a deluge of shocking and anti-democratic terrorist content, but it has also permitted, for example, Facebook's hard-line sexual conservatism, which has resulted in questionable removal decisions regarding displays of gay and lesbian affection<sup>138</sup> and images of breastfeeding and artistic nudity.<sup>139</sup> For example, Facebook's refusal to host an image of Courbet's nude 'L'Origine Du Monde' has sparked controversy in France.<sup>140</sup> Regardless of whether one approves of Facebook's sexually conservative approach, or Twitter's tough stance on terrorist content, these policies reflect the preferences of a dominant community culture which can marginalise diverging practices and attitudes. The SNS operator's power to remove content at the behest of the community's (perceived) wishes, subject to the shifting political and moral attitudes, introduces an unforeseeable threat to dissent and pluralism.
- 63 Another aspect to consider is the susceptibility of SNSs to private-sector demands. Through takedown notices, third parties can exert pressure on SNS removal policies. Numerous factors contribute to the likelihood of SNSs underrating their end users' free speech interests and unnecessarily complying with third party demands: the high volume of requests, particularly in the context of copyright enforcement<sup>141</sup>, and the correspondingly high transaction costs involved in adequately evaluating their claims;<sup>142</sup> legal uncertainty as to the conditions for 'actual knowledge' and intermediary liability; and end users' lack of contractual protection against content removal.<sup>143</sup> In many cases, risk-avoidance may then weigh heavier than the free speech interests of their (non-paying) customers. This imbalance of incentives speaks against an overreliance on the SNS operator as an arbiter between users and other private interests.<sup>144</sup>
- 64 These pressures from within and without the SNS may diverge from democratic considerations on the limits of acceptable speech. Even with sufficient constitutional safeguards against state co-optation, SNSs cannot necessarily be relied upon to observe free speech principles autonomously. A more complete protection from both public and private

interference must therefore focus on increasing the direct accountability of SNSs towards individual end users. Users should have some means to contest the unwarranted removal of their content - that is to say, removal which does not strike a balance between the removal ground and the end user's free speech rights. As described in section II, this balance requires a different calculus than that which is applied to state interference, with greater leniency as to the aims of intervention; for instance, while a national ban on pornography might be deemed excessive, an SNS could have legitimate reasons for maintaining such a policy. An important factor in determining the intermediary's discretion should be their degree of dominance, as reflected in the ECHR's case law.<sup>145</sup> As SNSs become more popular and influential as quasi-public forums, their removal policies should be held to stricter requirements.

- 65 Here, the GNI could provide some guidance as to best practices for SNSs. Although their rules are formulated so as to apply exclusively to the treatment of state orders, certain principles could also be extended to voluntary content moderation: content policies should be formulated clearly and interpreted restrictively, and content deletion should be limited to the infringing elements (such that an entire discussion thread, profile or page is not removed due to one prohibited comment or image).<sup>146</sup> For instance, the use of a false name may be prohibited, but it need not provide a ground for the complete deletion of an entire political protest page for all its followers.<sup>147</sup> Similarly, region-specific blocking should be preferred to total deletion (as the lesser of two evils).<sup>148</sup> Where possible, users are to be notified of their policy breaches before removal and be given the opportunity to respond and rectify policy breaches, as well as the ability to appeal decisions internally. These medium-specific factors could be taken into account when assessing the removal decisions in light of the freedom of expression.
- 66 These principles require a higher level of protection for end users than their contracts currently provide. If self-regulatory efforts such as the GNI cannot achieve this result, there is a need for the law to ensure such safeguards. Under the Charter, this could be achieved through the extension of the 'fair balance' duty on SNSs to include voluntary removal decisions. Under the ECHR, it would involve an appeal to positive state obligations to ensure an appropriate level of protection for end users. These fundamental rights-based approaches would have to be dealt with through end user litigation, and might require a significant re-examination of current doctrines. They are further problematised by the slow pace of jurisprudence in a rapidly changing media landscape, and, in the case of the ECHR, by a lack of horizontal effect. A more effective response would therefore involve active state regulation,

which might involve the prohibition of ToU clauses with overly broad content removal competences, or reversals of the burden of proof (an approach similar to EU consumer protection<sup>149</sup>). As Wauters *et al.* have argued, EU regulators could also improve contractual safeguards for SNS safeguards through the facilitation and encouragement of collective redress mechanisms.<sup>150</sup> It falls outside the scope of this article to determine whether these actions should occur at the national or EU level; whether some form of co-regulation is possible; and to which online services it should apply. However, the slow pace of fundamental rights case law and a lack of commercial incentives towards genuinely effective self-regulation may necessitate an operationalisation of such norms through public rulemaking.

## G. Conclusion

- 67 This article has revealed some chinks in the constitutional armour, and assessed the risks that they create. The current EU framework places a large degree of trust and responsibility in the hands of a few SNS companies, who are uniquely positioned to place boundaries on the tone and topic of public debate. This article has reviewed contractual provisions of two major SNSs, Facebook and Twitter, and found that they provide the operator with a broad, if not unlimited competence to remove content and terminate accounts. Many end users will therefore be unable to rely on their contractual relationship to contest disproportionate interferences with their online expression. Furthermore, network effects and information asymmetry hinder meaningful competition between services as to the level of speech protection granted.
- 68 The ECHR provides safeguards against the abuse and misuse of blocking injunctions and other coercive state measures directed at SNSs. Though the Convention's obligations are directed towards states, the theory of positive obligations also allows for the weighing of conflicting fundamental rights in private relationships. However, a review of such decisions reveals the Court's hesitance to acknowledge such obligations in the context of free speech, particularly in the context of access to privately-owned media. The unique affordances of SNSs and the dominant position of a few services, could lend credence to the invocation of positive obligations, but precedents such as *Appleby* and *Animal Rights Defenders* indicate the Court's reluctance to impose access duties on private parties.
- 69 The limitations on state injunctions are made more specific under EU law proper. The e-Commerce Directive sets out rules as to the foreseeability and proportionality of such interventions, and through the CJEU's case law the 'fair balance' requirements of
- the Charter have been concretely applied to IP-based blocking injunctions so as to protect the end users' free speech rights. However, the case law falls short of treating the free speech implications of voluntary removal by the intermediary. These 'voluntary' measures include removal achieved through notice and takedown procedures, which, due to their non-formalised nature, cannot be treated as a separate category *a priori*. For end users, the identification of direct state action currently remains essential for an appeal for their free speech rights against online services. It is submitted that the CJEU's jurisprudence should further explore the horizontal dimension of free speech rights online, and depart from a strict distinction between public and private responsibilities for the observance of these claims.
- 70 A more nuanced approach is required to protect users against unaccountable SNS content moderation. One concern is the susceptibility of such voluntary competences to state influence. This article has given practical examples of how EU governments have used a combination of political pressure and informal cooperation to effectuate change in SNS content policy, particularly in the context of anti-terrorist efforts. A shift from legislative regulation and formal injunctions to public-private collaborations allows state authorities to circumvent the traditional constitutional safeguards in place for their interferences with public discourse. While an adherence to rule of law principles and transparency requirements could go some way in curbing these developments, it is argued that these informal and indirect interactions based on 'raised eyebrows' and 'invisible handshakes' are inherently difficult to regulate, and that reform must therefore focus on increasing the platform's accountability towards the end user.
- 71 States are but one of many actors seeking to influence SNSs' content policies. To the extent that content removal is inspired by the demands and expectations of the end users, SNSs may be encouraged to sideline ideals of pluralism and dissent in favour of a majoritarian approach. To the extent that it is inspired by third party claims, transaction costs and the risk of liability may also discourage an adequate evaluation of free speech considerations. Therefore, even absent state interference, the commercial incentives of SNSs cannot be guaranteed to coincide with democratic ideals. While SNSs must retain some freedom to determine their own content policies, the platform's degree of dominance should contribute to stricter requirements of proportionality and subsidiarity for blocking and banning interventions.
- 72 In the context of social media content moderation, the public is private and the private is public; governments have been able to operationalise private moderation powers to further regulatory goals, and SNS companies are increasingly taking

on a quasi-judicial role in determining the limits of public discourse, with their Terms of Use and content policies coming to supplant legislative prohibitions. As these lines begin to blur, so should the distinction between public and private censorship, between horizontal and vertical free speech safeguards. SNS operators are well-positioned to act as agents of censorship in the online environment, at once highly influential and scarcely accountable. In order to address the structural threat to free speech posed by the powers of these middle men, end users' rights should be made to incorporate and reflect their fundamental rights.

- 1 The author extends his thanks to Britt van Breda, Christina Angelopoulous, Rade Obradović and Youssef Fouad for their comments and insights. Special thanks are owed to Tarlach McGonagle for his assistance throughout the research project.
- 2 A study by the Pew Research Center found that over 35% of youths find their news through SNS, and news websites receive 25% of their traffic on average from referrals by Facebook and Twitter. A. Lenhart et al., *Teens, Social Media & Technology Overview 2015*, Pew Research Center 9 April 2015. Available at: [http://www.pewinternet.org/files/2015/04/PI-TeensandTech\\_Update2015\\_0409151.pdf](http://www.pewinternet.org/files/2015/04/PI-TeensandTech_Update2015_0409151.pdf)
- 3 Z. Tufekci & C. Wilson, 'Social media and the decision to participate in political protest: Observations from Tahrir Square', *Journal of Communication* 62:2 (2012). C. Fuchs, *Social media: A Critical Introduction*, (SAGE Publications London 2012) p. 83. An interesting academic discussion, falling outside the scope of this article, has arisen as to the political efficacy of these 'born digital' protests. Authors such as Zeynep Tufekci argue that, although SNS allow for faster mobilisation and manifestation, and thus media exposure, they do not seem to support creation of unified, sustained protest movements. This is in part due to their potential for action without organisational hierarchies and a resulting inability to engage with institutional politics. Whether the increase in large-scale protests has also improved the ability to effectuate real change, is therefore subject to debate. However, regardless of whether these trends can be seen as a net gain for democracy, it is clear that SNS are now an essential instrument for political involvement and are therefore worth examining as to the risk of censorship. Z. Tufekci, 'The Medium and the Movement: Digital Tools, Social Movement Politics, and the End of the Free Rider Problem', *Policy & Internet* 6:2. E. Zuckerman 'New Media, New Civics?', *Policy & Internet* 6:2 (2014). More optimistically: C. Shirky, 'The political power of social media: technology, the public sphere and political change', *Foreign Affairs* January 2011. Available online at: <https://www.foreignaffairs.com/articles/2010-12-20/political-power-social-media> More sceptically: M Gladwell, 'Small Change: why the revolution will not be tweeted', *The New Yorker* 4 October 2010. Available online at: <http://www.newyorker.com/magazine/2010/10/04/small-change-3>
- 4 D. McGoldrick, 'The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective', *Human Rights Law Review* 13:1 (2013). O'Flaherty, 'Freedom of Expression: Article 19 of the ICCPR and the Human Rights Committee's General Comment No 34' (2012) *Human Rights Law Review* 12:4.
- 5 R. MacKinnon et al., *Fostering Freedom Online*, UNESCO Series on Internet Freedom (UNESCO Publishing 2014).
- 6 <http://newsroom.fb.com/company-info/>  
<https://about.twitter.com/company>
- 7 R. MacKinnon et al., *Fostering Freedom Online*, UNESCO Series on Internet Freedom (UNESCO Publishing 2014).
- 8 J. Zittrain, *A History of Online Gatekeeping*, *Harvard Journal of Law and Technology* 9:2 (2006), p. 255.
- 9 <https://www.facebook.com/legal/terms>
- 10 <https://www.facebook.com/legal/terms>
- 11 <https://www.facebook.com/legal/terms>
- 12 <https://twitter.com/ToS> (Emphasis added).
- 13 <https://support.twitter.com/articles/18311-the-twitter-rules>
- 14 E. Wauters et. al., 'Towards a better protection of social media users: a legal perspective on the terms of use of social networking sites', *International Journal of Law and Information Technology* 22:3 (2014).
- 15 E. Wauters et. al., 'Social Networking Sites' Terms of Use: Addressing Imbalances in the User-Provider Relationship through Ex Ante and Ex Post Mechanisms', *Journal of Intellectual Property, Information Technology and e-Commerce Law* 5:2 (2015).
- 16 E. Wauters et. al., 'Towards a better protection of social media users: a legal perspective on the terms of use of social networking sites', *International Journal of Law and Information Technology* 22:3 (2014).
- 17 On informational asymmetry as an obstacle to competition: G. Akerlof, 'The Market for Lemons: Quality Uncertainty and the Market Mechanism', *The Quarterly Journal of Economics*, 84:3 (1970).
- 18 Chiu, Aaron, T., 'Note. Irrationally bound: Terms of Use licenses and the breakdown of consumer rationality in the market for social network sites' *Southern California Interdisciplinary Law Journal* 21 (2011).
- 19 Ibid.
- 20 E. Wauters et. al., 'Social Networking Sites' Terms of Use: Addressing Imbalances in the User-Provider Relationship through Ex Ante and Ex Post Mechanisms', *Journal of Intellectual Property, Information Technology and e-Commerce Law* 5:2 (2015).
- 21 D. Harris et al., *Law of the European Convention on Human Rights*, (Oxford University Press 2014), p. 21-24.
- 22 Ibid.
- 23 *Convention on Human Rights*, Article 10(2).
- 24 *Sunday Times v UK* (No 1), app. no. 6538/74, ECHR 26 April 1979.; *Gaweda v Poland*, app. no. 26229/95 ECHR 14 March 2002. D. Harris et al., *Law of the European Convention on Human Rights*, (Oxford University Press 2014, Third Edition), p. 21-24.
- 25 D. Harris et al., *Law of the European Convention on Human Rights*, (Oxford University Press 2014, Third Edition), p. 21 - 24 .  
*Sunday Times v UK* (No 1), app. no. 6538/74, ECHR 26 April 1979. *Handyside v UK*, app. no. 5493/72, ECHR 7 December 1976.
- 26 D. Harris et al., *Law of the European Convention on Human Rights*, (Oxford University Press 2014, Third Edition), p. 21 - 24 .  
*Soering v. UK*, app. no. 14038/88, ECHR 7 July 1989.
- 27 *Delfi AS v Estonia*, app. no. 64569/09, ECHR 16 June 2015.
- 28 D. Harris et al., *Law of the European Convention on Human Rights*, (Oxford University Press 2014, Third Edition).
- 29 This increased level of protection extends to politicians and journalists, as well as activists and NGOs. See, respectively: *Feret v Belgium*, app. no. 15615/07 ECHR 16 July 2009. *Goodwin v UK*, app no. 17488/90 ECHR 27 March 1996. *Steel & Morris v. UK*, app. no. 68416/01 ECHR 05 February 2005. *TASZ v Hungary*, app. no. 37374/05 ECHR 14 April 2009.

- 30 J. Rowbottom, 'To Rant, Vent and Converse: protecting low level digital speech', *The Cambridge Law Journal* 71:02, p. 357. This article also argues for the increased protection of such 'low level' speech against disproportionate civil and criminal sanctions. Rowbottom argues that laws which were originally aimed at regulating professional mass media can place overly strict requirements on the mostly informal, albeit publicly visible, communications of SNS users.
- 31 *Müller and Others v. Switzerland*, app. no. 10737/84, ECHR 24 May 1988, para. 33.
- 32 *Handyside v UK*, app. no. 5493/72, ECHR 7 December 1976.
- 33 *Otto-Preminger-Institut v. Austria*, app. no. 13470/87, 20 September 1994, para 49.
- 34 *Garaudy v France*, app. no. 65831/01, ECHR 24 June 2003.
- 35 D. Harris et al., *Law of the European Convention on Human Rights*, (Oxford University Press 2014, Third Edition).
- 36 *Airey v. Ireland*, app. no. 6289/73, ECHR 9 October 1979, para 24.
- 37 *Airey v Ireland*, App. no. 6289/73, ECHR 9 October 1979.
- 38 *Özgür Gündem v Turkey*, app no. 23144/93, 16 March 2000. *Dink v Turkey*, app. no. 2668/07, ECHR 14 September 2010.
- 39 *Ibid.*
- 40 *Fuentes Bobo v. Spain*, app. no. [39293/98](#), ECHR 29 February 2000. In contrast, in *Palomo Sanchez*, the dismissal of labourers due to an insulting satire of their employer in a union magazine did not trigger a positive obligation for the State to intervene. Rather, the Court concluded that dismissal was 'not a manifestly disproportionate or excessive sanction capable of requiring the State to afford redress by annulling it or by replacing it with a more lenient measure'. *Palomo Sánchez And Others v. Spain*, app. nos. 28955/06, 28957/06, 28959/06 and 28964/06, ECHR 12 September 2011.
- 41 *Fuentes Bobo v. Spain*, app. no. [39293/98](#), ECHR 29 February 2000.
- 42 D. Tambini et al., 'The Privatisation of Censorship: self regulation and freedom of expression'. In: D. Tambini et al. (ed.), *Codifying Cyberspace: communications self-regulation in the age of internet convergence* (Routledge / UCL Press 2008), pp. 269-289. This distinction between positive and negative rights was originally made by Isaiah Berlin: I. Berlin, 'Two Concepts of Liberty', in I. Berlin, *Four Essays on Liberty*, (Clarendon Press 1969).
- 43 *Appleby And Others v. The United Kingdom*, app. no. 44306/98, ECHR 6 May 2003.
- 44 D. Mac Síthigh, 'From freedom of speech to the right to communicate' in M. Price et al. (eds.), *Routledge Handbook of Media Law*, (Routledge 2013), pp. 175-191.
- 45 *Verein Gegen Tierfabriken v. Switzerland*, app. no. 24699/94, ECHR 28 June 2001, para. 63
- 46 *Verein Gegen Tierfabriken v. Switzerland*, app. no. 24699/94, ECHR 28 June 2001, para. 63
- 47 *Informationsverein Lentia*, Application no. 13914/88, 24 November 1993.
- 48 The presence of viable alternatives was also referenced in the *Appleby* case – in the context of public manifestations, the Court found that public spaces such as squares, formed a viable alternative to protests in a privately-owned shopping mall. T. McGonagle, 'The Council of Europe against online hate speech: Conundrums and challenges', Council of Europe Expert Paper MCM (2013)005.
- 49 D. Harris et al., *Law of the European Convention on Human Rights*, (Oxford University Press 2014), p. 21-24.
- 50 *Animal Defenders International v. UK*, app no. 48876/08, ECHR 22 April 2013.
- 51 *Ibid.*
- 52 T. Lewis, 'Reasserting the Primacy of Broadcast Political Speech after *Animal Defenders International*?—Rogaland Pensioners Party v Norway', *Journal of Media Law*, 1:1, (2009), pp. 37-48. T. Lewis, '*Animal Defenders International v United Kingdom*: Sensible Dialogue or a Bad Case of Strasbourg Jitters?' *The Modern Law Review* 77: 3, (2014) pp. 460-474.
- 53 The relevance of functional differences between media has been recognised by the ECHR in cases such as *Khurshid Mustafa*, which concerned tenants' access to satellite television broadcasts and their clash with landlords' property rights. *Khurshid Mustafa and Tarzibachi v. Sweden*, app no. 23883/06, ECHR 16 December 2008. See: T. McGonagle, 'The Council of Europe's standards on access to the media for minorities: A tale of near misses and staggered successes', in: M. Amos et al. (eds.), *Freedom of Expression and the Media* (Nijhoff 2012), pp. 111-140.
- 54 On the unique affordances of SNS, see, generally: C. Fuchs, *Social Media: A Critical Introduction* (SAGE Publications London 2012). D. Boyd & T. Ellison, 'Social network sites: Definition, history, and scholarship', *Journal of Computer Mediated Communication*, vol. 13, no. 1 (2007). D. Boyd, (2010). 'Social Network Sites as Networked Publics: Affordances, Dynamics, and Implications.' In Z. Papacharissi (ed.), *Networked Self: Identity, Community, and Culture on Social Network Sites* (Routledge 2010), pp. 39-58.
- 55 Chiu, Aaron, T., 'Note. Irrationally bound: Terms of Use licenses and the breakdown of consumer rationality in the market for social network sites' *Southern California Interdisciplinary Law Journal* 21 (2011).
- 56 *Ibid.* Chiu describes consumers' difficulty in changing platforms as the 'stickiness' of SNS.
- 57 *Tyrer v. United Kingdom*, app. no. 5856/72, ECHR 25 April 1978. G. Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer', *European Journal of International Law* 21:3 (2010), pp. 509-541.
- 58 *Verein Gegen Tierfabriken v. Switzerland*, app. no. 24699/94, ECHR 28 June 2001, para. 63.
- 59 D. Tambini et al., 'The Privatisation of Censorship: self regulation and freedom of expression'. In: D. Tambini et al. (ed.), *Codifying Cyberspace: communications self-regulation in the age of internet convergence* (Routledge 2008).
- 60 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [E-Commerce Directive].
- 61 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Arts. 12-15.
- 62 E. Dommering, *De Zaak Scarlet/SABAM: Naar een horizontale integratie van het auteursrecht* AMI 2011/2.
- 63 See also: Case C-324/09. *L'Oréal SA and Others v eBay International AG and Others*, (2011), 2011 ECR I-06011. Case C-236/08. *Google France SARL and others v. LVMH* (2010), ECR I-02417.
- 64 Case C-360/10, *SABAM v. Netlog NV*, (2011) ECLI:EU:C:2012:85 Para. 27: 'In that regard, first, it is not in dispute that the owner of an online social networking platform - such as Netlog - stores information provided by the users of that platform, relating to their profile, on its servers, and that it is thus a hosting service provider within the meaning of Article 14 of Directive 2000/31.'
- 65 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [E-Commerce Directive], article 14.
- 66 *Ibid.*

- 67 E. Dommering, *De Zaak Scarlet/SABAM: Naar een horizontale integratie van het auteursrecht* AMI 2011/2. J van Hoboken, "Legal Space for Innovative Ordering: On the Need to Update Selection Intermediary Liability in the EU" (2009) *International Journal of Communications Law & Policy* 13:1.
- 68 C. Omer, 'Intermediary Liability for Harmful Speech: Lessons from Abroad', *Harvard Journal of Law and Technology* 28:1 (2014). R. MacKinnon et al., *Fostering Freedom Online*, UNESCO Series on Internet Freedom (UNESCO Publishing 2014). An alternative perspective is found in the ECHR's recent decision in *Delfi AS v. Estonia*, where the liability of a news website for defamatory end user comments was not found to breach the freedom of expression, despite expeditious removal efforts by the intermediary. While the Court acknowledged the contribution of safe harbours to online expression, article 10 ECHR evidently does not require an absolute level of protection. *Delfi AS v Estonia*, app. no. 64569/09, ECHR 16 June 2015. See: M. Husovec, 'ECTHR Rules on Liability of ISPs as a Restriction of Freedom of Speech', *Journal of Intellectual Property Law & Practice*, 2014, Vol. 9, No. 2. The free speech concerns inherent in the viability of online intermediary services is recognised in recital 9 of the e-Commerce Directive: Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [E-Commerce Directive].
- 69 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, Article 11. 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, Article 8(3).
- 70 "The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it." Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Recital 45.
- 71 Case C-360/10, *SABAM v. Netlog NV*, (2011) ECLI:EU:C:2012:85.
- 72 S. Kulk & F. Borgesius, 'Filtering for Copyright Enforcement in Europe after the Sabam Cases', *European Intellectual Property Review* 34:11 (2012).
- 73 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, Article 3(2). *L'Oréal SA and Others v eBay International AG and Others*, (2011), 2011 I-06011, para. 135-136.
- 74 *L'Oréal SA and Others v eBay International AG and Others*, (2011), 2011 I-06011, para. 139. Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, Article 3(2).
- 75 Case C-314/12. *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* (2014), not yet published.
- 76 Case C-275/06, *Promusicae v. Telefónica de España SAU* (2008), ECR I-00271. Case C-70/10, *Scarlet Extended SA v. SABAM* (2011), ECR I-11959. Case C-314/12. *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* (2014), not yet published. Case C-360/10, *Netlog NV v SABAM* (2012), ECR I-11354. See also: C. Angelopoulos, *Are blocking injunctions against ISPs allowed in Europe? Copyright enforcement in the post-Telekabel EU legal landscape*, *Journal of Intellectual Property Law & Practice* 9:10 (2014).
- 77 *Ibid.*
- 78 *Ibid.* See M. Husovec, 'CJEU Allowed Website Blocking Injunctions with Some Reservations' (2014) *Journal of Intellectual Property Law & Practice* 9:8.
- 79 *Ibid.*
- 80 C. Angelopoulos, *Are blocking injunctions against ISPs allowed in Europe? Copyright enforcement in the post-Telekabel EU legal landscape*, *Journal of Intellectual Property Law & Practice* 9:10.
- 81 *Ibid.*
- 82 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Article 14.
- 83 User-generated content is generally accompanied by buttons allowing users to 'flag' or 'report' content to SNS moderating teams, often with drop down menus allowing the flagger to specify his objection. Depending on the amount of information provided, these may or may not create 'actual knowledge'. The presence of these systems does not preclude notification by other means. E. Wauters et al., 'Towards a better protection of social media users: a legal perspective on the terms of use of social networking sites', *International Journal of Law and Information Technology* 22:1 (2014). R. MacKinnon et al., *Fostering Freedom Online*, UNESCO Series on Internet Freedom (UNESCO Publishing 2014).
- 84 *L'Oréal SA and Others v eBay International AG and Others*, (2011), 2011 I-06011, para. 122.
- 85 A majority of Member States have not implemented formal notice procedures for hosting intermediaries, and leave courts to determine 'actual knowledge' according to national legal standards on knowledge. T. Verbiest et al., *Study on the liability of Internet Intermediaries*, EC Markt/2006/09/E (2007) p.15, available at: [http://ec.europa.eu/internal\\_market/e-commerce/docs/study/liability/final\\_report\\_en.pdf](http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf)
- 86 A majority of Member States have not implemented formal notice procedures for hosting intermediaries, and leave courts to determine 'actual knowledge' according to national legal standards on knowledge. T. Verbiest et al., *Study on the liability of Internet Intermediaries*, EC Markt/2006/09/E (2007) p.15, available at: [http://ec.europa.eu/internal\\_market/e-commerce/docs/study/liability/final\\_report\\_en.pdf](http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf).
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# Games as Cultural Heritage

## Copyright Challenges for Preserving (Orphan) Video Games in the EU

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Keywords: Games; Cultural Heritage; Cinematographic Works; Orphan Works

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### A. Introduction

- 1 Preserving and digitising cultural heritage poses challenges on a conceptual, technical and legal level. This is particularly true for complex works such as video games. Their preservation is important, because games usually have a life span of about five years before a new system renders them practically obsolete.<sup>1</sup> They are however protected by copyright, and the term of protection exceeds this by decades.
- 2 The first mainstream game consoles date back to the 1980s<sup>2</sup> and many of the companies that developed games a couple of decades ago are out of business today.<sup>3</sup> Information about the rightsholders, contracts, etc. was often lost, possibly also because the industry was so young. This led to a situation where many<sup>4</sup> old video games today are so called abandonware<sup>5</sup> and/or orphan works.<sup>6</sup> For a good proportion of these games, it is difficult, if not impossible, to trace back the licensing agreements with the various authors and other rightsholders and determine which rights ended up with whom.<sup>7</sup>
- 3 From a technical point of view, currently the most sensible way of preserving video games is through emulation (mimicking the original system's environment).<sup>8</sup> Partly because the copyright situation around this is complicated (see below) and rightsholders often cannot be located, cultural heritage institutions have usually chosen the "typical museum approach of 'technological preservation'",<sup>9</sup> i.e. collecting and storing the original boxes, CDs, floppy disks etc. However, this is not a viable long-term solution, as the games, which are increasingly considered part of our cultural heritage<sup>10</sup>, often deteriorate on the shelves of these institutions.<sup>11</sup> While cultural heritage institutions go about challenges like this with some form of preservation concept, it is currently not these institutions, but mostly gaming enthusiasts who develop and use the great majority of emulators (usually for "retro-computing" and out of nostalgia for the games of their childhood).<sup>12</sup>
- 4 The orphan works problem in general has been discussed at length in the past few years,<sup>13</sup> and in 2012, a European directive<sup>14</sup> introduced a narrow exception for certain uses (including for preservation purposes) of certain types of orphan works. Video games, however, have rarely been included in the debate. In fact, none of the accompanying documents produced on a European level around the coming into force of the Orphan Works Directive appear to even mention games, despite the issue being particularly time sensitive for these kinds of works.<sup>15</sup>

- 5 This article sets out to clarify the legal status of orphan video games from a copyright perspective.<sup>16</sup> It analyses whether the Orphan Works Directive also applies to orphan video games (i.e. if they can be considered a type of audiovisual work), and, if so, whether the directive's regime is suitable for the specifics of these complex, "multimedia" works.

## B. Do video games fall under the Orphan Works Directive?

- 6 The Orphan Works Directive (in recital 1) points out the important role that museums and other cultural heritage institutions play in preserving and disseminating European cultural heritage. Therefore, as the EU Commission asserted in its impact assessment, the directive aims to "ensure lawful cross-border online access to orphan works" contained in these institutions "across Europe".<sup>17</sup> To this end, the directive introduces an exception to copyright that privileges said cultural heritage institutions. A work is considered an orphan after a diligent search for the rightsholders was conducted, and this orphan work status has to be recognised across Europe (mutual recognition, Art. 4 Orphan Works Directive). The exception enables cultural heritage institutions to reproduce ("for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration" (Art. 6 Orphan Works Directive)) and make available to the public several types of orphan works from their collections, i.e. books and other writings, cinematographic or audiovisual works and phonograms (Art. 1 Orphan Works Directive).
- 7 As video games are not expressly listed in Article 1 of the directive (subject-matter and scope), the answer to this question depends on what we consider video games to be in terms of copyright. Do games constitute audiovisual works and are thus covered? While some voices in academic literature answer this question affirmatively, stating, for example, that "[...] the inclusion of cinematographic and audiovisual works would cover all recordings of moving images, including slide presentations and video games"<sup>18</sup>, a WIPO Study from 2013 demonstrates that the question of how to classify video games *in their entirety* has not been handled uniformly in all Member States.<sup>19</sup>
- 8 Furthermore, Germany, for example, transposed the Orphan Works Directive into national law<sup>20</sup>, but did not use the term "audiovisuelle Werke" (audiovisual works, a term generally not used in the German Copyright Act), but only "Filmwerke" (cinematographic works), which is sometimes considered to be narrower and to possibly exclude video games.<sup>21</sup> This raises several questions: Are the terms audiovisual works and cinematographic works

autonomous European terms or can each member state decide how to define them in their territory?<sup>22</sup> Is there a way to classify video games in their entirety as audiovisual or cinematographic works?

## I. A uniform interpretation of "cinematographic or audiovisual works"?

- 9 CJEU case law has long established that whether or not a term is to be independently interpreted on a European level depends on whether the directive refers to the national laws of the Member States.<sup>23</sup> If the directive expressly mentions the law of the Member States, the term can be interpreted and defined on a national level, if, however, the directive provides a definition itself, the term is to be uniformly interpreted in all Member States.<sup>24</sup>
- 10 The case of "cinematographic or audiovisual works" is a little less clear cut. While both terms are mentioned in several directives,<sup>25</sup> they are not defined on a European level.<sup>26</sup> At the same time, the Orphan Works Directive also does not explicitly refer to the national laws of the Member States with regard to these terms. This becomes clear when looking at those parts of the directive that are directly addressed at Member States such as determining a fair compensation for the use of orphan works.<sup>27</sup> The wording here – "Member States shall be free to determine..." – is quite straightforward.
- 11 The CJEU reiterated settled case law in *Padawan/SGAE*, a case that dealt with the term "fair compensation" within the meaning of Article 5(2) (b) InfoSoc Directive, stating that: "[...] the need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union".<sup>28</sup>
- 12 As the reference to the different national laws is an exception to the harmonisation that directives otherwise intend, there is an assumption ("must normally be given") that the term ought to be independently interpreted.<sup>29</sup> CJEU case law requires that this assumption is backed up by the subject matter and purpose of the directive.<sup>30</sup> Recitals 8, 9 and 25 of the Orphan Works Directive state that the goal of the directive is to increase legal certainty for the use of orphan works by cultural heritage institutions and to allow cross-border access to orphan works. These reasons also led the European Commission to opt for the concept of mutual recognition of the orphan works status, which is

now a core part of the directive.<sup>31</sup> One could argue that it does not matter whether only some Member States interpret, for example, audiovisual works in such a way that the transposed exception also covers video games because at least their classification as an orphan work in one Member State will then have to be recognized across Europe.<sup>32</sup> However, the whole point of agreeing on certain types of works would be frustrated (and work against increasing legal certainty) if Member States could then interpret the term to mean vastly different types of works.

- 13 One constellation where the above-mentioned assumption may not apply is the case where an area of law is only partly harmonised.<sup>33</sup> Since the European copyright directives do not expressly harmonise the term “work” (apart from the conditions of copyright protection for computer programs<sup>34</sup>, photographs<sup>35</sup> and databases<sup>36</sup>), the different *categories* of works, one could argue, may not be uniformly interpreted in all Member States either. However, since its decision in *Infopaq*<sup>37</sup> the CJEU has been autonomously interpreting and specifying “the general condition for copyright protection and the protected subject matter of copyright law.”<sup>38</sup> Recent CJEU case law<sup>39</sup> has thus effectively harmonised at least parts of the term “work”<sup>40</sup> (tying it to the concept of the author’s “own intellectual creation”<sup>41</sup>). Further, the court has argued that diverging interpretations in different Member States with regard to exceptions and limitations<sup>42</sup> would adversely affect the internal market.<sup>43</sup>
- 14 With regard to the directives that are relevant to copyright law, the CJEU has only rarely opted to let the Member States interpret vague legal terms.<sup>44</sup> It therefore appears likely that the court would also interpret the different categories of works and non-original subject matter covered by the Orphan Works Directive autonomously. This would mean that Member States are not free to define the terms within their national laws, but must use the European terms.

## II. Can games in their entirety be classified as audiovisual or cinematographic works?

- 15 What do these European terms entail? Are video games audiovisual and/or cinematographic works or something completely different? As mentioned above, the Orphan Works Directive does not include any definition.

### 1. Wording of the Directive

- 16 Art. 1 (2) (b) of the Orphan Works Directive refers to “cinematographic or audiovisual works and

phonograms contained in the collections of publicly accessible libraries, educational establishments or museums as well as in the collections of archives or of film or audio heritage institutions.” (Emphasis added.) The “or” could imply that the terms are not equivalent. However, the wording may also be simply due to the fact that some Member States only use the term “audiovisual works” and others only use the term “cinematographic works” in their respective copyright laws.<sup>45</sup>

- 17 The choice of terms among the different copyright directives is also somewhat inconsistent. For example, even though other directives define “film” to mean audiovisual and cinematographic works as well as moving images, the Orphan Works Directive does not refer to films to describe subject matter and scope, but only mentions “cinematographic or audiovisual works and phonograms.” However, recital 20 of the directive states: “[...] Film or audio heritage institutions should, for the purposes of this Directive, cover organisations designated by Member States to collect, catalogue, preserve and restore *films and other audiovisual works or phonograms* forming part of their cultural heritage.” (Emphasis added.) This would imply that the European legislator might have assumed the term audiovisual works to be wider than the term film. It may also mean that the legislator did not mean to exclude non-original audiovisual subject matter (such as moving images)<sup>46</sup>. Thus, reading the directive, it appears as though the term “audiovisual works” is to be understood in a broad way.

## 2. The Court of Justice of the EU’s Nintendo decision

- 18 In its *Nintendo*<sup>47</sup> decision, the CJEU was asked to interpret Art. 6 InfoSoc Directive (on the legal protection of technical protection measures), and in this context clarified which directive is applicable to video games, the InfoSoc Directive with its general copyright rules or the Software Directive with specific rules for software. The CJEU held:
- 19 “As is apparent from the order for reference, *videogames*, such as those at issue in the main proceedings, *constitute complex matter comprising not only a computer program but also graphic and sound elements, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption*. In so far as the parts of a videogame, in this case, the graphic and sound elements, are part of its originality, they are protected, *together with the entire work*, by copyright in the context of the system established by Directive 2001/29.”<sup>48</sup> (Emphasis added.)
- 20 Even though the Software Directive is *lex specialis* to the Infosoc Directive and all games are partly code, the CJEU held that some parts of the game

(“graphic and sound elements”) are protected under the InfoSoc directive. In copyright terms, a game is therefore more than a computer program. Further, it appears the CJEU implies that a video game does consist of different types of works, but that it also has some kind of *protection as a whole* (“together with the entire work”), which is more than the protection of the parts. One question this case raises is whether the distributive approach that some Member States have adopted for video games can be upheld. One may interpret the cited decision as mandating a “unitary legal treatment” of video games under the InfoSoc Directive.<sup>49</sup> The CJEU’s *BSA* decision however may support the distributive approach.<sup>50</sup> In any case, the *Nintendo* decision explicitly mentions a protection for the “entire work” under the InfoSoc Directive. Thus, even if different directives apply to different parts of a video game, the *Nintendo* case appears to suggest that games *in their entirety* can still – possibly additionally – be *classified* as a specific type of complex work. This may be a known type of complex work, i.e. an audiovisual or cinematographic work.<sup>51</sup> But because the CJEU’s understanding of the term “work” is open and not tied to a closed list of copyright-protectable works<sup>52</sup>, it is also possible that computer games in their entirety are a new type of work that is protected under the InfoSoc directive, for example a multimedia work.<sup>53</sup> With regard to the question of whether video games can be classified specifically as audiovisual works, the decision thus does not provide very much guidance.

- 21 Some scholars who attempted to fit games into one category of works came to the conclusion that games are such multimedia works, because those works are understood to “combine on a single medium more than one different kind of expressions in an integrated digital format, and which allow their users, with the aid of a software tool, to manipulate the contents of the work with a substantial degree of interactivity.”<sup>54</sup> However, the term “multimedia work” does not exist in any of the European copyright directives.<sup>55</sup> Can such multimedia works *also* be classified as audiovisual or cinematographic works for the purpose of the Orphan Works Directive<sup>56</sup>?
- 22 What video games and movies certainly have in common is that they are complex works that combine different types of works in one medium. For both, the audiovisual elements are the focus, at least from the perspective of the user. So what could stand in the way of a classification of video games as audiovisual works?

### 3. Audiovisual works within an audiovisual work?

- 23 As mentioned above, courts have sometimes considered games to have graphic and sound

elements that are themselves protected as audiovisual or cinematographic works.<sup>57</sup> One may think that since a part of the game is already a cinematographic work, the work as a whole cannot be, because different types of works are added to the audiovisual elements. While it may sound odd that an audiovisual work can be comprised of more audiovisual works, this is possible for other categories of works as well. A part of a book could be protected as a literary work, and still, the book as a whole would be protected as a literary work as well. Its complexity and bundling of different types of works is even characteristic of an audiovisual work.<sup>58</sup>

## 4. Code

- 24 Every video game also entails source code and object code (primary game engine(s), ancillary code, plugins and comments).<sup>59</sup> Therefore, courts have often split up games into audiovisual works and computer programs.<sup>60</sup> However, animated movies, for example, depend on code<sup>61</sup> and would nevertheless be classified as cinematographic or audiovisual works.<sup>62</sup> There are of course differences between animated movies and video games, namely that the interactivity of the games requires a constant control by computer programs whereas animated movies are sometimes generated *with the help* of a 3D graphics program, but do not require a computer program integrated in the work to play the animated scenes.<sup>63</sup> Some movies, however, have animated parts, which are directly generated through programming in a given programming language, and thus partly constitute computer programs.<sup>64</sup> While it is important to evaluate whether a part of a given product is a computer program in the sense of the Software Directive or the respective national laws, it does appear odd and somewhat contrary to the Orphan Works Directive’s objectives to imagine that based on this distinction some works (that are “purely” audiovisual) may be covered, while those that partly consist of computer programs are not.
- 25 If one were to split up animated films or games into these two main elements (audiovisual parts and computer programs), it is unlikely that they would fall under the directive in their entirety. Their audiovisual elements would be covered, but in order to preserve the work, the binary code also needs to be copied. It seems questionable whether such a computer program could be considered a type of “other writing” in the sense of Art. 1 (2) (a) Orphan Works Directive. While the term is broad and Member States often protect code as a type of literary work<sup>65</sup>, the directive is likely intended to apply only to *printed* works (including electronic printing) such as the listed examples “books, journals, newspapers, magazines”.<sup>66</sup>

## 5. Interactivity

26 One major difference between games and regular movies is that games are designed to be interactive<sup>67</sup> while movies are generally linear and designed to be shown. These lines may blur, but it is true that some games leave so many options to the user that the players can come up with things the game studio did not even conceive of.<sup>68</sup> It does, however, appear questionable whether this difference in the way the work is put to use is really of importance. For example, Art. 3 (3) of the Satellite and Cable Directive refers to “cinematographic works *including* works *created* by a process analogous to cinematography.”<sup>69</sup> (Emphasis added.) Cinematographic works in the sense of this directive thus include all works that are created in an analogous way – independent of whether they are *used* in a similar way. This would be an easier case to argue for video games as they, like movies, are often developed by a team, can have high production costs, and require equivalent planning and conceptualising from idea and setting, to characters, sound effects or music.<sup>70</sup> Of course, this specification of cinematographic works cannot be found in the Orphan Works Directive (or in any other directive apart from the Cable and Satellite Directive) and the term could mean different things in different directives. However, particularly with regard to copyright law, this is an exception, and the principle of consistency would support a uniform interpretation, even across directives.<sup>71</sup>

## 6. Possible inconsistencies or odd consequences

27 It is important to note that a consistent classification of video games in their entirety as cinematographic or audiovisual works would then also mean that games fall under the other directives that use the terms cinematographic or audiovisual works or film, i.e. the Rental Directive (Art. 2 (1) (c) defines ‘film’ as “a cinematographic or audiovisual work or moving images, whether or not accompanied by sound”), the Term Directive and the Satellite and Cable Directive. In some instances, this does not appear to fit well, and it seems likely that the legislator at least did not have games in mind when drafting or revising these directives.<sup>72</sup> Further, a classification of games as audiovisual or cinematographic works may have effects on a national level for Member States with special copyright provisions for films in their copyright laws, for example with regard to authorship,<sup>73</sup> transfer of rights<sup>74</sup> or moral rights<sup>75</sup>. While courts in some Member States have not considered games a type of audiovisual work and have thus avoided the application of specific regimes for films<sup>76</sup>, courts in other countries have long applied these provisions to games as well.<sup>77</sup>

28 Overall, there are some compelling arguments supporting the notion that video games in their entirety are in fact audiovisual or cinematographic works for the purpose of the Orphan Works Directive. A clarification with regard to the directive’s scope may nevertheless be helpful and could be included in the review process, which will require the Commission to submit a report by 29 October 2015 concerning the possible expansion of the directive’s scope (see Art. 10 (1) Orphan Works Directive).

## C. Emulation of video games – do the orphan works provisions fit at all?

29 Assuming that video games can be considered audiovisual or cinematographic works in the sense of the Orphan Works Directive, what consequences would this have for orphan games?

30 An initial reading may lead to the conclusion that games could then be reproduced and made available to the public (by the relevant cultural heritage institutions, for the specific purposes listed in the Directive). However, the archiving and preservation of games is different from archiving and preserving the rest of the subject matter of the directive and it appears questionable whether the orphan works exception in its current form would legalise any meaningful preservation processes with regard to video games.

## I. Technical aspects of emulation

31 To analyse whether the Orphan Works Directive – provided that it is applicable to video games – is helpful, it is important to get a basic understanding of what is technically necessary in order to preserve such games.

32 There are different preservation techniques; apart from the above-mentioned technological preservation the two prevalent approaches are migration and emulation. Because migration entails the moving and conversion of digital objects into formats that are readable today, this process can be done for individual documents like texts or pictures, but it is considered ill-suited for complex works such as video games.<sup>78</sup>

33 The idea behind emulation, on the other hand, is to mimic the *original system’s environment* and therefore enable “the computer running the emulator to use most software designed for the emulated hardware.”<sup>79</sup> Emulation thus does not start with changes in the object itself, but attempts to recreate its original environment. Through this process it is possible, for example, to play an old game from a floppy disk on a computer today (that does not

have a floppy disk drive). With the help of emulators that provide conversion software, a game's "original functionality, look, and feel"<sup>80</sup> can thus be recreated. The process is complex though, as not only the object itself, but also the application it uses, the operating system and drivers ought to be archived.<sup>81</sup> Emulation can target different "layers" (application, operating system, hardware), but often emulators for games emulate at least some hardware components.<sup>82</sup> The process requires the programmer to understand the original program or system in order to write his/her own program with functions resembling the old program or system.<sup>83</sup> Ideally, he/she would therefore need access to the original source code or at least to the hardware specifications. As that is often not available, the way to understand the "inner workings" of the relevant hard-/software is decompiling the object code through reverse engineering.<sup>84</sup>

- 34 Furthermore, because the old devices that read floppy disks or cartridges are not available anymore for new computers, it is essential to make digital copies of the storage media. These are called "images".<sup>85</sup>
- 35 The result of the emulation process is a sort of "frame" in which the original data stream can be put into execution.<sup>86</sup> The process raises several issues with regard to copyright, which in turn are relevant for the effectiveness of the orphan works exception.

## II. Copyright aspects

### 1. Reverse engineering

- 36 Reverse engineering may be necessary in order to decompile the original hardware, firmware or the application that runs a given game. Art. 6 of the Software Directive addresses this issue. The provisions allow the reproduction of the code and translation of its form without authorisation from the rightholder where this is indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs. There are further conditions, i.e. that the actions are performed by a licensee or lawful user (which a cultural heritage institution would likely be), that the necessary information is not quickly and easily accessible, and that the acts are confined to the parts of the original program that are necessary in order to achieve interoperability. As cultural heritage institutions would aim to achieve interoperability between the "old Multimedia Works and current computer environments", they can likely fulfil the requirements of this exception.<sup>87</sup>

### 2. Technical protection measures

#### a.) Legal protection of technical protection measures

- 37 Generating an "image" (see above) is essentially making a copy of a given video game and its original storage media layout. This affects the exclusive reproduction right (Art. 2 InfoSoc Directive) of the copyright owner. The Orphan Works Directive allows cultural heritage institutions to make reproductions of the items they hold in their collections. However, what makes video games different from the rest of the directive's subject matter is that the majority of games are set up with technical protection measures that aim to prevent copying,<sup>88</sup> whatever its purpose. The CJEU clarified in *Nintendo* that with regard to video games, the provisions on technical protection measures contained in the InfoSoc Directive have to be applied (see above). According to Art. 6 (1) of the InfoSoc Directive, Member States shall provide adequate legal protection against the circumvention of any effective technological measures. It follows that if technical protection measures cannot be circumvented legally, many orphan games also cannot be archived without infringing copyright. The relationship between exceptions and technical protection measures is thus crucial for determining the effectiveness of the orphan works provisions when it comes to video games.

#### b.) A right to hack for orphan video games?

- 38 There is no general "right to hack" for the user whose intended use of a work is legal under an exception, but prevented by technical protection measures.<sup>89</sup> The directive relies on voluntary measures by rightholders to enable users to benefit from exceptions, and in absence of such voluntary measures, Member States "should take appropriate measures to ensure that rightholders provide beneficiaries of such exceptions or limitations with appropriate means of benefiting from them" (Recital 51). However, Art. 6 (4) InfoSoc Directive also only lists certain exceptions that need to be made available, the exception for private copying, for example, *may* but does not have to be, included in the "measures" Member States take. In Germany, this led to a situation where digital copies for private uses are legal under certain (strict) conditions, however, if the work is protected by technical protection measures, rightholders are only required to make available the benefit of the exception to those users who want to make *analogue* private copies.<sup>90</sup>
- 39 As the rightholders of orphan works (per definition) cannot be located or found, an amendment of the provisions in the InfoSoc Directive to include the

new exception in the list in Art. 6 (4) would not have made sense. Is there thus a way to legitimise a “right to hack” in this special situation?

40 In *Nintendo* the CJEU stated that “[t]he legal protection referred to in Article 6 of that directive applies only in the light of protecting that rightholder against acts which require his authorisation.”<sup>91</sup> However, this does not necessarily equal the right to circumvent the technical protection measures if one’s use does not require authorisation. Rather, the scope of the legal protection of technical protection measures seems to have to be determined more abstractly. To do this, the CJEU leaves it to the national courts to examine, inter alia, “the purpose of those devices, products or components” used to circumvent the technical protection measures, and “the evidence of actual use which is made of them”.<sup>92</sup> The national courts thus have to compare how often a device is used to circumvent in order to infringe copyright, and how often the circumvention enables non-infringing actions.<sup>93</sup>

41 Therefore, it appears as though currently, the orphan works exception’s effectiveness is greatly limited by technical protection measures. To be certain, cultural heritage institutions would possibly have to build a device to circumvent these measures where they could prove that it is almost exclusively used for non-infringing uses.

### c.) The role of legal deposits

42 In some Member States such as France, Denmark or Finland, the national laws provide that certain cultural heritage institutions receive copies of video games to preserve them. For example, under French law, computer games must be deposited at the Bibliothèque nationale de France “with appropriate access codes.”<sup>94</sup> In Germany on the other hand, video games are excluded from the legal deposit requirement, which means cultural heritage institutions do not have such access.<sup>95</sup> The access codes likely only help with regard to technological preservation because they allow the game to be played on the system it was originally designed for, but not to be reproduced in order to, for example, generate an “image”. Overall, the laws on legal deposits, while being very important to game preservation, differ from country to country<sup>96</sup>, and sometimes even within the different states in one country, which puts some institutions in a better position with regard to game preservation than others.

### d.) Reproduction or adaptation?

43 Another question is whether an “image” really only entails a 1:1 copy or whether some alterations to the

data are necessary. Usually, changes to the digital document are not required.<sup>97</sup> There are however cases where the binary code needs to be slightly altered; to overcome technical protection measures, change the format of the data in order to make it readable for the emulator, and because emulation processes are also not necessarily flawless and without loss.<sup>98</sup> The necessity of at least minor alterations thus cannot always be precluded with certainty. With regard to the InfoSoc Directive, the CJEU has considered some alterations to a poster (i.e. alterations to its physical medium) to constitute reproductions and has left open the question of whether the right of adaptation is also harmonised on a European level and if so, what it would entail.<sup>99</sup> The Software Directive (in Art. 4 (b)) on the other hand, clearly distinguishes between the reproduction right and the right to alter the computer program.<sup>100</sup> As the changes would not simply affect the game’s medium, but also the binary itself, it appears questionable whether the Orphan Works Directive would still cover this alteration as a form of reproduction.

44 This point illustrates that the directive’s focus on reproduction and making available to the public is not really fitting for video games. However, even with regard to works less complex than games, emulation is increasingly regarded as a useful preservation strategy.<sup>101</sup> Therefore, this issue will inevitably become increasingly relevant.

### e.) The role of voluntary contractual systems for abandonware

45 The topic of abandonware is closely related to the orphan works problem. If there is no more commercial interest tied to a game, chances appear to be higher that information about the rightsholders gets lost. For games that have (or are about to) become abandonware, voluntary contractual systems can play an important role. Companies that decide to stop distributing a specific game may decide to license it as freeware, meaning that users can download it free of charge.<sup>102</sup> In order to ensure ongoing support, the source code of the game engine will sometimes be released under a free software licence,<sup>103</sup> which allows user communities to take care of fixing bugs etc. themselves. If the company chooses a free software licence, this allows users to study, share and modify the software<sup>104</sup>, so that many of the issues described above do not apply.<sup>105</sup> These licences are also “viral,” meaning that subsequent modifications to the software cannot be appropriated, because they also have to be made available under the free software licence.<sup>106</sup> Such free software licences are thus helpful for game emulation as well. However, these agreements require that the game in question is not yet an orphan, because only the copyright holders can

(re)license the work in question.<sup>107</sup> As mentioned above, an unclear copyright situation is however rather common for old video games, especially if the original company went out of business.<sup>108</sup> Voluntary contractual systems can thus (only) serve as a tool to avoid abandonware becoming orphan works in the first place.

## D. Conclusion and outlook

46 While there are some compelling arguments for considering that the (mandatory) European exception in the Orphan Works Directive is also applicable to video games, cultural heritage institutions need to also consider other copyright provisions that will greatly limit the effects of this directive. The legal protection of technical protection measures will likely pose the main obstacle to preservation efforts. As there is no “right to hack,” it is illegal to circumvent the technical protection measures that many video games are equipped with. Further, the system of the InfoSoc Directive that requires rightsholders to enable users to benefit from certain exceptions is not helpful for orphan works. With regard to the uses the directive allows, a strict distinction between a 1:1 reproduction and an alteration appears difficult when copying videogames. Overall, the European legislator thus has likely assumed a relatively broad understanding of audiovisual works in the Orphan Works Directive that would also cover video games, but did not take into consideration the specificities of these works.

47 In order to make the exception effective with regard to video games, it appears important to enable cultural heritage institutions to legally circumvent technical protection measures for the uses that are covered by the directive. National laws with regard to legal deposits can be helpful in order to prevent future loss of video games, but do not help with regard to the currently large number of orphan video games. Similarly, voluntary contractual systems have been helpful for games that are about to become abandonware, but they require clarity with regard to who the rightsholders of a given game are. These licenses are thus also helpful for preventing future orphan works, but cannot solve the current issue in its entirety.

48 In the context of the general copyright reform debate, it appears important to note that whatever provisions may be tweaked, the European and national legislators should keep in mind the importance of video games as part of our cultural heritage, and the specific difficulties that come with preserving such complex digital works.

1 *Conley et al*, Use of a Game Over: Emulation and the Video Game Industry, A White Paper, 2 Nw. J. Tech. & Intell. Prop. 2004, 261, at p. 270. Apart from this planned obsolescence,

the storage media also do not last longer than 20 years, see *Loebel*, Lost in Translation: Leistungsfähigkeit, Einsatz und Grenzen von Emulatoren bei der Langzeitbewahrung digitaler multimedialer Objekte am Beispiel von Computerspielen, at p. 15.

- 2 See *Greenspan/Boyd/Purewal*, Video Games and IP: A Global Perspective, WIPO Magazine 2/2014, available at [http://www.wipo.int/wipo\\_magazine/en/2014/02/article\\_0002.html](http://www.wipo.int/wipo_magazine/en/2014/02/article_0002.html); the first video games such as *Spacewar* are more than 50 years old, see *Ramos Gil de la Haza*, Video Games: Computer Programs or Creative Works?, WIPO Magazine 4/2014, available at: [http://www.wipo.int/wipo\\_magazine/en/2014/04/article\\_0006.html](http://www.wipo.int/wipo_magazine/en/2014/04/article_0006.html). All websites last checked on August 20, 2015.
- 3 See *van der Hoeven, et al.*, Legal Aspects of Emulation, iPres 2010 (Vienna), available at: <https://fedora.phaidra.univie.ac.at/fedora/get/o:245907/bdef:Content/get>, at 4.1.
- 4 The *Computerspielemuseum* in Berlin estimates that around 50 % of their collection consists of at least partial orphans.
- 5 Abandonware means software (such as old video games), which is no longer commercially distributed/sold and for which product support is no longer available. It is thus “abandoned” by its manufacturer. Many games that are abandonware are also orphan works.
- 6 Orphan works are works still protected by copyright whose owner is unidentifiable or untraceable.
- 7 See *van der Hoeven, et al.*, op. cit. *supra* note 3, at 4.1. As developer Maciej Miłsik pointed out at the #SaveGame workshop, developers are themselves not always sure of the conditions of the licence agreements for the games they developed several decades ago, see *Böck*, Computerspiele können kaum legal archiviert werden, available at: <http://www.golem.de/news/urheberrecht-computerspiele-koennen-kaum-legal-archiviert-werden-1504-113802.html>.
- 8 *Loebel*, op. cit. *supra* note 1, at p. 39. For a more detailed explanation of emulation see below, part B. I.
- 9 *Barwick, et al.*, Playing Games With Cultural Heritage: A Comparative Case Study Analysis of the Current Status of Digital Game Preservation, 6 Games and Culture, 2011, 373, at p. 381.
- 10 Several Member States’ laws on legal deposits include video games, for example, Finland (see The National Library of Finland, legal deposit requirements, available at: <http://www.nationallibrary.fi/publishers/legaldeposit/recordings.html#Videogames>), France (see *Lasfargues et al.*, Legal deposit of the French Web: harvesting strategies for a national domain, international Web Archiving Workshop, Aarhus (2008), available at: <https://hal.archives-ouvertes.fr/hal-01098538/document>) or Denmark (see European Federation of Video Game Archives, Museums and Preservation Projects (EFGAMP), The Royal Library (of Denmark), available at: <http://www.efgamp.eu/the-royal-library-denmark/>). Similarly, in the US, the Library of Congress has about 3,000 video games in their collection, see *Owens*, Yes, The Library of Congress Has Video Games: An Interview with David Gibson, September 09, 2012, available at: <http://blogs.loc.gov/digitalpreservation/2012/09/yes-the-library-of-congress-has-video-games-an-interview-with-david-gibson/>.
- 11 *Barwick, et al.* also point out that games, which are inherently interactive, require a different kind of presentation from other objects in cultural heritage institutions because it is important to keep the software alive and enable people to experience the game as a player, op. cit. *supra* note 9, at p. 385.
- 12 *Loebel*, op. cit. *supra* note 1, at pp. 135 et seq. Commercial emulators exist as well, though, due to their lack of portability/independence from a specific platform, they are not suitable for long-term archiving, see *ibid.* at p. 140.
- 13 See e.g. *van Gompel*, Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in

- Europe? IIC, 2007, 669; *Grünberger*, Digitalisierung und Zugänglichmachung verwaister Werke, ZGE 2012, 321; *Teng*, The orphan works dilemma and museums: an uncomfortable straitjacket, 2 JIPLP, 2007, 30; *de la Durantaye*, How to Build an Orphanage and Why, 2 JIPITEC, 2011, 226; *van Gompel & Hugenholtz*, The Orphan Works Problem: The Copyright Conundrum of Digitizing Large-Scale Audiovisual Archives, and How to Solve It, Amsterdam Law School Legal Studies Research Paper No. 2012-10, 2012; *Klass & Rupp*, Die Digitalisierung des europäischen Kulturerbes, ZUM, 2013, 760; *Rosati*, The Orphan Works Directive, or throwing a stone and hiding the hand, 8 JIPLP, 2013, 303; *Peifer*, Die gesetzliche Regelung über verwaiste und vergriffene Werke, NJW, 2014, 6; *Möller*, Verwaiste Werke – Eine Analyse aus internationaler Perspektive, 2013; *Favale*, et al., Copyright, and the Regulation of Orphan Works: A comparative review of seven jurisdictions and a rights clearance simulation, 2013, available at: <http://www.create.ac.uk/publications/copyright-and-the-regulation-of-orphan-works/>. For the US see e.g. *Hansen*, et al., Solving the Orphan Works Problem for the United States, 37 COLUM. J.L. & ARTS 1, 2013, 1.
- 14 2012/28/EU, hereafter Orphan Works Directive.
- 15 Unlike for other media, a lack of preservation for games will in many cases lead to the loss of the items as there is no “‘comfort zone’ to allow retrospective collecting”, *Barwick*, et al., op. cit. *supra* note 9, at p. 385.
- 16 For emulating hardware, patent protection and the special protection for semi-conductors (Topographies of Semiconductors Directive, 87/54/EEC) may be relevant as well. These questions have already been addressed, e.g. by *van der Hoeven*, et al., op. cit. *supra* note 3, at 8.1. et seq. This paper focuses on copyright and orphan works, as this issue has not been yet been thoroughly analysed for video games.
- 17 European Commission, Impact Assessment on the Cross-border Online Access to Orphan Works, SEC (2011) 615 final, May 24, 2011, at p. 14.
- 18 *Suthersanen/Frabboni* in: *Stamatoudi/Torremans* (eds.), EU Copyright Law – A commentary (2014), at 13.13. As is the case for many of the texts dealing with this question, the commentary does not provide an explanation for this assessment.
- 19 *Ramos*, et al., The Legal Status of Video Games: Comparative Analysis in National Approaches, 2013, available at: [http://www.wipo.int/export/sites/www/copyright/en/creative\\_industries/pdf/video\\_games.pdf](http://www.wipo.int/export/sites/www/copyright/en/creative_industries/pdf/video_games.pdf). The study does not only cover EU countries and also not all Member States. It however finds that e.g. “Belgium is apt to protect video games as audiovisual works, which entails a specific regime for authorship and transfer of rights” (p. 19) whereas some Member States adopt a “distributive approach”, where “each component must be subject to the legal status applicable to it (e.g., software, music, script or graphics)” (pp. 36, 41).
- 20 The law from October 1, 2013 amended the Germany Copyright Act (Urhebergesetz) and came into force on January 1, 2014.
- 21 *Peifer*, Die gesetzliche Regelung über verwaiste und vergriffene Werke, NJW 2014, 6, at p. 8; similarly *Spindler*, Ein Durchbruch für die Retrodigitalisierung? Die Orphan-Works-Richtlinie und der jüngste Referentenentwurf zur Änderung des Urheberrechts, ZUM 2013, 446, at p. 450. German courts have however long applied the special provisions for moving images and cinematographic works to electronic games, see e.g. *Hanseatisches Oberlandesgericht Hamburg*, GRUR 1983, 436; *OLG Hamburg*, GRUR 1990, 127, at p. 128; *BayObLG*, GRUR 1992, 508.
- 22 See e.g. *Kamina*, The subject-matter for film protection in Europe, in: *Derclaye* (ed.), Research Handbook on the Future of EU Copyright (2009), at p. 88, arguing (with regard to the Rental and Lending Directive, Satellite and Cable Directive, Term Directive, and InfoSoc Directive) that the “definition of audiovisual works does not seem to be within the scope of harmonization.”
- 23 See, for example, Case C-467/08 *Padawan/SGAE* [2010], paragraph 32.
- 24 *Leenen*, Die Auslegung von Richtlinien und die richtlinienkonforme Auslegung und Fortbildung des nationalen Rechts, JURA 2012, 753, at p. 767; *Riesenhuber* in: *Riesenhuber* (ed.), Europäische Methodenlehre (2015), at § 10 margin number 4.
- 25 Apart from the Orphan Works Directive (Art. 1(2)(b)) also in the Rental and Lending Directive (Art. 2) and the Term Directive (Art. 3 (3)).
- 26 In fact, even on an international level, audiovisual works are not defined under the Universal Copyright Convention, the TRIPs Agreements or the WIPO Copyright Treaty of 1969 (each of these only mentions the term). The only international definitions can be found in the WIPO Draft Model Provisions that state in Art. 2 (1) that audiovisual works are “works consisting of a series of related images and accompanying sounds, if any, which are intended to be shown by appropriate devices”, and in Art. 2 Treaty on the International Registration of Audiovisual Works (Film Register Treaty), which states that for the purposes of the Treaty, audiovisual work “means any work that consists of a series of fixed related images, with or without accompanying sound, susceptible of being made visible and, where accompanied by sound, susceptible of being made audible.” The application of the Film Register Treaty has however been suspended, see WIPO, Document A/35/14, Matters concerning the treaty on the international registration of audiovisual works, 08/18/2000, paragraph 5.
- 27 Art. 6 (5) of the Orphan Works Directive reads: “Member States shall be free to determine the circumstances under which the payment of such compensation may be organised. The level of the compensation shall be determined, within the limits imposed by Union law, by the law of the Member State in which the organisation which uses the orphan work in question is established.” Similarly, Article 5 (concerning the end of the orphan works status) and Art. 3 (2) (concerning the sources for the diligent search) are also worded clearly with respect to leaving certain tasks to the Member States.
- 28 CJEU, Case C-467/08 *Padawan/SGAE* [2010], paragraph 32. See also, in particular, CJEU, Case C-327/82 *Ekro* [1984], paragraph 11; Case C-287/98 *Linster* [2000] paragraph 43; Case C-5/08 *Infopaq International* [2009] paragraph 27; Case C-34/10 *Brüstle* [2011] paragraph 25; Case C-128/11 *UsedSoft* [2012], paragraph 39; and, recently, despite of the optional nature of the exceptions in Art. 5 (3) (k) InfoSoc Directive, CJEU, Case C-201/13 *Deckmyn* [2014] paragraphs 15 et seq.
- 29 See also *Riesenhuber*, op. cit. *supra* note 24, at § 10 margin number 6.
- 30 See e.g. the CJEU’s reasoning in case C-128/11 *UsedSoft* [2012], paragraph 41.
- 31 See European Commission, Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works COM(2011) 289 final; European Commission, Impact assessment on the cross-border online access to orphan works, SEC(2011)615s, pp. 20 et seq., 33 et seq. For an analysis of the different options to deal with orphan works that European Commission had considered, see *de la Durantaye*, op. cit. *supra* note 13.
- 32 This refers to the works covered by the Directive, which are works first published or broadcast in a Member State. The works that are e.g. covered by the UK licensing scheme for orphan works and were first published or broadcast outside the EU would not be subject to mutual recognition of the status as orphan, see *Rosati*, The Orphan Works Provisions of the ERR Act: Are They Compatible with UK and EU Laws? Available at: <http://ssrn.com/abstract=2323393>, at p. 15.

- 33 See ECJ, Case 105/84, *Danmols Inventar* [1985], paragraphs 26 et seq.; *Riesenhuber*, op. cit. *supra* note 24, at § 10 margin number 7.
- 34 Art. 1(3) Software Directive, which reads: “A computer program shall be protected if it is original in the sense that it is the author’s own intellectual creation. No other criteria shall be applied to determine its eligibility for protection.”
- 35 Art. 6 Term Directive 2006/116/EC: “Photographs which are original in the sense that they are the author’s own intellectual creation shall be protected in accordance with Article 1. No other criteria shall be applied to determine their eligibility for protection. Member States may provide for the protection of other photographs.”
- 36 Art. 3(1) Database Directive: “In accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author’s own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection.”
- 37 CJEU, Case C-5/08 *Infopaq International A/S* [2009].
- 38 *Leistner*, Europe’s copyright law decade: Recent case law of the European Court of Justice and policy perspectives, CML Rev. 2014, 559, at p. 561.
- 39 See e.g. CJEU, Case C-5/08 *Infopaq International A/S* [2009], paragraphs 31 et seq.; CJEU, Case C-393/09 *BSA* [2010], paragraphs 44 et seq.; CJEU, Joined Cases C-403/08 and C-429/08 *APL* [2011] paragraphs 96 et seq.
- 40 For an analysis of the methodological-critical readings of the CJEU’s autonomous interpretation of the term, see *van Eechoud*, Diverse Readings of the Court of Justice Judgments on Copyright Work, JIPITEC 2012, 60, at pp. 72 et seq.; *von Lewinski*, Introduction: The Notion of Work under EU Law 63 GRUR Int, 2014, 1098.
- 41 For a more specific look at the general condition as well as the parameters and criteria the CJEU developed for specific types of works see, particularly, *Leistner*, op. cit. *supra* note 38, at pp. 561 et seq.; *Metzger*, Der Einfluss des EuGH auf die gegenwärtige Entwicklung des Urheberrechts, GRUR 2012, 118, at pp. 121 et seq.; *Rosati*, Closed subject-matter systems are no longer compatible with EU copyright GRUR Int. 2014, 1112, at pp. 1114 et seq. With regard to the reception of the CJEU’s case law in Germany, see *Bisges*, Der europäische Werkbegriff und sein Einfluss auf die deutsche Urheberrechtentwicklung, ZUM 2015, 357.
- 42 CJEU, Case C-435/12 *ACI Adam* [2014], paragraph 34. The case concerns the InfoSoc Directive. However, the Orphan Works Directive in recitals 2, 8 and 9 also emphasises the importance of free movements of knowledge, legal certainty in the internal market and the market’s functioning in general.
- 43 *Rosati*, op. cit. *supra* note 41, at pp. 1114 et seq.
- 44 See *Metzger*, op. cit. *supra* note 41, at p. 121; *Rosati*, Just a laughing matter? Why the decision in Deckmyn is broader than parody, CML Rev. 2015, 511, at pp. 520 et seq.
- 45 According to *von Lewinski* in: *Walter/von Lewinski* (eds.), European Copyright Law (2010), at 6.2.24, this was the reason why the Council amended the proposal for the Rental and Lending Directive to include the term “audiovisual works,” but leave “cinematographic works” in as well when defining “film” (see Art. 2 (1) (c)).
- 46 The transposed provisions in the German Copyright Act use the term “Filmwerke” (cinematographic works), “Tonträger” (phonograms) and, instead of audiovisual works, “Ton- und Bildträger” (audio and image media). The explanatory memorandum simply states that the directive intends to not only cover cinematographic works, but also its storage media, see *Deutscher Bundestag*, Drucks. 17/13423, at p. 15. While this may well be in accordance with the directive’s goals, the directive actually only uses the term “phonogram” which is not defined on a European level, but generally only refers to fixations of sound, see e.g. Art. 2 (b) of the WIPO Performances and Phonograms Treaty (WPPT).
- 47 CJEU, Case C-355/12 *Nintendo* [2014]
- 48 CJEU, Case C-355/12 *Nintendo* [2014], paragraphs 22 et seq.
- 49 *Rosati*, op. cit. *supra* note 41, at p. 1115. *Oehler* on the other hand interprets the decision to mean that the CJEU leaves this question open, see *Oehler*, EuGH: Umgehung des Schutzsystems für eine Videospielekonsole, MMR 2014, 401, at pp. 404 et seq. For a critical analysis of the CJEU’s understanding of the *lex specialis* doctrine, see *Rendas*, Lex Specialis (sima): Videogames and Technological Protection Measures in EU Copyright Law, E.I.P.R. 2015, 39, at pp. 43 et seq.
- 50 See CJEU, Case C-393/09 *BSA* [2010], paragraphs 40 et seq. The case did not concern video games, but the graphic user interface of computer programs. In this decision, the CJEU clearly distinguishes between the parts of a program that are protected under the Software Directive (the “expression in any form of a computer program which permits reproduction in different computer languages, “e.g. the source code and object code, paragraph 35), and the graphic user interface, which may be protected under the InfoSoc Directive, if it is original (paragraphs 44 et seq.). It thus appears possible that the court would also apply such a distributive approach to the different parts of video games.
- 51 For the issue of whether the presence of code may rule out a classification as an audiovisual or cinematographic work, see below, part A. II. (4).
- 52 *Leistner*, Der europäische Werkbegriff, ZGE 2013, 4, at p. 11; *Rosati*, op. cit. *supra* note 41, at pp. 1112 et seq.
- 53 *Schack*, Urheber- und Urhebervertragsrecht, at margin number 248; *Stamatouidi*, Are Sophisticated Multimedia Works Comparable to Video Games, 48 J. Copyright Soc’y U.S.A., 2001, 467, 470.
- 54 *Stamatouidi*, op. cit. *supra* note 53, at 470; *Schack* points out similar characteristics, op. cit. *supra* note 53, at 248.
- 55 Recital 10 of the InfoSoc Directive refers to „multimedia products“: “[...] The investment required to produce products such as *phonograms, films or multimedia products*, and services such as ‘on-demand’ services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.” (Emphasis added.) In the operative provisions however, only the term “film” is employed. While the wording of the recital may indicate that multimedia products and films are not the same thing, judging from this recital, the directive clearly intends to give legal protection to producers of films as well as multimedia products while nevertheless only using the term film in the operative part. This may thus also be considered as an indicator for an interpretation of the term film that also covers multimedia products.
- 56 Affirmative *Suthersanen/Frabboni* in: *Stamatouidi/Torremans* (eds.), EU Copyright Law (2014), at 13.13; critical of a broad definition of audiovisual works: *Kamina*, op. cit. *supra* note 22, at pp. 94 et seq.
- 57 See e.g. a recent decision by the German Federal Court (BGH), Urteil vom 27.11.2014 - I ZR 124/11 = BeckRS 2014, 22154, paragraph 40.
- 58 *Nordemann* in: *Fromm/Nordemann* (eds.), Urheberrecht, Vor §§ 88 ff. UrhG, at margin number 12.
- 59 *Ramos*, et al., op. cit. *supra* note 19, at p. 8.
- 60 See *Stamatouidi*, op. cit. *supra* note 53, at pp. 479 et seq., with an overview of the case law in different states. See also, *Rendas*, op. cit. *supra* note 49, at p. 40.

- 61 Karl, Urheberrecht: Voraussetzungen der rechtmäßigen Umgehung eines Schutzsystems für Videospielekonsolen, *EuZW* 2014, 304, at p. 307.
- 62 Implied by e.g. *Manegold/Czernik*, in: Wandtke/Bullinger (eds.), *Praxiskommentar zum Urheberrecht* (2014), Vor §§ 88 UrhG, at margin number 72; However, *González*, *Der digitale Film im Urheberrecht* (2002), at p. 91 et seq., considers an animated film to be partly protected as a cinematographic work and partly as a computer program.
- 63 Once saved, it can be done by some form of digital player, see *González*, op. cit. *supra* note 62, at p. 73, who argues that therefore those kinds of animated movies that are only generated with the help of a computer program do not partly consist of computer programs.
- 64 *Ibid.*, at p. 68.
- 65 See Art. 1 Software Directive.
- 66 See *Suthersanen/Frabboni*, in: Stamatoudi & Torremans (eds.), *EU Copyright Law* (2014), at 13.13 who make an *ejusdem generis* argument.
- 67 See *Barwick, et al.*, op. cit. *supra* note 9, at p. 374.
- 68 A prominent example of this type of game is *Second Life*.
- 69 See also, *Dreier* in: Walter/von Lewinski (eds.), *European Copyright Law* (2010), at 7.3.12.
- 70 For a more detailed comparison see *Rauda*, *Recht der Computerspiele*, at p. 39. The German Copyright Act, in Art. 2 (1) Nr. 6 also speaks of “cinematographic works, including works produced by processes similar to cinematography”.
- 71 *Lenaerts/Gutiérrez-Fons*, *To Say What the Law of the EU Is*, *EUI Working Papers AEL* 2013/9, at p. 14, *Riesenhuber*, in: *Europäische Methodenlehre*, op. cit. *supra* note 24, at § 10 margin number 24.
- 72 However, e.g. the term “film” in the Rental and Lending Directive has always been considered broader than what the rental and lending of films would usually require and this does not appear to have caused any problems, see *von Lewinski*, in: *Walter/von Lewinski* (eds.), *European Copyright Law* (2010), at 6.2.26.
- 73 With regard to the principal director, Art. 2 (1) Term Directive and Art. 2 (2) Rental and Lending Directive already state that he or she shall be considered one of the film’s authors.
- 74 For Germany, see §§ 88, 89 German Copyright Act (UrhG).
- 75 See e.g. § 93 German Copyright Act (UrhG).
- 76 See *Kamina*, op. cit. *supra* note 22, at p. 94 with examples from France.
- 77 For Germany, see e.g. *BayObLG*, *GRUR* 1992, 508. A detailed analysis of the consequences a classification of games as audiovisual or cinematographic works would have in different Member States is, however, outside the scope of this article.
- 78 *nestor* (ed.): *Fact Sheet 22, Emulation als Bewahrungskonzept in: Langzeiterhaltung digitaler Daten in Museen*, available at: [http://files.dnb.de/nesstor/sheets/22\\_emulation.pdf](http://files.dnb.de/nesstor/sheets/22_emulation.pdf); *van der Hoeven/van Wijngaarden* note: “Digital objects are increasingly dependent on functionality, so ignoring the environmental aspects disables the possibility of full reconstruction of the objects”, *Modular emulation as a long-term preservation strategy for digital objects*, available at: <http://iwaw.europarchive.org/05/papers/iwaw05-hoeven.pdf>.
- 79 *Wen*, *Why emulators make video-game makers quake*, June 4, 1999, available at: <http://www.salon.com/1999/06/04/emulators/>. However, not all emulators necessarily emulate hardware as explained below.
- 80 *Rothenberg*, *Avoiding Technological Quicksand: Finding a Viable Technical Foundation for Digital Preservation – A Report to the Council on Library and Information Resources*, 1999, at p. 17, available at: <http://www.clir.org/pubs/reports/rothenberg/pub77.pdf>.
- 81 *nestor* (ed.): *Fact Sheet 22, Emulation als Bewahrungskonzept in: Langzeiterhaltung digitaler Daten in Museen*, available at: [http://files.dnb.de/nesstor/sheets/22\\_emulation.pdf](http://files.dnb.de/nesstor/sheets/22_emulation.pdf).
- 82 This is considered the most adequate form of emulation, see *Loebel*, op. cit. *supra* note 1, at pp. 63 et seq. with further references.
- 83 *Tsiricos*, *One Flew Over Pac-Man’s Nest*, October 1, 2000, available at: <http://pdf.textfiles.com/academics/pacman-tsiricos.pdf>, at p. 20.
- 84 *van der Hoeven et al.*, op. cit. *supra* note 3, at 4.2.
- 85 *Ibid.*
- 86 *Ibid.*
- 87 *Ibid.*, at 7.
- 88 *Ibid.*, at 4.1.
- 89 See *Stieper*, *Rechtfertigung, Rechtsnatur und Disponibilität der Schranken des Urheberrechts* (2009), at p. 475.
- 90 See §§ 53, 95 (b) German Copyright Act (UrhG), *Arlt*, in: *Hoeren/Sieber/Holzengel* (eds.), *Multimedia-Recht* (2014), at margin numbers 54 et seq.
- 91 CJEU, *Case C-355/12 Nintendo* [2014], paragraph 25. *Jütte* interprets the decisions to mean that users may in fact circumvent technical protection measures for non-infringing uses, see *Jütte*, *Technische Schutzmaßnahmen an der Schnittstelle der Interessen von Rechtsinhabern und Nutzern*, in: *Taeter* (ed.), *Big Data & Co*, *DSRI Tagungsband Herbstakademie* (2014), 237, at pp. 248 et seq.
- 92 *Id.*, paragraph 36.
- 93 *Id.*
- 94 *van der Hoeven, et al.*, op. cit. *supra* note 3, at 6.2.
- 95 See *Barwick, et al.*, op. cit. *supra* note 9, at p. 385.
- 96 *van der Hoeven, et al.*, op. cit. *supra* note 3, at 6.2.; *Ricolfi, et al.*, *Survey of Private Copyright Documentation Systems and Practices* (prepared for WIPO) (2011), available at: [http://www.wipo.int/export/sites/www/meetings/en/2011/wipo\\_cr\\_doc\\_ge\\_11/pdf/survey\\_private\\_crdocsystems.pdf](http://www.wipo.int/export/sites/www/meetings/en/2011/wipo_cr_doc_ge_11/pdf/survey_private_crdocsystems.pdf), at p. 11.
- 97 *van der Hoeven, et al.*, op. cit. *supra* note 3, at 2.
- 98 *Loebel*, op. cit. *supra* note 1, pp. 107, 160.
- 99 CJEU, *Case C-419/13 Art & Allposters* [2014], paragraphs 27, 46. The court also left open the interpretation of Art. 12 Berne Convention, which provides: ‘Authors of literary or artistic works shall enjoy the exclusive right of authorising adaptations, arrangements and other alterations of their works.’ On the relationship between the right of reproduction and the right of adaptation, see *Cabay/Lambrecht*, *Remix prohibited: how rigid EU copyright laws inhibit creativity*, *Journal of Intellectual Property Law & Practice*, 2015, Vol. 10, No. 5, 359, at pp. 362 et seq.
- 100 Whether the Software Directive would be relevant with regard to video games is disputed (even though this issue would only affect alterations of the code of the game). For the diverging opinions on the applicability of the different directives, see *supra* part A. II. 2. and notes 49 and 50.
- 101 European projects that dealt with emulation as a preservation strategy were not limited to video games, see e.g. *KEEP* (“Keeping Emulation Environments Portable”, a project aimed at enabling the “accurate rendering of both static and dynamic digital objects”, see *About Keep*, available at: <http://www.keepproject.eu/ezpub2/index.php?/eng/About-KEEP>), or *PLANETS* (“Preservation and Long-term Access through Networked Services”), see the project page, available at: <http://www.planets-project.eu/>.
- 102 There is a long list of games that were rereleased as freeware, see *List of commercial video games released*

as freeware, available at: [https://en.wikipedia.org/wiki/List\\_of\\_commercial\\_video\\_games\\_released\\_as\\_freeware](https://en.wikipedia.org/wiki/List_of_commercial_video_games_released_as_freeware).

- 103 An example is SimCity (1998), which was rereleased under a GNU GPLv3 under the (original) title Micropolis in 2008, see *Simser*, SimCity Source Code Released to the Wild!, January 10, 2008, available at: <http://weblogs.asp.net/bsimser/simcity-source-code-released-to-the-wild-let-the-ports-begin>. There are many more examples, see List of commercial video games with available source code, available at: [https://en.wikipedia.org/wiki/List\\_of\\_commercial\\_video\\_games\\_with\\_available\\_source\\_code](https://en.wikipedia.org/wiki/List_of_commercial_video_games_with_available_source_code)
- 104 See FSF, What is free software, available at: <http://www.fsf.org/about/what-is-free-software>. For a detailed analysis of the General Public Licence, see *Dusollier*, Open source and copyleft: authorship reconsidered?, 26 Colum. J.L. & Arts 281 (2003), at p. 284 et seq. Available at: [http://works.bepress.com/severine\\_dusollier/18/](http://works.bepress.com/severine_dusollier/18/).
- 105 As there are a plurality of alternative licences, other issues (such as the compatibility between different licences and questions of private international law) may arise that are outside the scope of this article. For details, see *Metzger*, Open Source und andere alternative Lizenzmodelle. Nutzung des Urheberrechts als Mittel zur Sicherung freier Kommunikation, in: Grünberger/Leible (eds.), Die Kollision von Urheberrecht und Nutzerverhalten (2014), 115, at p. 121 et seq.
- 106 *Dusollier*, Sharing access to intellectual property through private ordering, 82 *Chicago-Kent Law Review* 1391 (2007), at p. 1414. Available at: [http://works.bepress.com/severine\\_dusollier/14](http://works.bepress.com/severine_dusollier/14)
- 107 For a detailed analysis of the general questions around the conclusion of contracts and open software licenses see *Metzger*, Freie Software, Open Content – Ausgleich expansiver Urheberrechte durch das Vertragsrecht? in Hilty/Peukert (eds.), Interessenausgleich im Urheberrecht, (2004), 253, at p. 254 et seq.
- 108 See e.g. *Moore*, Lost in limbo: on the hunt for PC gaming's abandoned classics, Mar 27, 2015, available at: <http://www.pcgamer.com/lost-in-limbo-on-the-hunt-for-pc-gamings-abandoned-classics/>; *Savetz*, Can „Abandonware“ Revive Forgotten Programs? – Challenges and Obstacles, September 17, 2001, available at: <http://web.archive.org/web/20120213191159/http://www.savetz.com/articles/byte-abandonware.php?sort=date>.

# Enforcing Copyright Infringements Online

## In Search of Balanced Private International Law Rules

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**Abstract:** Enforcement of copyright online and fighting online “piracy” is a high priority on the EU agenda. Private international law questions have recently become some of the most challenging issues in this area. Internet service providers are still uncertain how the Brussels I Regulation (Recast) provisions would apply in EU-wide copyright infringement cases and in which country they can be sued for copyright violations. Meanwhile, because of the territorial approach that still underlies EU copyright law, right holders are unable to acquire EU-wide relief for copyright infringements online. This article first discusses the recent CJEU rulings in

the Pinckney and Hejduk cases and argues that the “access approach” that the Court adopted for solving jurisdiction questions could be quite reasonable if it is applied with additional legal measures at the level of substantive law, such as the targeting doctrine. Secondly, the article explores the alternatives to the currently established *lex loci protectionis* rule that would enable right holders to get EU-wide remedies under a single applicable law. In particular, the analysis focuses on the special applicable law rule for ubiquitous copyright infringements, as suggested by the CLIP Group, and other international proposals.

**Keywords:** Copyright Enforcement; Targeting Doctrine; Copyright Violations; Lex Loci Protectionis

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### A. Introduction: IP, PIL and the Internet

1 With the emergence of the Internet, the enforcement of cross-border intellectual property (IP) infringements has become highly relevant, especially in the area of copyright law. With the prevalence of online copyright “piracy”, the efficient enforcement of copyright has proven to be an especially challenging task for both the legislators<sup>1</sup> and the courts.<sup>2</sup> Private international law (PIL) issues raise some of the most difficult questions in this area. First, it is necessary to decide which court has jurisdiction in EU-wide (and worldwide) copyright infringement cases online. Secondly, once the court jurisdiction is established, one needs to determine which law the court has to apply when establishing EU-wide infringement and granting EU-

wide remedies. The currently applicable EU Brussels I Regulation (Recast) allows infringers to be sued either in the place of the defendant’s domicile or in the place of the harmful event.<sup>3</sup> However, it does not specify where the “harmful event” is supposed to occur when copyright infringement is taking place online. With regard to the applicable law, the EU Rome II Regulation subjects copyright infringement to the law of the country “for which protection is claimed”.<sup>4</sup> This so called “*lex loci protectionis*” rule means that national copyright law applies only in respect of infringement occurring inside the territory of a particular state. Therefore in order to get EU-wide remedies, the copyright laws of each EU Member State (currently, 28 such laws) would need to be applied.

2 The CJEU has recently clarified some of the PIL issues relevant to cases of copyright infringement

online. Namely, in the *Pinckney*<sup>5</sup> and *Hejduk*<sup>6</sup> cases it clarified that the courts of the state where the infringing content can be accessed have a territorially-limited jurisdiction over the online copyright infringement case. At the same time, this “access approach” has been heavily criticised by a number of commentators.<sup>7</sup> Furthermore, a number of questions in the area still remain open, such as the applicable law rule in online copyright infringement cases.

- 3 This, and other questions related to IP and PIL, have been addressed in detail in doctrine, including several international academic proposals, such as the proposal from the European Max Planck Group on Conflict of Laws and Intellectual Property (CLIP Proposal).<sup>8</sup> Currently, the Committee on Intellectual Property and Private International Law at the International Law Association is working on a set of international guidelines in this area.<sup>9</sup>
- 4 The question addressed in this paper is what jurisdiction and applicable law rules should apply in order to ensure both the effective enforcement of copyright law online and sufficient protection of legitimate interests of users.<sup>10</sup> For this purpose, I will first focus on evaluating jurisdiction rules for copyright infringements online as established by the CJEU and analyse possible alternatives. Secondly, I will analyse the suitability of the *lex loci protectionis* rule in solving copyright disputes online and discuss some other solutions that could facilitate the granting of EU-wide relief in such cases.

## B. Jurisdiction in copyright cases online

- 5 The first question to be analysed here is which courts should have jurisdiction to hear cases of copyright infringement occurring online. According to the Brussels I Regulation (Recast), right holders can bring the case before the court of the State where the defendant has his/her domicile<sup>11</sup>, or in the State where the harmful event occurred or is to occur<sup>12</sup>. Whereas the former rule does not raise problems that are specific to the Internet environment, applying the second rule and determining the “place of the harmful event” in an online environment has proven to be a difficult task<sup>13</sup>.
- 6 As mentioned, the CJEU had a chance to provide an interpretation of “place of the harmful event” in two recent cases. In the *Pinckney* case,<sup>14</sup> the French right holder discovered that his 12 songs had been reproduced without his authority on a CD in Austria by Mediatech and then marketed by the United Kingdom companies through various Internet sites accessible *inter alia* in France. He brought an action against Mediatech before the court in his own

domicile, France. The CJEU found that, in online copyright infringement cases, the place of damage under article 5(3) of Brussels I Regulation is the place where the infringing content could be accessed (so called “access approach”). As a result, the French court was granted jurisdiction, however, it was limited to the territory of France only.

- 7 This decision was met with “shock” both by the Advocate General and the IP community, and was criticised for enabling extensive forum shopping by right holders.<sup>15</sup> In previous cases regarding the localisation of online activities, the CJEU had applied the so called “targeting doctrine” which would allow a finding of infringement of the IP right in a particular country only if its territory was targeted by the website.<sup>16</sup> Advocate General Jääskinen had suggested applying the same targeting doctrine when determining jurisdiction in the *Pinckney* case,<sup>17</sup> which the CJEU rejected.
- 8 The same access approach has been upheld in the recent *Hejduk* case.<sup>18</sup> A German company EnergieAgentur, without Ms Hejduk’s consent and without providing a statement of authorship, made her photographs of architectural buildings available on its website [www.energieregion.nrw.de](http://www.energieregion.nrw.de) for viewing and downloading. Ms Hejduk brought a copyright infringement action before an Austrian court. The CJEU confirmed the *Pinckney* approach and once again established that, under ex article 5(3) Brussels I, the court of the place where the infringing content can be accessed has jurisdiction to hear the case but it can grant only territorially-limited damages. The Court rejected the suggestion by Advocate General Cruz Villalón to distinguish the *Pinckney* case, reject the access approach and establish jurisdiction only in the country “where the causal event took place”.<sup>19</sup>
- 9 The following subsections will analyse the suitability of these three approaches for the establishment of jurisdiction in copyright cases online: the access approach, the targeting doctrine, and the “causal event” rule.

## I. Access approach

- 10 As mentioned above, the access approach adopted by the CJEU in copyright cases online has been met with a number of criticisms. From the perspective of private international law and the Brussels I Regulation (Recast) in particular, the access approach seems to contradict both general and specific goals set under the Brussels I Regulation (Recast).<sup>20</sup> First, predictability and foreseeability principles, as entrenched in the Brussels I Regulation (Recast),<sup>21</sup> seem to be undermined. The access approach allows a defendant to be sued in any place where the infringing content could be accessed online, that

is, in virtually every EU Member State (assuming that no geo-location measures are applied). Thus, a defendant acting in one state cannot predict the place of the suit in advance. The situation gets even worse if a defendant is actually and clearly targeting some countries but the website can still be accessed in other countries (“overspill” effects). In such a situation, the case can still be initiated in the courts of countries that are not targeted.<sup>22</sup> Secondly, an underlying purpose of the Brussels I Regulation (Recast) and CJEU practice is to curb forum shopping. The access criterion enables the broadest possible forum shopping by the right holder who can now initiate a case in any country with access to the website.<sup>23</sup>

- 11 Thirdly, as the CJEU itself has highlighted, “the rule of special jurisdiction laid down in Article 5(3) of the Regulation is based on the existence of a particularly close connecting factor between the dispute and the courts of the place where the harmful event occurred” (emphasis added).<sup>24</sup> However, it is very doubtful whether courts of the place where the content can merely be accessed have a “particularly close connection” with the dispute. The state of the court would be one of the many states where content can be accessed. The fact that the content can be accessed does not automatically lead to the fact that it was (or will be) accessed and in this way caused (or will cause) damage in that state. Thus, it is questionable whether the court of a place of mere access would be “the court objectively best placed to determine whether the elements establishing the liability of the person sued are present”.<sup>25</sup>
- 12 Similarly, it is also doubtful whether the access approach helps to attain the goal of “sound administration of justice and the efficacious conduct of proceedings”.<sup>26</sup> As the Advocate General in the *Hejduk* case noted, where the work is merely accessible for viewing and downloading in a country, it is impossible to estimate the exact damage that occurs in that country. Then, it is likely that the court would either underestimate the damage in the jurisdiction or overestimate it, and in this way cross the limits of court jurisdiction.<sup>27</sup> Furthermore, if the same activity is adjudicated by several courts on a territorial basis, this may lead to conflicting outcomes or excessive damages.
- 13 From the perspective of a balance of interest approach underlying copyright law, one may question what implication the access approach, as applied when determining the jurisdiction under ex article 5(3) Brussels I (art 7(2) Brussels I Recast), has on the parties involved in the dispute.<sup>28</sup> The permission for right holders to sue for copyright infringement online in each country from where the content can be accessed gives great advantages to right holders.<sup>29</sup> This strengthens the possibilities of copyright enforcement online and copyright protection in general. On the other hand, such forum shopping possibilities cause legal insecurity and a lack of foreseeability for users, in particular, online service providers. As mentioned, such a situation is even more unreasonable from the perspective of online service providers if they are targeting only a specific country (or several countries) and access in other countries is a mere “overspill” effect. For instance, an online service provider runs a Lithuanian website in a Lithuanian language, with advertising targeting a Lithuanian audience and members residing essentially in Lithuania. The website operator makes a French work available on the website without authorisation from the right holders. It would be quite unreasonable from the perspective of the online service provider if the French right holder was able to sue this Lithuanian website in France merely because the illegal content is accessible in France.
- 14 Thus, the access approach may further discourage online service providers from offering EU-wide services. Actually, it invites them to apply geolocation measures technically restricting the access to certain EU Member States only.<sup>30</sup> Here one should ask how such practices are likely to affect the EU digital market and whether they are compatible with recent EU policies on copyright and creative markets online. If defendants choose to use geolocation or other measures and geographically limit access to their websites, this would lead to further territorial segmentation of the EU online market. In recent studies<sup>31</sup> and Commission policy papers<sup>32</sup> the geographical segmentation of creative markets online has been highlighted as one of the most significant problems and the Commission is expected to take measures to address this single market problem in the near future.<sup>33</sup> The “access” approach adopted by the CJEU reinforces the territorial nature of copyright on the Internet and in this way contributes to the problem.
- 15 Despite these criticisms, there are also arguments that justify the establishment of jurisdiction of a local court based on mere access to the website in that country. First, contrary to what some commentators argue,<sup>34</sup> the *Pinckney* and *Hejduk* decisions are consistent with the previous CJEU rulings on jurisdiction issues online. In the *eDate Advertising* case,<sup>35</sup> dealing with the violation of personality rights online, the CJEU applied article ex 5(3) of Brussels I and allowed the case to be brought in any country where the content was accessed (scope of jurisdiction limited to the territory of the state).<sup>36</sup> In the *Wintersteiger* case,<sup>37</sup> which concerned the infringement of national trade mark rights online, the Court seems to have followed the same access approach. However, since trade mark protection is limited only to those countries where the trade mark is registered, the Court logically restricted jurisdiction only to those Member States

where the trade mark is registered. Copyright, on the contrary, is automatically protected in all Member States without registration; therefore, the general access criterion was applied.<sup>38</sup>

- 16 As both the Advocate General in the *Pinckney* case and some commentators have pointed out, in a number of previous cases the CJEU has followed another, targeting, approach.<sup>39</sup> However, it has been applied in cases analysing the scope of exclusive rights at the level of substantive law,<sup>40</sup> rather than when determining jurisdiction of the court. Both the Advocate General and the Court highlighted that the jurisdiction and localisation questions should not be mixed up.<sup>41</sup> Although the Advocate General suggested also applying the targeting approach to the analysis of jurisdiction questions, the CJEU took a different approach. The Court decided that there is no need to apply the targeting approach when analysing the question of jurisdiction; rather, broader grounds of jurisdiction (i.e. any place of access) shall be allowed. This different approach towards the targeting doctrine at the level of jurisdiction and when determining the scope of exclusive right can be explained by the different objectives of PIL and substantive law provisions. The localisation of a protected act will determine not only the question of infringement but also for which territories a copyright licence should be obtained. The criteria to establish jurisdiction may be broader and consider various principles of PIL, such as the sound administration of justice.<sup>42</sup>
- 17 Furthermore, although the access approach allows forum shopping by right holders, this threat is minimal since other legal mechanisms, if applied together with the access approach, will to a large extent discourage right holders from forum shopping. First, as the CJEU highlighted, the courts of the place where the content can merely be accessed would have a limited scope of jurisdiction. That is, they will only be able to grant damages that occurred in the territory of that country. Since damages in a country with mere access would be minimal or equal to zero, suing in that country would not be the most optimal solution for the right holder.<sup>43</sup> Thus, the right holder that wishes to obtain EU-wide relief is encouraged to approach the court of the state where at least some damage could be established. Alternatively, the right holder could obtain entire cross-border damages in the courts of the defendant's domicile (art 4(1) of Brussels I Recast; ex art 2(1) Brussels I) or in the courts of the place where the causal activity leading to harm took place (art 7(2) Brussels I Recast; ex art 5(3) Brussels I).
- 18 Another way to solve the forum shopping problem caused by the access approach would be to apply the targeting doctrine at the level of substantive law. As will be discussed later, the targeting doctrine has already been extensively applied when localising

various uses online and offline. It is suggested here that it should apply when localising copyright infringement online as well.<sup>44</sup> According to this doctrine, if the courts find that the country where the infringing content was accessible was not targeted by the website, they will dismiss the claim of copyright infringement in that country. That is, even if the access approach allows right holders to sue defendants in the countries where the website can merely be accessed, according to the targeting doctrine, the claim of infringement in such countries would fail at a substantive law level. As a result, right holders would have little incentive to sue infringers in such "empty jurisdictions".<sup>45</sup> Meanwhile, only the courts of the targeted Member State will be able to establish infringement in the state and award damages.<sup>46</sup> Such an approach has been followed *inter alia* by the Austrian court in the abovementioned Wintersteiger case. As a consequence of the CJEU decision in the Wintersteiger case, the Austrian court accepted jurisdiction in the case of a trade mark infringement online. However, it rejected a finding of trade mark infringement under Austrian law since no targeting or commercial effects had been established in Austria.<sup>47</sup>

- 19 Thus, it is true that allowing jurisdiction on the basis of mere access to the content provides right holders with extensive forum shopping opportunities. However, this problem is reduced since courts of the place of access have only territorially limited jurisdiction; in the absence of targeting and marketing effects in the country, they will not be able to establish damages. Further, if the targeting doctrine applies when allocating the place of copyright infringement at the level of substantive law, the courts of the place of mere access would not be able to establish copyright infringement in their territory at all. The combination of these rules would result in a rather balanced outcome. Although the access approach provides right holders with broad jurisdiction choices, they would be effectively limited since in jurisdictions with mere access, right holders would not be able to get any relief. Meanwhile, users would get more legal security since they can foresee that only the courts of targeted countries would eventually be able to establish infringement and that the damages such courts grant would be limited to the forum territory only. In order to get EU-wide remedies, right holders would need to approach courts in the country of the defendant's residence.

## II. Targeting Doctrine

- 20 As an alternative to the access approach, the targeting doctrine has been broadly discussed. It has been applied in a number of the CJEU cases, either at the level of substantive law when localising the

activity in a cross-border scenario, or in relation to jurisdiction based on art 17 (ex art 15) of the Brussels I Regulation (Recast).<sup>48</sup> It was also proposed by the Advocate General in the *Pinckney* case.<sup>49</sup> A similar market effect approach has been recommended by the World Intellectual Property Organization (WIPO) when determining infringement of trademarks online.<sup>50</sup> This market effect approach was followed by some national courts<sup>51</sup> and suggested by commentators.<sup>52</sup> The European CLIP Group also suggests limiting unreasonable forum shopping by right holders by applying a targeting approach.<sup>53</sup> Unsurprisingly, lawyers expected that the targeting doctrine would be the approach that the CJEU adopted in the *Pinckney* case.<sup>54</sup>

- 21 The underlying idea of the targeting doctrine, as suggested at the level of jurisdiction, is welcomed. It intends to limit the number of courts that could hear the case by excluding jurisdiction of courts in the countries that were not targeted and not substantially affected by the online activity. It means more predictability for online users, including online service providers. By targeting their conduct to some countries only, they can be sure that they may be sued in those countries only, and not in any other country where the website can merely be accessed. This means less possibility of forum shopping for the right holders since the number of potential forums decreases. Also, the courts that would be granted jurisdiction under these rules would have a closer connection to the dispute since the activity would have (actual or potential) effects in that country; they would be better able to estimate the harm done, which would also lead to sounder administration of court proceedings.
- 22 From a copyright law perspective, the balance between right holders' and users' (potential infringers') interests in IP enforcement procedures is also better maintained. By applying the targeting doctrine, right holders' possibilities of enforcement may be reduced (e.g. they may not be able to sue in their home country just because the content is accessible there). Meanwhile, this solution would better serve the legal certainty and foreseeability interests of online service providers. In addition, the balance of interests here can also be adjusted by defining which party would have to prove whether the country at stake is targeted. According to the CLIP proposal, the burden should be on a defendant to prove that a forum country has not been targeted, since the defendant possesses more information about the access and usage of the website.<sup>55</sup> Such an allocation of the burden of proof would decrease the disadvantages that the targeting doctrine causes to right holders.
- 23 On the other hand, a few problems would arise if the targeting doctrine is applied when determining jurisdiction in copyright infringement cases online.

One of the most difficult tasks is finding a proper definition of "targeting". What criteria should be taken into account when determining whether the country was targeted? What criteria are sufficient to establish targeting? What activities by the internet service provider are sufficient to claim that it did not target particular countries? How high should the standard be? For instance, if a Lithuanian news website primarily targeting a Lithuanian audience is also being accessed by a number of Lithuanian immigrants in France, would France be "targeted" by this website? Does the answer change if the online publisher "wanted" it to be read by Lithuanian emigrants abroad? Would the answer differ if a service provider simply "did not care"? Another example could be the case scenario in the *Hejduk* case: would the German architects' website under the domain name .de also be targeting German speaking architects in neighbouring Austria? How explicitly should the website include or exclude Austria as a potential audience? Even if the website explicitly excludes the Austrian audience (e.g. by using disclaimers) but the website is still widely accessed by the specialist audience in Austria, would the website still be considered as targeting Austria?

- 24 Several guidelines could be useful in determining targeting. The 2001 WIPO Recommendation for the use of signs on the Internet<sup>56</sup> sets a number of factors that could be *mutatis mutandis* taken into consideration when determining targeting in copyright cases. Also, the CJEU and national courts have already been applying the targeting doctrine at the level of substantive law, and despite the lack of a clear definition, they came to some reasonable solutions.<sup>57</sup> The question, however, remains whether such a fact-based analysis should be undertaken when establishing jurisdiction. It seems to be more reasonable at the level of substantive law. Further, let us assume that in order to establish targeting at a jurisdictional level, a more general evaluation of the situation is sufficient. Then, the question emerges as to how the "targeting" at the level of jurisdiction and "targeting" when allocating the conduct online (at the level of substantive law) should be distinguished; the same term would refer to different standards. Overall, the difficulty in defining the term "targeting" speaks in favour of applying it at the level of substantive law rather than when determining jurisdiction of the court.
- 25 The other problem is when no countries are specifically targeted by online conduct or, alternatively, all countries are targeted.<sup>58</sup> This would often happen with websites using a broadly spoken language, such as English. For instance, these might be the websites that have popular content or services in which users from across the EU are interested (such as file-sharing websites), or news websites that target specialist audiences across the EU (e.g. the IPKat blog). Also, one may imagine that

under the *Pinckney* scenario, UK online companies are interested in making any possible sales not only in the UK but also across the EU. In such cases the targeting doctrine would be difficult to apply. Would that mean that those Internet service providers who have not undertaken careful measures to target just specific markets could be sued in any country where the content may be accessed? On the one hand, this might be quite reasonable. If a service is intended for an EU-wide audience, the service provider is exposing itself to all jurisdictions across the EU. On the other hand, such a legal situation discourages online service providers from offering EU-wide services.<sup>59</sup> In order to avoid risks, they are likely to restrict their online services to several markets and this is not compatible with the EU goal of creating a single digital market for creative content.

- 26 Also, the recent national court practice in applying the targeting doctrine when allocating copyright infringements online shows that it is applied by courts quite broadly. Often, very few connecting factors are sufficient to establish targeting in the forum country.<sup>60</sup> In order to make this doctrine effective in restricting the forum shopping by right holders, the CJEU would need to establish a more rigid standard of what constitutes targeting.
- 27 Thus, the targeting approach could be helpful in deciding jurisdiction of the court when websites clearly target one or several countries and right holders sue in countries clearly not targeted by these websites.<sup>61</sup> This would prevent right holders from suing in a jurisdiction where the website is merely accessible.<sup>62</sup> However, the application of the targeting doctrine at the level of jurisdiction would often require a careful factual analysis. Such analysis could be better carried out at the level of substantive law when localising the infringing activity.<sup>63</sup>
- 29 On the one hand, such a “causal event” rule would guarantee great legal certainty for online service providers. They could be sued only in the country from where they acted, which would normally be the country of their domicile. On the other hand, such a rule, especially if applied at the level of jurisdiction, would lead to unreasonable disadvantages to right holders and may significantly weaken the enforcement of copyright online. Right holders would be required to sue foreign infringers outside their jurisdiction; they would not have a chance to get local remedies in any other country, including their home country, even if damage is felt there. It may be unreasonably difficult for right holders to enforce their rights against websites operating abroad. This would weaken the enforceability of copyright law online. Also, such an approach would encourage forum shopping by online service providers; they may want to provide their services from countries where the court system is not functioning well or where copyright protection is weakest. Further on, this rule would normally lead to the same results as the “defendant’s domicile” rule. This means that an additional ground of jurisdiction based on the place of a harmful event would be largely eliminated. For this reason, applying the “causal event” rule for determining jurisdiction in copyright cases online does not seem to be a viable option.
- 30 To conclude, the above discussion has demonstrated that the access approach, as adopted by the CJEU, is not as unreasonable as some commentators argue. It is true that the access approach per se may encourage forum shopping by right holders and could undermine the legal certainty and foreseeability interests of online service providers. However, this danger is diminished to a minimum by two legal mechanisms if they are applied in parallel to the access approach. First, the targeting approach could be applied to allocate the online activity at the level of substantive law, which means that the courts in the countries with mere access to the infringing content will not be able to establish infringement and grant remedies in their territories. Secondly, as the CJEU has clarified, courts in the place of mere access have jurisdiction to grant territorial remedies only. These two rules would discourage right holders from bringing cases in countries with mere access to the illegal content. Furthermore, although the targeting doctrine may seem, at a first glance, to be a more suitable alternative than the accessibility approach, the analysis shows that it has its own problems. Namely, the establishment of targeting would often require a detailed factual analysis, which could be better carried out when allocating the online conduct at the level of substantive law. Finally, the “causal event” rule, as suggested by the Advocate General in the *Hejduk* case, is the least suitable option for determining jurisdiction in copyright cases online. It would give overly significant advantages to the

### III. “Causal event” approach

- 28 The third solution could be subjecting copyright infringement online to the jurisdiction of the court where the infringing conduct originated. As the Advocate General proposed in the *Hejduk* case, under ex article 5(3) Brussels I (art 7(2) Brussels I Recast), jurisdiction could be granted only to the courts of the state where the “causal event” took place.<sup>64</sup> This would mean that the place of a harmful event under Article 7(2) of the Brussels I Regulation (Recast) would be only the place from where the defendant acted to initiate the allegedly infringing activity. It would often coincide with the place of residence of the defendant, but this would not necessarily always be the case. As will be discussed later, a similar “country of origin” approach has already been applied at the level of substantive law.<sup>65</sup>

online users (potential defendants) by unreasonably weakening the position of right holders.

## C. Applicable law and copyright online

- 31 After the court establishes jurisdiction, the next question that should be addressed is what law applies to cross-border copyright infringement online. Up to now courts have seldom discussed applicable law questions in these cases. At best, they simply mention the *lex loci protectionis* rule and conclude that it leads to the application of forum law. This is an easy and correct solution in some cases, but not in others. When the defendant is sued in the place of the harmful event, the court would have jurisdiction only with respect to the infringement occurring inside that country. Here, the *lex loci protectionis* rule would coincide with *lex fori* and the law of the forum country would apply as the law of the country “for which protection is sought”. However, the situation would be different if the defendant is sued, for example, in the defendant’s domicile. The court of the defendant’s domicile is granted jurisdiction to adjudicate EU-wide copyright infringement. The question arises as to which national law such cross-border infringement could be adjudicated under and EU-wide remedies granted. In other words, how the *lex loci protectionis* rule, as established under the Rome II Regulation, would apply to EU-wide infringements occurring online?
- 32 I will first provide an overview of the problems related to the application of *lex loci protectionis* in copyright infringements online.<sup>66</sup> Then, I will analyse two possible alternatives that would mean a departure from an established territoriality principle; the country of origin rule and a special applicable law rule for ubiquitous copyright infringements.

### I. Lex loci protectionis

- 33 The *lex loci protectionis* rule is implemented by Article 8(1) of the Rome II Regulation and requires subjecting each IP infringement to the law of the country for which protection is sought.<sup>67</sup> This applicable law rule is based on the territoriality principle that still underlies EU copyright law. The territoriality principle generally means that copyright law of one state applies only in the territory of that state and does not extend to any acts outside that state’s territory.<sup>68</sup> The result of this is that the same work is protected under multiple national laws that may grant different scope of protection and enforcement measures. *Lex loci protectionis*, as an applicable law rule that mirrors the territoriality principle, requests that the infringement of an IP right is adjudicated by the law of the country that grants that right. If

the right is infringed in several states, the law of each state would apply with respect to the (part of) infringement occurring in that state.

- 34 The territoriality approach and *lex loci protectionis* rule have traditionally been justified by the need for states to maintain sovereignty over their own national copyright laws, which constitute a part of national cultural policies.<sup>69</sup> However, with the increasing globalisation of creative markets and especially with the emergence of the Internet, it has become increasingly difficult to justify a strict territoriality approach in copyright.<sup>70</sup> First, although infringements online have EU-wide (or worldwide) reach, the *lex loci protectionis* rule does not allow a right holder to acquire, under a single applicable law, EU-wide relief. Instead, even if the case is brought before a court having international jurisdiction over the dispute, the court would have to apply 28 national copyright laws for the same online infringement.<sup>71</sup> Secondly, for users, such as Internet service providers, this means that they have to comply with the law of each Member State in which their service is available. This encourages service providers to limit their services to certain territories, which is not compatible with the EU single digital market policy.<sup>72</sup> Therefore, the European Commission has several times raised the question of abandoning or limiting the territoriality principle, at least in an online environment.<sup>73</sup> Similarly, a number of academic proposals have suggested introducing a single-law approach at least to multi-state copyright disputes.<sup>74</sup> Therefore, the alternatives to the territoriality approach and *lex loci protectionis* rule need to be discussed.

## II. Country of origin rule

- 35 The main alternative to the *lex loci protectionis* rule has traditionally been the country of origin, or *lex originis*, rule. Generally, it suggests subjecting copyright disputes to the law of the country from where the work originates. That is, instead of the territoriality approach, it promotes a universality approach and suggests that a single law should apply in respect of a single work, regardless of where it has been exploited. Although it has been advocated by some commentators<sup>75</sup>, it has been accepted in few jurisdictions<sup>76</sup>, and often only to a limited extent<sup>77</sup>. The reasons against the introduction of the *lex originis* rule for copyright infringements online have been discussed by a number of authors<sup>78</sup>. In short, *lex originis* is not compatible with the national treatment provision implemented in article 5(2) of the Berne Convention<sup>79</sup>. As a result of *lex originis*, works used in the same country would be subject to different rules of different countries (depending on the origin of the work). Furthermore, *lex originis* does not ensure more legal certainty for users of

works, as compared to *lex loci protectionis*. When commercial users want to use a number of different works (e.g. communicate works over the radio, TV or on the Internet), each of these works might be subject to a different national law, depending on its place of origin. In addition, *lex originis* prevents states from pursuing their territorial copyright policies in their own territories in respect of works originating abroad. That is, according to *lex originis*, national laws would apply in respect of works created inside the country, but not in respect of works created in other countries but used inside the forum country<sup>80</sup>. These and other reasons have led to the general rejection of *lex originis* as a possible alternative to the *lex loci protectionis* rule.

- 36 On the other hand, European policy makers have been discussing the idea of introducing a similar country of origin approach at the level of substantive law.<sup>81</sup> Although this would be a solution to the territoriality problem at the level of substantive law rather than private international law, it is worth a short discussion here.
- 37 The country of origin doctrine was implemented as a substantive law rule in the EU Cable and Satellite Directive,<sup>82</sup> where communication to the public by satellite was defined as occurring only in the country where the broadcasting signals were emitted. Outside copyright law, a similar concept was used in the E-commerce directive<sup>83</sup> where e-service providers were subjected only to the laws of the country of their establishment.<sup>84</sup> Following this approach, in the case of online communications, the act of making available works online could be defined as taking place only in the country where the defendant is established (E-commerce directive approach) or in the country where the act leading to the making available online originates (Satellite and Cable directive approach).<sup>85</sup>
- 38 I argue here that such an approach would not be the most suitable one. On the one hand, it is true that the country of origin doctrine, if implemented at a substantive law level, would ensure much greater legal certainty for Internet service providers. They would need to comply only with the law of the country from where the activity originates. The single-law approach that this doctrine follows would also enable right holders to get EU-wide relief under a single law, namely, the law of the country from where the infringing activities originate. For instance, in the *Hejduk* case, after the jurisdiction of the court is established (be it in Austria or elsewhere), the court would have to apply German law with respect to the making available of photos online; German law would apply in determining EU-wide remedies, and there would be no possibility whatsoever of applying Austrian law.<sup>86</sup>
- 39 On the other hand, the definition of the act of making available as taking place only in the country of origin would lead to several problems. First, this may lead to forum shopping by service providers where they establish themselves in (or provide their services from) a country with the lowest copyright protection standards.<sup>87</sup> It is true that national copyright laws of Member States are harmonised to a certain extent.<sup>88</sup> However, a number of issues remain non-harmonised (most importantly, copyright exceptions), which means that the scope of protection in different Member States still differs.<sup>89</sup> Thus, the country of origin rule could be suitable when the full harmonisation of copyright laws has been achieved,<sup>90</sup> which is unlikely to happen in the near future.<sup>91</sup> Secondly, when the defendant is situated abroad, right holders would be forced to go to a foreign court (of country of origin) to adjudicate the dispute; that court would apply their own law. Alternatively, if jurisdiction rules allow, a right holder may sue a foreign defendant in the right holder's own home jurisdiction; however, these courts would need to apply foreign copyright law to establish EU-wide infringement and grant remedies. For instance, following the scenario in the *Pinckney* case, if the jurisdiction of a French court was established<sup>92</sup> and the making available is defined as taking place in the UK (a country from where making available originates), French courts would have to apply UK copyright law to establish the EU-wide infringement.<sup>93</sup>
- 40 Thirdly, such a definition of the making available right would contradict the targeting doctrine that has been recently established by the CJEU in defining/localising other intellectual property rights in the online environment. A country of origin approach would replace the targeting doctrine and entirely eliminate territoriality with respect to the making available right online. Fourthly, a country of origin approach would prevent right holders from adjudicating a copyright infringement originating abroad in a home country and getting at least a territorially limited relief. This has been the most popular practice up to now. Right holders may prefer territorially-limited national relief that they could get in their local court, instead of the EU-wide relief which they would need to acquire in a foreign court or by proving foreign law. Fifthly, the law of the country of origin might be in some cases not sufficiently related to the entire dispute. For instance, the activity may originate in one country, but the internet service may target and/or have its main impact in other countries.<sup>94</sup> In such cases, it may be unreasonable to apply the law of the country of origin and entirely ignore the laws of the countries impacted, especially if the laws of these countries provide for different legal solutions. In addition, the application of a country of origin approach would lead to the situation where players in the same market would be subject to different

laws which means the infringement of *par condition concurrentium* principle.<sup>95</sup>

- 41 As a result, the country of origin approach, even if implemented at the level of substantive law, does not seem to be a viable solution, at least so long as there is no full harmonisation of copyright law across the EU.

### III. Special applicable law rule for ubiquitous infringements

- 42 Another way to restrict the negative effects of territoriality in online copyright cases is to introduce a special applicable law rule for ubiquitous copyright infringements. The rule suggested in art 3:603 of the CLIP Proposal could serve as an example:<sup>96</sup>

- 43 Article 3:603: Ubiquitous infringement

- (1) *In disputes concerned with infringement carried out through ubiquitous media such as the Internet, the court may apply the law or the laws of the State or the States having the closest connection with the infringement, if the infringement arguably takes place in every State in which the signals can be received.*
- (2) *In determining which State has the closest connection with the infringement, the court shall take all the relevant factors into account, in particular the following:*
  - (a) *the infringer's habitual residence;*
  - (b) *the infringer's principal place of business;*
  - (c) *the place where substantial activities in furthering of the infringement in its entirety have been carried out;*
  - (d) *the place where the harm caused by the infringement is substantial in relation to the infringement in its entirety.*
- (3) *Notwithstanding the law applicable pursuant to paragraph 2, any party may prove that the rules applying in a State or States covered by the dispute differ from the law applicable to the dispute in aspects which are essential for the decision. The court shall apply the different national laws unless this leads to inconsistent judgments, in which case the differences shall be taken into account in fashioning the remedy.*

- 44 The rule means that in the case of ubiquitous (online) infringements of copyright, the court may apply to the entire cross-border dispute the single law that has the closest connection with the dispute. In addition, the CLIP proposal suggests an exception which allows any party to prove that the law of any country covered by the claim provides for a different solution; this has to be taken into account when granting a remedy.

- 45 For instance, if in the *Pinckney* scenario a French right holder wanted to get international relief against the

UK online service providers, he would have to go to a competent court with an EU-wide jurisdiction and ask for the application of the single law with the closest connection (which would probably be UK law). The UK defendants could claim, for instance, that their activity is not infringing some of the laws in the EU or that damages in some countries would be lower than damages under UK law. This would have to be taken into account by the court when designing the remedy.<sup>97</sup> Similar rules have been suggested by the ALI,<sup>98</sup> Joint Japanese-Korean Proposal<sup>99</sup> and are currently discussed as a possible international guideline by the Committee on Intellectual Property and Private International Law at the International Law Association.<sup>100</sup>

- 46 This rule has a number of advantages and some disadvantages. The latter, however, could still be eliminated. First, under this ubiquitous infringement rule the right holder gets possibility to request an EU-wide relief, even if this may need to be done in a foreign court and applying a foreign law. At the same time, s/he remains a possibility to request the relief in his/her own country (if there are sufficient grounds of jurisdiction and infringement could be established here); however, this relief would be territorially limited. Second, this special applicable law rule for ubiquitous copyright infringements could be applied only to cases where EU-wide infringements are obvious,<sup>101</sup> i.e. *prima facie* infringement cases, but not in cases when it is clear that infringement is possible in some states but potentially not possible in other states.<sup>102</sup> This may happen when the case concerns the issues that have not been harmonized at the EU level. For instance, in *Pinckney* case, where the UK companies were selling unauthorised DVDs online, the *prima-facie* infringement is likely to be established across the EU since making available right has been harmonized at the EU level and no exceptions would arguably apply to the case. However, this would not be so obvious in less straightforward cases. For instance, in the German Thumbnail case<sup>103</sup> the courts struggled with the question whether showing of pictures in a form of thumbnails in Google search engine would infringe copyright or, rather, whether this use would be covered by any of the copyright exceptions. Since copyright exceptions are not fully harmonized at the EU level, it would be meaningful to limit German court decision in this case to the single territory and allow courts of other Member States to give their say on the matter.
- 47 Third, this rule envisages that the law “with the closest connection” would apply. This helps to avoid the potential problem of a country of origin rule, namely, that online service providers decide to run their services from the state with laws most favourable to them. Also, it helps to deal with scenarios when an online service has more connection to the country other than the country where activity originated.

However, the flexible “closest connection” factor leads to certain legal uncertainty.<sup>104</sup> Although the CLIP proposal has a number of factors that should be taken into account when determining the closest connection,<sup>105</sup> for Internet service providers it may still be difficult to in advance foresee which law has the closest connection and what law they have to comply with. Therefore, in order to ensure more legal certainty, it is advisable to introduce some presumption in the ubiquitous infringement rule. For instance, it could be presumed that the country from where the activity originated or where the defendant is established has the closest connection to the dispute. However, this presumption could be rebutted by proving that other country is more related to the dispute (e.g. when website clearly targets an audience in another country).<sup>106</sup>

48 Fourthly, this ubiquitous infringement rule also allows for taking into account the possible divergences among national copyright laws. As mentioned, this rule would apply only to *prima facie* infringement cases where the issues are essentially harmonised at EU level. However, if certain issues remain divergent (e.g. calculation of damages or type of relief available) the parties may refer to these differences and the court should take these differences into account when determining the remedy.<sup>107</sup>

49 Thus, such a special applicable law rule for ubiquitous infringements would have a number of advantages compared with the country of origin doctrine as discussed above. Right holders would get an opportunity in *prima facie* online copyright infringement cases to get EU-wide remedies under a single applicable law. If right holders do not wish to adjudicate such EU-wide infringement in a foreign court or under a foreign law, they still retain the opportunity to request relief in their home jurisdiction;<sup>108</sup> this relief would be limited to the forum territory. Further on, legal security for users, including online service providers, would be ensured by allowing such cross-border relief only in the jurisdiction that is most closely related to the dispute and only in cases where *prima facie* infringement can be established across the EU. Cases that address issues not yet harmonised would be left to the discretion of national courts. Also, it is likely that the courts, applying the ubiquitous infringement rule, would often have to apply forum law which would make court proceedings easier and more efficient. Currently, only the courts of the defendant’s domicile seem to have EU-wide jurisdiction (and, thus, the jurisdiction to apply this ubiquitous infringement rule).<sup>109</sup> At the same time, it is likely that in most cases the defendant’s domicile will have the closest connection to the dispute.

50 One of the potential problems with the ubiquitous infringement rule could be that national courts are

not used to engaging in analysis and application of such a flexible applicable law rule. The ubiquitous infringement rule would require a more careful discussion in selecting the applicable law, and the weighting of different factors when establishing the closest connection. However, a similarly flexible rule has been introduced in the Rome I Regulation.<sup>110</sup> Also, some lower instance courts in Europe have already demonstrated some attempts to consider more carefully applicable law issues in copyright.<sup>111</sup>

51 Thus, the special applicable law rule for ubiquitous infringements, as suggested in the CLIP and other international proposals, could be quite a reasonable rule that would contribute to the effective and balanced enforcement of EU-wide copyright infringements online. It would not only provide improved enforcement possibilities for right holders but also, if slightly amended, would adequately take into account the legal certainty and foreseeability interests of users. Also, parties would be left with the possibility of claiming infringement under national copyright law and acquiring territorial remedies.

## D. Conclusions

52 Copyright enforcement online has proven to be a difficult task. PIL questions, such as jurisdiction and applicable law, are currently some of the most problematic issues that courts have to address in cases of copyright infringement online. It has been a challenging task to determine which states have jurisdiction over copyright infringement online, the scope of their jurisdiction and what law should apply where a right holder wants to obtain EU-wide remedies.

53 Recent CJEU decisions on jurisdiction in copyright cases online have been met with criticism. However, the analysis has shown that the “access approach”, as applied by the Court, could be quite reasonable if courts of a place of access are given only territorially limited jurisdiction and if the access approach (at the level of jurisdiction) is applied together with the targeting doctrine (at the level of substantive copyright law). This combination of these rules would reduce the forum shopping possibilities for right holders and grant users a reasonable level of certainty.

54 The next question that courts will have to answer is how to enable right holders to obtain EU-wide remedies in cases of copyright infringement online. Following the current territoriality principle and the *lex loci protectionis* rule, this task seems to be impossible. The country of origin approach does not seem to be a reasonable solution either, at least as long as there is no full harmonisation of national copyright laws across the EU. As an alternative option, a special applicable law rule for ubiquitous

copyright infringement could be considered, as suggested in CLIP and other academic proposals. It would enable right holders in cases of copyright infringement online to get EU-wide remedies; it also has the potential to ensure the necessary safeguards for users.

- 1 For the most recent EU initiatives see, e.g., European Commission, Action Plan on the Enforcement of Intellectual Property Rights (1 July 2014) <[http://ec.europa.eu/internal\\_market/ipenforcement/action-plan/index\\_en.htm](http://ec.europa.eu/internal_market/ipenforcement/action-plan/index_en.htm)>.
- 2 E.g. in recent years the CJEU has issued a number of decisions in this area, e.g., C-275/06 Promusicae (concerning disclosure of IP addresses of alleged infringers); C-70/10 Scarlet Extended (concerning ISP's duty to filter illegal content online); C-314/12 UPC Telekabel Wien (concerning blocking foreign illegal websites), C-466/12 Svensson (application of copyright exceptions for linking).
- 3 Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1-32 (Brussels I (Recast)), respectively, art. 4(1) and 7(2).
- 4 Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, p. 40-49 (Rome II Regulation), art. 8(1).
- 5 CJEU case C170/12, Peter Pinckney v KDG Mediatech AG, EU:C:2013:635.
- 6 CJEU case C-441/13, Pez Hejduk v EnergieAgentur NRW GmbH, EU:C:2015:28.
- 7 For a comment see, e.g., Smith and Leriche, "CJEU ruling in Pinckney v Mediatech: jurisdiction in online copyright infringement cases depends on the accessibility of website content", 36(2), E.I.P.R. 2014, 137-138; Husovec, "European Union: comment on Pinckney", IIC 2014, 45(3), 372-373.
- 8 European Max Planck Group on Conflict of Laws in Intellectual Property, Conflict of Laws in Intellectual Property: The CLIP Principles and Commentary (Oxford, Oxford University Press, 2013); CLIP principles (without commentary) are available on <[www.cl-ip.eu](http://www.cl-ip.eu)> (last visited 2 Feb. 2015). Other international proposals include the American Law Institute, Intellectual Property: Principles Governing Jurisdiction, Choice of Law and Judgments in Transnational Disputes (Chestnut, ALI Publishers, 2008); Japanese Transparency Proposal on Jurisdiction, Choice of Law, Recognition and Enforcement of Foreign Judgments in Intellectual Property", in: Basedow, Kono & Metzger(eds.), Intellectual Property in the Global Arena (Mohr Siebeck, 2010), pp. 394-402; Joint Japanese-Korean "Principles of Private International Law on Intellectual Property Rights of October 14, 2010", The GCOE Quarterly Review of Corporation Law and Society (2011), pp. 112 et seq
- 9 See <<http://www.ila-hq.org/en/committees/index.cfm/cid/1037>> (last visited on 2 Feb. 2015); the draft ILA Guidelines were presented in WIPO Seminar on 16 January 2015, Geneva; seminar materials and a recorded webcast are available at <[http://www.wipo.int/meetings/en/details.jsp?meeting\\_id=35183](http://www.wipo.int/meetings/en/details.jsp?meeting_id=35183)> (last visited 2 Feb. 2015)
- 10 The third area of PIL law, the recognition and enforcement of judgments, is not addressed in this article.
- 11 Art 4(1) of Brussels I Recast; ex art 2(1) Brussels I.
- 12 Art 7(2) Brussels I Recast, ex art 5(3) Brussels I
- 13 Generally, it is an established practice that the harmful event occurs either in the place where the harmful activity originated (the causal event took place) or in the place of the damage that resulted from this activity (the so called "ubiquity theory"). The courts of the place of the harmful activity have jurisdiction over the entire dispute, while the courts of the place of damage have jurisdiction limited to the territory of that state only. While establishing the place of the causal event in online infringement cases may be quite manageable, determining the "place of damage" online is a challenging task, see Case C-68/93 Shevill v Presse Alliance SA [1995] ECR I-415.
- 14 C-170/12, Pinckney.
- 15 For a comment see, e.g., Smith and Leriche, "CJEU ruling in Pinckney v Mediatech: jurisdiction in online copyright infringement cases depends on the accessibility of website content", 36(2), E.I.P.R. 2014, 137-138.
- 16 For more see the section "Targeting doctrine".
- 17 C-170/12, Pinckney, Opinion of Advocate General Jääskinen, delivered on 13 June 2013, para. 73
- 18 C-441/13, Hejduk.
- 19 C-441/13, Hejduk, Opinion of Advocate General Pedro Cruz Villalín, delivered on 11 September 2014, para. 44.
- 20 See also C-441/13, Hejduk, AG Opinion, para. 43.
- 21 Recital 15 of the Brussels I Regulation (Recast).
- 22 In addition, some argue that legal certainty and predictability from the perspective of the right holder is also undermined. Namely, in cases such as Hejduk, the courts would not be able to estimate the exact damage that occurred in the specific territory; so right holders cannot foresee in advance the potential outcomes of the case, see C-441/13 Hejduk, AG opinion, para 43.
- 23 See C-170/12 Pinckney, AG opinion, para 68; Paul Torremans, "Jurisdiction in intellectual property cases", in Torremans (ed), Research Handbook on Cross-border Enforcement of Intellectual Property (Edward Elgar 2014) 381-420, at 385-389.
- 24 CJEU C-170/12 Pinckney, para 27.
- 25 CJEU C-170/12 Pinckney, para 28.
- 26 Brussels I Regulation (Recast), Recital 16.
- 27 C-441/13 Hejduk, AG opinion, paras 39, 42.
- 28 For a general discussion on how PIL provisions relate to IP enforcement see Neumann, "Ubiquitous and multistate cases", in Torremans (ed.), Research Handbook on Cross-Border Enforcement of Intellectual Property 497-525 (Edward Elgar 2014), at 498-505.
- 29 See also Smith and Leriche, "CJEU ruling in Pinckney v Mediatech: jurisdiction in online copyright infringement cases depends on the accessibility of website content", 36(2) E.I.P.R. 2014, 137-138, 138.
- 30 Similarly, the eDate Advertising case (C-509/09 and C-161/10) that allowed jurisdiction in each place of access was criticised as harmful for publishers, making them more cautious in publishing online, see Jennifer Agate, "Jurisdiction in the Context of internet Publication", Journal of Intellectual Property Law & Practice, 2012, Vol. 7, No. 4, 241-243, 243.
- 31 See IBF International Consulting, Study on Digital Content Products in the EU, p. 43 <[http://ec.europa.eu/consumers/enforcement/sweep/digital\\_content/docs/dcs\\_complementary\\_study\\_en.pdf](http://ec.europa.eu/consumers/enforcement/sweep/digital_content/docs/dcs_complementary_study_en.pdf)> (last visited 2 Feb. 2015).
- 32 See previous draft Impact Assessment on the Modernisation of the EU Copyright Acquis that was leaked to the public in April 2014, available at <<http://statetwatch.org/news/2014/may/eu-draft-impact-assessment-copyright-acquis.pdf>> (last visited on 5 Dec. 2014).
- 33 See Essers, "EU Commission goes after geo-blocking, 'absurd' digital barriers", blogpost of 25 Mar 2015, available at <http://www.pcworld.com/>; A Digital Single Market Strategy for Europe, Brussels, 6.5.2015 COM(2015) 192 final.

- 34 See contra Husovec, *supra* note 7, at 372-373.
- 35 Joint Cases C-509/09 and C-161/10, eDate Advertising and Martinez, EU:C:2011:685.
- 36 In addition, the courts of the place of the “centre of interests” of a victim was granted jurisdiction over the entire dispute.
- 37 CJEU Case C-523/10, Wintersteiger AG v Products 4U Sondermaschinenbau GmbH, EU:C:2012:220.
- 38 Such an approach has been previously applied in cross-border broadcasting of copyright subject matter, see CJEU case C-192/04 - Lagardère Active Broadcast ECLI:EU:C:2005:475 (the cross-border broadcasting act takes place both in the country of emission and country of reception of the signal except for satellite broadcasting, which is subject to country of origin under the EU Satellite and Cable directive); discussed in Depreeuw and Hubin, “Of availability, targeting and accessibility: online copyright infringements and jurisdiction in the EU”, *Journal of Intellectual Property Law & Practice*, 2014, Vol. 9, No. 9, 750-764, at 752-753.
- 39 For relevant case law see the section “Targeting doctrine”.
- 40 Alternatively, in these cases a special jurisdiction ground under art 17 (ex art 15) of Brussels I Regulation (Recast) was applied.
- 41 See CJEU C-170/12 Pinckney, AG Opinion, para 65.
- 42 See Depreeuw and Hubin, *supra* note 38, at 761.
- 43 In contrast, some critics still argue that such a mosaic theory, caused by the territorial scope of jurisdiction is a very weak remedy against possible jurisdictional abuse, see Husovec, *supra* note 7, at 373.
- 44 See Depreeuw and Hubin, *supra* note 38, at 763.
- 45 See Paul Torremans, “Jurisdiction in intellectual property cases”, in Torremans (ed.), *Research Handbook on Cross-border Enforcement of Intellectual Property* (Edward Elgar 2014) 381-420, at 385-389.
- 46 Depreeuw and Hubin, *supra* note 38, at 763.
- 47 “Austria: Regulation 44/2001, art.5(3) - Wintersteiger III”, 44(8) IIC 2013, 992-998.
- 48 See, CJEU cases C-324/09 L’Oréal and Others, ECLI:EU:C:2011:474, para. 65 (concerning national and Community trade marks), C-5/11 Donner, ECLI:EU:C:2012:370, paragraph 27 (concerning an alleged infringement of an author’s exclusive distribution right), CJEU Case C-604/10, Football Dataco Ltd and Others v Yahoo! UK Ltd and Others, EU:C:2012:115 and Case C173/11, Football Dataco Ltd and Others v Sportradar and others, ECLI:EU:C:2012:642 (para 36) (regarding the infringement of the ‘sui generis’ right over a database); C-585/08 - Pammer and Hotel Alpenhof, ECLI:EU:C:2010:740; for an overview of these cases see Depreeuw and Hubin, *supra* note 38, at 573-576.
- 49 C-170/12 Pinckney, AG opinion, para. 73.
- 50 See Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet, adopted by the Paris Union for the Protection of Industrial Property and WIPO, between 24 September and 3 October, 2001 (2001 WIPO Recommendation). For more on this instrument see Wichard, “The Joint Recommendation Concerning Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet”, in Drexl and Kur, *Intellectual Property and Private International Law: Heading for the Future* 257-264 (Hart Publishing 2005).
- 51 E.g. [BGH, 13.10.2004 - I ZR 163/02](#) - Hotel Maritime (Germany), Austria: Regulation 44/2001, art.5(3) - Wintersteiger III”, 44(8) IIC 2013, 992-998 (Austria), Cour de cassation decision of 13 July 2010, Nr. 06-20.230 (France).
- 52 E.g. Treppoz, E., “Croniques. Droit européen de la propriété intellectuelle”, *Revue Trimestrielle de Droit Européen*, Nr. 4, 2013.
- 53 The relevant provision of Art. 2:202 of the CLIP Proposal stipulates that: “In disputes concerned with infringement of an intellectual property right, a person may be sued in the courts of the State where the alleged infringement occurs or may occur, unless the alleged infringer has not acted in that State to initiate or further the infringement and her/his activity cannot reasonably be seen as having been directed to that State.” (emphasis added).
- 54 See Husovec, *supra* note 7, at 374.
- 55 See CLIP Principles, art 2:202, comment by Husovec, *supra* note 7, at 373-374.
- 56 2001 WIPO Recommendation, see *supra* note 50, Art. 3.
- 57 See *supra* note 48.
- 58 See similar Ohly, “Choice of Law in the Digital Environment – Problems and Possible Solutions”, in Drexl and Kur, *Intellectual Property and Private International Law: Heading for the Future* 241-256 (Hart Publishing 2005), at 255.
- 59 Also, under art. 3 of the E-commerce Directive, online service providers should only comply with the law of a country of establishment; this rule, however, does not apply to copyright law, see Annex to the E-Commerce directive.
- 60 See, e.g., German Supreme Court decision of 29 April 2010 - I ZR 69/08 - Vorschaubilder, GRUR 628, para. 14 (2010) (international jurisdiction of German courts has been confirmed on the basis that “the thumbnails in a search engine of the defendant can be seen (also) in Germany”); German Supreme Court decision of 21 September 2006 - 29 U 2119/06 Haftung von eBay als Mitstörer für Urheberrechtsverletzungen, JurPC Web-Dok. 124/2006, Abs. 1-76, 46 (the connection to the country is established when the service “is in German language and directed to domestic commerce”).
- 61 CLIP Principles art 2:202 seems to be limited to these situations only, see CLIP Proposal, art. 2:202C13-C18.
- 62 See similar argument Husovec, *supra* note 7, at 374.
- 63 Interestingly, CLIP suggests a similar “de minimis” rule at a substantive law level, see art. 3:602 CLIP Proposal; see also James J. Fawcett and Paul Torremans, *Intellectual Property and Private International Law* (Oxford University Press 2011), at 17.25. There are a number of differences between applying the targeting doctrine at the jurisdiction and at the substantive law level. For instance, if the targeting doctrine was applied at the level of jurisdiction, the court has to apply this doctrine ex officio. If it was applied at substantive law level, it would be up to the parties (mainly the defendant) to raise the issue of targeting. Also, the question of burden of proof would be answered differently depending on whether this rule is applied at jurisdiction or substantive law level. If the targeting doctrine is implemented at the jurisdiction level, it would be up to the *lex fori* to determine who bears the burden of proof. If it is applied at the substantive law level (as in CJEU cases, such as Football Dataco), it will be up to the *lex substantiae* to determine who bears this burden.
- 64 C-441/13 Hejduk, AG opinion, paras 39, 42.
- 65 See *infra* section “Country of origin rule”.
- 66 This discussion focuses on infringement only and does not touch upon such issues as initial ownership; for more on this topic see, e.g. Eechoud, “Alternatives to the *lex protectionis* as the Choice-of-Law Rule for Initial Ownership of Copyright”, in Drexl and Kur, *Intellectual Property and Private International Law: Heading for the Future* 289-307 (Hart Publishing 2005).
- 67 A number of issues relating to this rule are not clear, such as the scope of *lex loci protectionis*, its international origin, relationship with *lex loci delicti* and others, for more see, e.g., Leistner, Matthias, “The Law Applicable to Non-Contractual Obligations Arising from an Infringement of National or Community IP Rights”, in Leible, Stefan & Ohly, Ansgar (eds.),

- Intellectual Property and International Private Law (Mohr Siebeck 2009); Basedow & Metzger, “Lex loci protectionis europea”, in: Trunk, A. et al. (eds.) *Russia in the International Context: Private International Law, Cultural Heritage, Intellectual Property, Harmonization of Laws. Festschrift für Mark Moiseevic Boguslavskij* 153, 162 (Berliner Wissenschafts-Verlag 2004).
- 68 For more about the territoriality principle in the context of copyright law see, e.g., Wadlow, Christopher, *Enforcement of Intellectual Property in European and International Law* para. 1-22 (London Sweet & Maxwell 1998); Kegel, Gerhard & Seidl-Hohenveldern, Ignaz, “Zum Territorialitätsprinzip im internationalen öffentlichen Recht”, in Heldrich, Andreas & Henrich, Dieter & Sonnenberger, Hans-Jürgen, *Konflikt und Ordnung* 233-277, 234 (C.H. Beck’sche Verlagsbuchhandlung 1978).
- 69 See Ohly, supra note 58, at 244. For more see Matulionyte, *Law Applicable to Copyright: A Comparison of the ALI and CLIP Proposals* (Edward Elgar 2011), at 19-20.
- 70 See also Drexl, “The Proposed Rome II Regulation: European Choice of Law in the Field of Intellectual Property”, in Drexl and Kur, *Intellectual Property and Private International Law: Heading for the Future* 151-176 (Hart Publishing 2005), at 169-171.
- 71 See Fawcett and Torremans, supra note 63, at 17.26. On the other hand, the right holder may “shop” for the most favourable national law and get at least a territorially-limited relief that may still lead to extraterritorial effects; e.g. courts often grant an injunction requiring the entire closure of the website without specifying the territorial scope of the remedy; see Rita Matulionyte, “The Law Applicable to Online Copyright Infringements in the ALI and CLIP Proposals: A Rebalance of Interest Needed?”, 2 (2011) *JIPITEC* 26-36, at 26.
- 72 For more criticisms of *lex loci protectionis* see Matulionyte, supra note 71, at 27.
- 73 More recently, the need to redefine exclusive reproduction and making available rights online or introduce a community copyright title is discussed in the draft Impact Assessment, supra note 32.
- 74 See the special applicable law rule for ubiquitous infringements, as proposed in CLIP, ALI and Joint Japanese-Korean Proposals, infra section “Special applicable law rule for ubiquitous infringements”.
- 75 E.g. Schack, Haimo, *Urheber- und Urhebervertragsrecht* (Mohr Siebeck 2007).
- 76 It is found in copyright statutes in Romania, Greece and Portugal.
- 77 It has been applied to determine the law applicable to the initial ownership question in France and the US, see *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82 (2nd Cir. 1998) (USA).
- 78 E.g. Evert, Till, *Anwendbares Urheberrecht im Internet* (Verlag Dr. Kovač 2005), pp. 217-221; Muth, Susanne, *Die Bestimmung des anwendbaren Rechts bei Urheberrechtsverletzungen im Internet* (Peter Lang 2000), p. 147, Birkmann, Andrea, *Die Anknüpfung der originären Inhaberschaft am Urheberrecht Ein Vergleich der Rechtslage in Deutschland, Frankreich und den USA unter Berücksichtigung internationaler Konventionen* (Nomos Verlagsgesellschaft 2009), pp. 46-50.
- 79 1886 Berne Convention for the protection of literary and artistic works, September 9, 1886, Paris.
- 80 For more see Matulionyte, *Law Applicable to Copyright: A comparison of the ALI and CLIP Proposals* (Edward Elgar 2011), General part: 2.A.II.
- 81 This idea has also been raised for discussion by the European Commission, see, e.g., draft Impact Assessment on the Modernisation of the EU Copyright Acquis, op. cit. supra note 32, p 60; the Commission Green Paper on the online distribution of audiovisual works in the European Union COM (2011) 427 final.
- 82 Art. 1.2(b) of 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 L 248, 06.10.1993, pp. 15-21.
- 83 Art. 3 of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, p. 1-17 (however, copyright and related rights are excluded from its scope, see Annex to the Directive).
- 84 For discussion on the country of origin approach in other areas of law, see Leistner, “Comments: The Rome II Regulation Proposal and its Relation to the European Country-of-Origin Principle”, in Drexl and Kur, *Intellectual Property and Private International Law: Heading for the Future* 177-200 (Hart Publishing 2005).
- 85 Compare with the proposal of AG Villalón to allow jurisdiction in the place of “causal event”, as discussed above.
- 86 In contrast, the Austrian plaintiff Mediatech would, under this rule, be subject to the law of Austria since the unauthorised reproduction of works took place in Austria.
- 87 See Matulionyte, Rita M, *IP and Applicable Law in Recent International Proposals: Report for the International Law Association. JIPITEC*, Vol. 3. 263-305(2012), at paras 114-115; CLIP Commentary, para N7; Neumann, supra note 28, at 516.
- 88 This has been achieved by a number of EU directives, e.g., [Directive 2009/24/EC](#); [Directive 96/9/EC](#) Directive 2001/84/EC; [Directive 2006/115/EC](#); [Directive 2012/28/EU](#); Directive 2001/29/EC.
- 89 In contrast, some argue that the current level of harmonisation is sufficient for the introduction of the country of origin principle in copyright law, see Ohly, supra note 58, at 253-254.
- 90 Neumann, supra note 28, at 522.
- 91 Instead, the introduction of the Community copyright title should be considered, see draft Impact Assessment, supra note 32.
- 92 This becomes difficult if making available is defined as taking place in the UK only; in such a case, it is difficult to prove that the harmful event occurred in France.
- 93 In some countries, like the UK, the courts presume that foreign law is of the same content as local law, and only if the presumption is challenged do parties have to prove the content of foreign law. However, such rules do not necessarily exist in other countries.
- 94 E.g., in the *De Agostini* case, the broadcaster situated in the United Kingdom transmitted TV programmes in the Swedish language to Sweden, which infringed Swedish laws on advertising. Despite the minor connection to the United Kingdom, under the E-Commerce Directive, UK law had to be applied, at least for certain parts of the claims, see Ohly, A. (2001) ‘Herkunftslandprinzip und Kollisionsrecht’, *GRUR International*, 50(11), 899, p. 906.
- 95 Ohly, A. (2001) ‘Herkunftslandprinzip und Kollisionsrecht’, *GRUR International*, 50(11), 899, 905 et seq.
- 96 It has also been suggested by Fawcett and Torremans, supra note 63, at 17.28.
- 97 For more on this rule see CLIP Proposal, commentary to art 3:603; Matulionyte, supra note 71, at 166-202.
- 98 ALI Principles, supra note 8, sec 321.
- 99 Joint Japanese-Korean proposal, supra note 8, art. 306
- 100 ILA Committee Drafts have not yet been publicly made available but they have been accessible to the author of the article, as a member of the Committee.

- 101 See CLIP Proposal art 3:603(1) (“...if the infringement arguably takes place in every State in which the signals can be received”).
- 102 For more see Matulionyte, supra note 71, at 14.
- 103 German Supreme Court decision of 29 April 2010 - I ZR 69/08 - Vorschaubilder, GRUR 628, para. 14 (2010).
- 104 See also Matulionyte, supra note 71, para 26.
- 105 See CLIP Proposal, art 3:603(2).
- 106 Similarly, in an early CLIP draft, the “defendant’s residence” rule was provided as an escape clause, see Art. V.3.(3) of CLIP, Possible Structure of the Principles, Draft of 2008 (unpublished); in comparison, early drafts of the ALI Principles contained *lex fori* as a “last resort” rule, see ALI Principles, Discussion Draft, 2006, available (for sale) at <[www.ali.org](http://www.ali.org)> [last accessed on 1 April 2015], §321(2).
- 107 In addition, this rule eventually shifts the burden of proof from plaintiff to defendant. In order to avoid a sometimes unreasonable burden on infringers, the burden of proof should be allocated on a case-by-case basis, for more see Matulionyte, supra note 71, at 32.
- 108 This is possible if there are sufficient grounds of jurisdiction and if infringement could be established under the targeting theory.
- 109 As discussed, this is generally allowed under the Shevill doctrine, but it is to be seen whether this doctrine is confirmed in copyright cases.
- 110 Art 4(4) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6–16 (refers to the “law of the country with which it is most closely connected”).
- 111 See *On Editions du Seuil v Google Inc. And Google France*, Paris TGI, December 18, 2009, commented on in Mitchell, “Google Books infringes Copyright: Fair Use Doctrine Inapplicable, TGI says”, 24/2 World Intellectual Property Report 9 (2010).

# EU Copyright Law, Lobbying and Transparency of Policy-making

## The cases of sound recordings term extension and orphan works provisions

by **Agnieszka Vetulani-Cęgiel**, PhD, Post-Doctoral Researcher, Assistant Professor, Adam Mickiewicz University in Poznań, Poland; Faculty of Political Science and Journalism, Department of Press Systems and Press Law

**Abstract:** The objective of this paper is to discuss EU lobbying in the area of copyright. Legislation needs to regulate the legal position of various different stakeholders in a balanced manner. However, a number of EU copyright provisions brought into effect over recent years were highly controversial and have led to suggestions that powerful lobbying forces may have had some influence. This article investigates the effects of lobbying on copyright law-making in Europe. A specific comparative and multi-faceted analysis is provided of the legislative process for two recently adopted directives: 2011/77/EU which extends the term of protection of sound recordings and 2012/28/EU which introduces certain

permitted uses of orphan works (some references are also made to the ACTA case). Firstly, a short presentation is given of the legal bases for the EU consultation process and lobbying. Next, an analysis is provided of the two cases, taking into consideration the policy-making procedures (with special focus on how the consultation process was handled), the legal solutions proposed and adopted and the various stakeholders' claims. Lastly, it asks why some interest groups were successful and some others failed (the analysis identifies two types of factor for the effectiveness of lobbying: those resulting from stakeholders' actions and those connected with the consultation process).

**Keywords:** Copyright; Law-Making; Policy-Making; Interest Group; Lobbying; Stakeholder; Consultation; Transparency; Orphan Work; Sound Recording; Phonogram; EU; Library; Music

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## A. Introduction<sup>1 2</sup>

1 In recent years, the European Commission has been very active in the area of copyright legislation. Its activities, undertaken within the wide framework of the digital single market, concern issues that are important as regards the protection and use of copyrights and related rights. They also relate to areas connected with media policy and digital culture. Within the past decade alone, the

Commission's initiatives have resulted in the following EU directives: 2010/13/EU on audiovisual media services<sup>3</sup>, 2011/77/EU extending the term of protection for sound recordings<sup>4</sup>, 2012/28/EU on orphan works<sup>5</sup> and 2014/26/EU on collective management of copyright and related rights<sup>6</sup>. It has also carried out work in relation to other issues, such as private copying levies or out-of-commerce works. Moreover, in 2013–2014 the Commission ran public consultations on the review of the EU copyright rules<sup>7</sup> and conducted the 'Licences for Europe'

stakeholder dialogue<sup>8</sup>. The latter sought to ‘deliver rapid progress in bringing content online through practical industry-led solutions’<sup>9</sup> and covered the following issues: 1) cross-border access and the portability of services, 2) user-generated content and licensing for small-scale users of protected material, 3) audiovisual sector and cultural heritage institutions, 4) text and data mining. Currently, in connection with the above-mentioned preparatory works, the Commission is carrying out work in order to deliver ‘a copyright modernisation initiative’.<sup>10</sup>

- 2 As copyright provisions regulate different areas connected with the creation, dissemination and exploitation of protected content, stakeholders of various types are affected by them. The main stakeholders include rights owners (such as authors, artists, publishers, various entertainment industries, broadcasters, etc.), users (using protected content for private or public purposes) and other parties (e.g. collecting societies, internet service providers). These parties (or the organisations officially representing them) undertake lobbying activities of various types in order to influence the law, sometimes with great success. The rapid development of new technologies and the challenges of exploiting immaterial goods, mean it is the voice of the various creative industries (especially entertainment industries in the music and film sectors) that is particularly audible. Also, these rights holders are exerting strong global pressures to make copyright rules stricter; as but one example among many, let us consider the Anti-Counterfeiting Trade Agreement (ACTA)<sup>11</sup>. Nowadays parallels are being made with the ongoing negotiation process for the Transatlantic Trade and Investment Partnership (TTIP)<sup>12</sup>. The scope of the EU directives and that of ACTA draw attention to the copyright law-making process, especially with respect to the transparency of policy-making, the consultation process, the representation of the various different interests and the user protection (in terms of the copyright regime and fundamental rights and freedoms).<sup>13</sup>
- 3 Lobbying, in general, forms part of the democratic political process and permits society to participate actively in law-making procedures. It plays an important role in European Union law-making and is shaped by the specificity of the EU institutional system. Its large scale and well-developed mechanisms result especially from the openness and positive perception by the European Commission. The Commission sets the EU’s policies and is therefore the most significant target of lobbying<sup>14</sup>. The Commission is willing to cooperate with interested parties and often seeks external expertise<sup>15</sup> (this approach is tied in with the ‘democratic deficit’ and ‘resource deficits’ of this institution<sup>16</sup>). It has repeatedly underlined the benefits coming from stakeholders’ input to the creation and performance of EU sectoral policies.<sup>17</sup> The open attitude of the Commission towards interest groups has entailed

their inclusion in its policy-making process and in work on legal mechanisms. In practice, lobbying by stakeholders is provided for, *inter alia*, within the process of consultation with interested parties (also referred to as the ‘dialogue with the civil society’<sup>18</sup>)<sup>19</sup> which constitutes a kind of institutional framework for lobbying actions. Apart from contacting the Commission officials in Directorates General, stakeholders strive to address their interests at the level of the Commissioners’ cabinets. Also the European Parliament – due to its increasing role in the EU law-making process<sup>20</sup> and its ‘democratic credentials’ – has become the ‘natural venue’ for lobbyists, especially those striving for protection of citizens’ interests.<sup>21</sup> Another lobbying target is the Council of the EU, although this is where it becomes difficult to exert influence. This is because, first, at this stage most provisions are already shaped and secondly, it requires taking the ‘national route’ (contrary to the ‘Brussels route’) which means the necessity of conducting lobbying at the national level<sup>22</sup>. Although the European Parliament and the Council amend the text, “it is not easy to radically change the text of the Commission. (...) This means that it is important for any particular interest to be taken into account as early on as possible, ideally in the Commission’s initial proposal”<sup>23</sup>. Having this in mind, the article will, to a large extent, focus on lobbying at the stage of the Commission work.

- 4 Lobbying by interest groups and the consultations on EU policies held by the European Commission are two cross-cutting processes. The European Commission creates many opportunities for stakeholders to participate in the debate on the possible development of EU policies. In particular, it runs different types of consultation, such as white and green papers, public hearings, conferences, seminars, advisory groups or bilateral consultations. These initiatives facilitate access to the Commission’s officials and stakeholders use these means to articulate their interests and strive for better protection of their interests. It is also a way for them (likewise for other entities, independent experts, citizens etc.) to affect EU policy direction and shape future legal mechanisms.
- 5 In general, at the EU level lobbying has a lawful and professional character. It is provided for in a structured way by a variety of entities representing interests of third parties or a given interest group<sup>24</sup>. Among such entities are international or European branch federations (which constitute ‘umbrella’ organisations for national bodies, businesses, NGOs etc.), national business or industry or citizen associations, national or European NGOs, corporations, consultancy and law firms, think-tanks, representations of regions etc. Lobbying consists mainly of presenting to the legislator demands for establishing a certain level of legal protection by either changing the law or keeping the legal status quo. It may be performed in the form

of direct lobbying, either in an informal or formal way (i.e. by submitting position papers, legal and/or economic reports etc.), within the consultations initiated by the European Commission or beyond. It may also take the form of indirect lobbying. The latter consists of building social support by appealing to the general public (e.g. by conducting campaigns in the media) and/or by calling citizens to undertake action targeted at the legislator (e.g. by initiating and coordinating grassroots actions, such as: petitions, street demonstrations, activities in cyberspace of various types).<sup>25</sup> The indirect lobbying is becoming an increasingly effective method, especially in view of the development of new media tools and Internet-based communication technologies (like social media). Citizen participation in large-scale street demonstrations and cyber-protests, as was the case during the campaign against ACTA in 2012<sup>26</sup>, constitutes an important development in the EU policy-making processes in the area of copyright<sup>27</sup>.

- 6 Another kind of activity is that of academics who actively participate in the public debate on possible changes of law. Besides the research activity, sometimes they also run actions targeted at the legislator (e.g. by participating in consultations, submitting studies or issuing open letters to EU politicians). In most cases they look at the public interest and the fair balance of interests between various different stakeholders. Therefore, their activity falls within a broader term of 'advocacy', rather than of 'lobbying', as there is no direct link between entities providing actions (e.g. research centres, academics) and the third party or the interest group<sup>28</sup>.
- 7 The objective of this paper is to discuss EU lobbying in the area of copyright. It concerns lobbying activities undertaken during the European Commission's work on the proposal for a directive extending the term of protection of sound recordings and the proposal for a directive introducing uses of orphan works (references are also made to the ACTA case). Work on these two EU initiatives was conducted by different Commission units in parallel, which has made it possible to provide a comparative multi-faceted analysis of these two cases. Both proposals (like the directives themselves) were highly controversial and have been widely criticised for their limited scope and the need for such narrowly focused legal mechanisms. Also, the law-making process adopted has been questioned. As legislation needs to regulate the legal position of various different stakeholders in a balanced manner, there have been suggestions that powerful lobbying forces may have had some influence. Therefore this article investigates the effects of lobbying on copyright law-making in Europe. It focuses, on the one hand, on the Commission's policy-making and, on the other, on the participation of stakeholders (including lobbies) in the creation of EU policies. Firstly, a

short presentation is given of the legal basis of the EU consultation process and lobbying (the issue of lobbying poses challenges to law-makers). Next, an analysis is provided of the two cases, taking into consideration the policy-making procedures (with special focus on how the consultation process was handled), the legal solutions proposed and adopted and the various stakeholders' claims. Lastly, the article examines why some interest groups are successful and some others fail (the analysis concerns factors stemming from the groups' activities and from the nature of the consultation process).

## B. Legal bases for the EU consultation process and lobbying

- 8 As things stand, there are no binding provisions concerning either the consultation process or lobbying to the European Commission. However, a debate on the transparency of the policy-making process, that was triggered by the issuing of the *White Paper on European Governance*<sup>29</sup> in 2001, led to various actions being taken, resulting in the establishment of a set of principles and rules relating to the consultation process and lobbying.
- 9 Yet in 2001, as part of the European initiative *Interactive Policy Making*, the Commission created a website called *Your voice in Europe*<sup>30</sup>. The objective was to establish an EU 'single access point' to a variety of consultations and other tools that would enable citizens and organisations to play an active role in the European policy-making process (i.e. to get information about consultations and to submit contributions).
- 10 Following an announcement in the *White Paper on European Governance*, in 2002 the Commission established the *General principles and minimum standards for consultation of interested parties*<sup>31</sup>. The general principles were defined as: a) wide participation throughout the policy chain, from conception to implementation, b) openness and accountability of the institutions (by ensuring the visibility and transparency of consultation processes run by the Commission), c) effectiveness of the consultations (by running consultations at an early stage of policy development and by respecting the principle of proportionality) and d) coherence of the actions taken by the Commission departments. In turn, the minimum standards for consultation related to the following issues: a) clear content of the consultation process, b) consultation target groups (relevant parties should have an opportunity to express their opinions), c) publication (adequate awareness-raising publicity, e.g. open public consultations should be published on the Internet and announced at the 'single access point'), d) time limits for participation (at least 8 weeks for reception

of responses to written public consultations and 20 working days for meetings), e) acknowledgement of contributions and feedback (results of public consultations should be displayed on websites linked to the single access point on the Internet). It should be noted, however, that the general principles and minimum standards for consultations apply to public consultations only (especially those that are run in connection with Green Papers<sup>32</sup> or other Commission initiatives that are subject to the Impact Assessment of the economic, social and environmental consequences<sup>33</sup>).<sup>34</sup>

- 11 Simultaneously, in 2002 the Commission issued another document (also announced in the White Paper on European Governance) on the *Collection and Use of Expertise: Principles and Guidelines*<sup>35</sup>. The core principles to be applied by the Commission departments were as follows: a) to seek advice of an appropriately high quality, b) to be open in seeking and acting on advice from experts, c) to ensure that methods for collecting and using expert advice are effective and proportionate. In turn, the guidelines related to: a) planning ahead, b) preparing for the collection of expertise, c) identifying and selecting experts, d) managing the involvement of experts, e) ensuring openness. As a result of subsequent work, in 2010 a register of expert groups was set up together with new horizontal rules for Commission expert groups<sup>36</sup>. In particular, the following types of members were envisaged (Rule 8): 1) individuals appointed in their personal capacity; 2) individuals appointed to represent a common interest shared by stakeholders in a particular policy area (not to represent an individual stakeholder); 3) organisations, including companies, associations, non-governmental organisations, trade unions, universities, research institutes, union agencies, union bodies and international organisations; 4) Member States' authorities at national, regional or local level. Also, the selection process and appointment of members was defined (Rule 9). Although rules for expert groups are established, they do not solve many practical problems related to their functioning, e.g. absence of independent experts or unbalanced representation of interest groups<sup>37</sup> (see the lobbying effectiveness factors identified in terms of the consultation process, point 4.2 of this paper).
- 12 Another measure, this time concerning lobbying, was the European Transparency Initiative of 2005<sup>38</sup>. Its objective was to establish a voluntary register for interest groups and a code of conduct and to increase transparency by applying (in a more effective way) standards for consultations. These works resulted in the creation in 2011 of a Transparency Register, which is common to the European Parliament and the Commission. This Register ultimately concerns 'organisations and self-employed individuals' acting with the objective of directly or indirectly influencing

the formulation or implementation of policy and the decision-making processes of the EU institutions<sup>39</sup>. By registering, entities are obliged to follow the code of conduct. It should be underlined, however, that the obligation to register applies only to entities that want to obtain accreditation from the European Parliament and a pass. For consultations run by the Commission, registration is not compulsory (contributions from registered and nonregistered parties are published in separate documents). It is clear, therefore, that the way in which the register works (and in particular the mere fact of being registered) does not influence lobbying practices towards the European Commission (both carried within the consultation process or independently) and stakeholders' input. In consequence, the register does not solve the problems associated with the differing effectiveness of certain lobbying groups (see point 4 of this paper).<sup>40</sup>

- 13 The Commission has recently (19.05.2015) issued the Better Regulation Guidelines<sup>41</sup>. The Better Regulation initiative aims at making the EU action more effective by ensuring that "policy is prepared, implemented and reviewed in an open, transparent manner, informed by the best available evidence and backed up by involving stakeholders"<sup>42</sup>. The Guidelines cover the whole policy cycle: policy design and preparation, adoption, implementation (transposition, complementary non-regulatory actions), application (including enforcement), evaluation and revision. The document includes *inter alia* Guidelines on Stakeholder Consultation. These Guidelines' objective is to complement and further define the scope of the General principles and minimum standards for consultation of 2002. It is worth mentioning that a lot of attention is paid to the mapping of stakeholders. The following categories of stakeholder are foreseen: citizen / individual; industry / business / workers' organisations; EU platform, network or association; organisation / association; public authority; consultancy; research / academia; other. In particular, an accent is put on the need to distinguish between stakeholder categories, as well as to differentiate within a specific stakeholder category. It is stressed, moreover, that for a successful stakeholder mapping, the following aspects should be considered: to identify target groups that run the risk of being excluded; to seek balance and comprehensive coverage of interests; to identify the need for specific experience, expertise, technical knowledge and/or involvement of non-organised interests; to avoid 'regulatory capture' (i.e. the same businesses/representative organisations should not always be exclusively consulted, as this increases the risk of listening to a narrow range of interests); to use clear and transparent criteria for selection of participants (e.g. for targeted consultations like meetings, conferences or other types of stakeholder event with limited capacity, pre-selection of participants may be necessary).

As concerns stakeholders' input, the Guidelines omit the issue of the need to identify duplicative contributions, which was pointed out in the Public Consultation Document on Stakeholder Consultation Guidelines<sup>43</sup>. In turn, a positive aspect of the Stakeholder Consultation Guidelines is that they refer to all kinds of consultation, i.e. the open public consultations and the targeted ones. If we consider the lobbying effectiveness factors identified in terms of the consultation process (see point 4.2 of this paper), it seems that stressing the need to identify categories of stakeholders / interests would constitute a step in the right direction towards balancing the interests of the various stakeholders and preventing the negative effects of offensive lobbying by certain interest groups (only).

### C. Impact of lobbying on the making of copyright law

- 14 Both in the case of extension of the term of protection for sound recordings and in that of the exploitation of orphan works, the law-making process initiated by the European Commission ultimately led to adoption of a new directive (respectively Directive 2011/77/EU amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, and Directive 2012/28/EU on certain permitted uses of orphan works). Although the legislative process in these two cases concerned the same area (copyright rules), it was conducted in parallel by two different Commission Directorates-General, namely DG Internal Market and Services (DG MARKT) and DG Information Society and Media (DG INFOS)<sup>44</sup>. The former, responsible for EU policy in the field of copyright, dealt with the term of protection of sound recordings, while the latter coordinated the orphan works issue within the EU's Digital Libraries Initiative<sup>45</sup>. Work on both issues was conducted within the same time frame (the first decade of the 21<sup>st</sup> century and the early 2010s), which makes it possible to provide a comparative multi-faceted analysis and draw conclusions on the Commission's policy-making in the area of copyright.

#### I. Interest representation

- 15 Lobbying in the area of copyright is mainly carried out by international or European branch federations acting on behalf of their members, primarily national organisations or corporations representing particular interest groups or various different creative sector industries. This does not mean, however, that other entities (such as national branch organisations, international and/or national institutions, think-tanks, NGOs, corporations, etc.) may not undertake lobbying activities independently; indeed, this could to some extent be observed in the cases

being examined. Usually European or international federations (unlike national organisations) are more effective than national entities, as lobbying constitutes their only activity and also due to the fact that national bodies often do not have enough resources to conduct lobbying activities at European level on a regular basis.

- 16 International organisations bring together various different groups concerned by copyright rules: copyright holders (such as authors, co-authors), rights holders of related rights (such as performing artists, phonogram producers, broadcasters), users of protected content (such as consumers of protected immaterial goods, libraries, archives) and other parties (such as collecting societies, cable operators, internet service providers etc.).
- 17 Interest representation in the copyright field is characterised by there being a large number of actors. Certain interest groups are represented by more than one branch organisation (good examples are representatives of artists<sup>46</sup>, creators<sup>47</sup> or publishers<sup>48</sup>). Such organisations usually have highly qualified personnel who are experts in the specific problems of the sector concerned, including copyright provisions. Usually, international organisations that represent the interests of rights holders are sector-specific, unlike those representing users which tend to have a more horizontal character<sup>49</sup>.

### II. Case 1: Sound recordings

- 18 In 2008 the European Commission announced<sup>50</sup> the launch of legislative work aimed at extending the term of protection of sound recordings and improving the economic situation of performing artists (previous discussions on this issue had been ongoing in the UK until the British government adopted the Gowers' recommendation<sup>51</sup> not to prolong the term of protection for sound recordings; also, many parties commented on the duration of related rights during public consultations on the review of the EC legal framework in the field of copyright and related rights, run by the European Commission in 2004<sup>52</sup>). The Commission proposal envisaged extending the term of protection from 50 to 95 years and introducing two new additional clauses in favour of music performers<sup>53</sup>, namely provisions concerning the establishment by record companies of special funds for performers and a 'use it or lose it' clause. The work ultimately led to a new directive<sup>54</sup> being issued in 2011 extending the term of protection of sound recordings from 50 to 70 years and introducing the two above-mentioned measures together with a 'clean slate' clause<sup>55</sup>.
- 19 The Commission's legislative work on the proposal for a new directive took only a few months (February–July 2008). The Impact Assessment<sup>56</sup> concerning

this initiative, issued in April 2008, mentioned the following consultations run by the Commission: 1. public consultations on the review of the EC legal framework in the field of copyright and related rights (2004), 2. bilateral consultations with performers' associations and the recording industry (2006–2007), and 3. independent studies (2006–2007). In turn, the proposal for a directive<sup>57</sup> mentioned only the public consultations of 2004 and the bilateral consultations in the period 2006–2007 and underlined 'no need for external expertise'. The latter was obviously untrue, as in 2005, the Commission contracted out a study entitled "The Recasting of Copyright & Related Rights for the Knowledge Economy"<sup>58</sup>. The fact that the Commission ignored this study met with major disagreement from academics.<sup>59</sup> Also, it should be noted that some of the studies were not independent<sup>60</sup> as they were prepared for the benefit of groups representing rights holders<sup>61</sup>. It should be noted, too, that the consultations of 2004 were not dedicated to the issue of the term of protection of copyright and related rights (their scope was much broader). In addition, the Commission declared there that "the term of protection for phonogram producers does not cause particular concern since the term has been harmonised in the Community"<sup>62</sup>. Also, attention should be drawn to the narrow scope of other consultations (taking into consideration the types of consulted parties).

20 Lobbying activities were carried out by various different parties. Among the advocates of the planned changes were representatives of the phonographic industry and performing artists from the music sector (with partial support from the audiovisual sector)<sup>63</sup>. These groups were pressing for an extension of the term of protection of their rights and the establishment of additional clauses that would protect their interests (for instance, a 'use it or lose it' measure). Among the various arguments were those focusing on the bad legal and economic situation of performers – especially session musicians – at the end of their lives (a flagship motto), online piracy of music, increasing marketing costs, the need to make investments in 'new talent' and the need to adapt the level of protection of performances in the EU to the protection available in the USA. These parties were supported by some other groups representing music publishers and the entertainment retail sector<sup>64</sup>, who were also aiming to strengthen their rights. These groups' lobbying activities were carried out within the (albeit narrow) consultation process, as well as beyond it. Besides the informal lobbying, the parties' activities consisted of issuing formal letters, position papers (both independently and in coalitions) and expert reports, as well as coordinating grassroots actions (petitions). At the stage of discussion in the European Parliament, groups (mainly performers) were actively working on the amendments to the formal proposal, especially on the meaning of the additional clauses, achieving a great deal of success.

Also, once the proposal was in the Council, British musical artists' representatives strongly lobbied the UK government. This resulted in a change to the British position (on March 27, 2009, the UK voted against the Commission proposal; however, it eventually supported an extension up to 70 years and a change of the 'transitional' additional measures for performers to 'permanent' ones)<sup>65</sup>.

- 21 The opponents of the Commission proposal included groups representing the interests of users, namely consumers of immaterial goods<sup>66</sup> and institutions representing the cultural sector (notably libraries)<sup>67</sup>. These parties were against extending the terms of related rights (but not against the notion of the need to improve the legal situation of performers). The lobbying by these groups consisted of issuing formal letters and position papers<sup>68</sup> in which, moreover, references were made to the critical opinions of academics (the latter criticised the scope of the Commission proposal as well as its arguments and indicated alternative ways of improving the difficult situation faced by performing artists). Unlike the activities of the proponents, the opponents' lobbying had a defensive character. This resulted, among other things, from the fact that the launch of the Commission's legislative work was announced unexpectedly and that the planned timescale for issuing the proposal for a new directive was short. The low level of lobbying carried out by these groups before this announcement was due to the fact that, in the earlier documents, the Commission had not declared the intention to prolong either copyright or related rights. These parties' lobbying was strongly supported by the activities of academics<sup>69</sup> urging the Commission and the European Parliament to consider independent evidence on the issue of copyright term extension and to reject the Directive in its proposed form.<sup>70</sup>
- 22 The scope of both the proposal and the directive reflects the claims of the phonogram industries and music performers, as the legal instrument provides for a term extension as well as additional measures for musicians. The Commission proposal (just like the Directive) gave rise to many objections.<sup>71</sup> The opponents, including academia, criticised the idea and arguments, the scope of the provisions and the way in which the legislative work was conducted. It was pointed out, in particular, that extending the term of protection would solve neither the bad economic situation of performers (the additional clauses for performers would not actually improve their economic situation) nor the industry problems related to online piracy and necessary investments (not to mention that this is not the purpose of copyright provisions). The main defect of the proposal (and the Directive) was that the legal instrument applied (unjustly) only to performances fixed in phonograms and totally omitted the interests of the audiovisual sector (it did not apply to

performances recorded on videograms though this issue was discussed in the European Parliament while works on amendments were underway). Moreover, it did not take into account either its impact on end users or the issue of creative exploitation of works being in the public domain.

- 23 Bearing in mind the scope and type of the consultations mentioned above, and especially the fact that the Commission did not launch any public consultations specifically concerning the issue of extending the term of protection of sound recordings, it can be stated that groups representing phonogram producers and performers were favoured, as they had greater access to the Commission officials in the consultation process. The narrow scope of the consultations that took place and the controversies over the proposed legal instrument lead to the conclusion that the whole Commission initiative to extend the term of protection of sound recordings resulted from effective lobbying by the phonographic industry and musicians (artists and performers), as these groups were taking offensive action and were the most interested in changing the legislation. The power of the music sector as a lobby is demonstrated by the high degree to which the interests of phonogram producers and musicians (only) converge with the content of the directive (only their arguments were taken into account).

### III. Case 2: Orphan works

- 24 The issue of orphan works was raised by public cultural institutions (mainly libraries and archives) participating in the EU Digital Libraries Initiative<sup>72</sup>, having arisen while they were digitising their collections. It turned out that, in many cases, it was not possible to establish whether works were still protected by copyrights and/or who the rights owner was and/or how to find him in order to get his consent for exploitation of such a work.
- 25 In the period 2006-2011 the European Commission undertook a number of consultations on the orphan works issue (see below). In 2010 the European Parliament called on the Commission to submit a legislative proposal for an orphan works directive<sup>73</sup>. Following the Commission proposal of 2011<sup>74</sup>, in 2012 the European Parliament and the Council issued a new Directive on certain permitted uses of orphan works<sup>75</sup>. This legal mechanism (both the proposal and the Directive) applies to cultural institutions (only), to works in print in the form of books, journals, newspapers, magazines or other writings (the Directive also covers works and other protected subject-matter that are embedded or incorporated in the works in print; for instance, visual works), audiovisual works and phonograms (stand-alone visual works are excluded). While the proposal stated
- that the choice of legal mechanism would be left up to the Member States (a ‘mutual recognition of national solutions’ concept), the Directive introduced a new exception or limitation to the rights of reproduction and making available to the public (in accordance with Articles 2 and 3 of Directive 2001/29/EC<sup>76</sup>). The permitted uses (making available and reproduction) are possible after carrying out a diligent search for rights holders in respect of each work (there are no provisions for mass digitisation) within the public interest missions of these institutions only<sup>77</sup>. The Directive provides for mutual recognition of orphan work status and fair compensation for rights holders that put an end to the orphan status of their works (in the proposal the provision also concerned uses other than those within the public interest missions of institutions).<sup>78</sup>
- 26 The European Commission ran various different types of consultation concerning the orphan works issue. Most of the consultations took place within three advisory groups, namely the High Level Expert Group on Digital Libraries (HLEG), Copyright Subgroup (2006–2009), the Working Groups on Sector-Specific Guidelines on Due Diligence Criteria for Orphan Works (2007–2008), and the Reflection Group (or “*Comité des Sages*”) on Bringing Europe’s Cultural Heritage Online (2010–2011). Apart from this, stakeholders could also participate in the debate within the following initiatives: the Stakeholders’ Seminar (2007), the Green Paper on Copyright in the Knowledge Economy (2008), the Public Hearing on Orphan Works (2009) and on a bilateral basis (2009–2010).<sup>79</sup> This finally led to the inclusion of this issue in the Digital Agenda for Europe, where the Commission announced the creation of ‘a legal framework to facilitate the digitisation and dissemination of cultural works in Europe by proposing a Directive on orphan works’<sup>80</sup>. Among the parties consulted were groups representing cultural institutions (notably libraries and archives) and right holders. However, the absence of representation of other kinds of users (such as consumers of immaterial goods interested in further creative exploitation of orphan works) should be noted. Another weak point of the consultation process was the restricted nature of the consultations at the early stage of the work (only advisory groups, no public issue-tailored consultations).
- 27 The parties most interested in introducing a legal mechanism facilitating the exploitation of orphan works were public cultural institutions<sup>81</sup>. They called for the establishment of a legal mechanism at the EU level that would enable ‘safe’ exploitation of orphan works, i.e. which would make it possible to avoid the risk of paying damages for the unlawful exploitation of such a work in the event of reappearance of the right holder. At the beginning, parties pointed out the significance of the problem, its scale and potential legal solutions (they also indicated

certain mechanisms that were already in place)<sup>82</sup>. In-depth discussions were subsequently conducted within advisory groups and further consultations. In particular, cultural institutions called for the establishment of another exception or limitation to rights in relation to the practice of mass digitisation of works. Also, they called for the legal solution chosen to cover all kinds of works (published and unpublished) from all creative sectors and all types of exploitation (both for statutory and commercial purposes). These parties lobbied independently and via various consultation fora. Among the opponents of this initiative were representatives of rights holders of copyright and related rights from all creative sectors (text, sound, visual, audiovisual)<sup>83</sup>. These groups became involved in the discussions at the advisory group stage. Their demands concerned, in particular, the following issues: compulsory licences for cultural institutions for exploitation of orphan works (instead of a new exception or limitation to the rights); licence fees to be paid to the respective collecting society (both for commercial and non-commercial exploitation); exclusion of the possibility of exploiting unpublished works; the need to search with due diligence for rights holders in relation to each work<sup>84</sup> (as opposed to the mass digitisation of works)<sup>85</sup>.

- 28 The Commission proposal mainly reflected the recommendations of the High Level Expert Group on Digital Libraries, particularly by adopting the concept of mutual recognition of national solutions and of the need for a diligent search for rights holders prior to the use of a work<sup>86</sup>. The final legal solution reflects the main claim of cultural institutions, namely introduction of a new statutory exception or limitation to the rights. However, adversaries of the initiative blocked certain other demands of the cultural institutions. Examples include the exclusion from the Directive of other kinds of user, commercial uses of orphan works, as well as provision for the mass digitisation of libraries' and archives' collections<sup>87</sup>.
- 29 Both the Commission proposal and the Directive itself raised a number of controversial issues<sup>88</sup>. First, the scope of the legal solution was criticised (there is provision for 'safe' exploitation of orphan works in respect of cultural institutions only, while the interests of other kinds of user are omitted). Next, it concerns only selected categories of works (for instance, stand-alone visual works are excluded) and does not allow the commercial exploitation of orphan works (even by the cultural institutions). Moreover, it does not provide a solution for the mass digitisation process, as a diligent search for rights holders must be carried out with reference to each work. Also, the type of legal instrument chosen raised many objections.<sup>89</sup> These factors show that the Directive does not provide a wide-ranging solution for the problem of orphan works.
- 30 The above-mentioned observations allow us to draw the following conclusions about the influence of lobbying groups on the law-making process in this case. Firstly, groups representing cultural institutions had an impact on initiating the debate and work at the EU level. Secondly, the Commission ran some consultations at the request of certain lobbying groups. Thirdly, the legal instrument illustrates the demands of parties participating in the advisory groups: public cultural institutions, most interested in a safe mechanism for using orphan works, had an impact on the general scope of the legal mechanism, while some important aspects of the legal solution reflected their opponents' claims.

## D. Reasons why certain lobbying groups are effective

- 31 A comparative analysis of the EU policies relating to the extension of the term for sound recordings and to orphan works allows us to identify two groups of effectiveness factors of certain lobbying groups. Some factors are connected with interest groups' actions, while others concern the way the process of consulting stakeholders is handled.

### I. Effectiveness factors regarding lobbying groups

- 32 Obviously, groups interested in having regulations introduced in a given field take steps to strongly lobby the European Commission. In both cases, strong pressures could be observed from both opposing sides of the conflicts (rights holders and users) on the policy making processes and the shape of the legal mechanisms. Surprisingly, different kinds of stakeholders were beneficiaries of the provisions on each occasion: rights holders calling for an extension of the term for sound recordings (primarily, the record industry, and artists to a lesser degree) and users (public cultural institutions) for provisions on orphan works (although they are not entirely the winners of the battle). An overview of these cases allows us to identify the following determinants of effective lobbying: 1. the relationship between interest groups and the target of lobbying, 2. the arguments put forward by interest groups, 3. the type of organisations and the configuration of interests, 4. the way of conducting actions.
- 33 1. Relationship between interest groups and the target of lobbying. In both of the consultation processes discussed, the parties lobbying effectively had a stronger position in relation to the target of lobbying (the relevant Unit in the European Commission) than their lobbying opponents (for the term extension the stronger group was performing

artists and phonogram producers and, for orphan works, it was public cultural institutions as users). Their strong position resulted from the fact that they were (in practice) beneficiaries of actions by the Commission: DG INFSO policy was by definition in favour of public sector users (cultural institutions), as its policy concerned the European Digital Libraries Initiative. Meanwhile the policy of DG MARKT was for rights holders benefitting from their copyright and related rights. It has become clear that there is a convergence between the interests of parties carrying out offensive lobbying and the policy conducted by the Commission Units concerned.

- 34 This fact also explains the absolute lack of effectiveness of parties who were not beneficiaries of these Commission Units, namely end users (consumers of immaterial goods) and users interested in exploitation of works in the public domain. It should be noted that, as a rule, policy in favour of consumers came, at that time, from DG Health and Consumers (DG SANCO), not DG MARKT or DG INFSO. In turn, the case of ACTA shows that end-users (as parties not being holders of copyright and related rights) are not effective unless they manage to mobilise the public (irrespective of whether it is done by a 'single tweet' or as a result of a big lobbying campaign). The case of lobbying against ACTA in Poland is a good example of the effectiveness of indirect (grassroots) lobbying. The campaign<sup>90</sup>, conducted in new media (especially via Facebook or other related websites, like <http://stopacta.com.pl>), caused a large response from the public, starting from activities in cyberspace (e-petitions or cyber protests, like Internet blackout and taking down websites) to street demonstrations.
- 35 2. Arguments put forward by interest groups. In both cases, the arguments of the parties lobbying effectively involved, paradoxically, stressing their weak position under the copyright regime. In the case of the term of protection, the parties pointed to the bad legal and financial situation of performing artists at the end of their lives, while in the case of orphan works, cultural institutions emphasised the high risk of lawsuits for damages by reappearing rights owners, which was the main factor stopping them from exploiting orphan works. Highlighting weak copyright protection and/or unfair provisions was ultimately a key argument in favour of changing copyright provisions in order to reinforce the level of protection and the legal situation of the interested parties. In the sound recordings case, the EU legislator recognised this rationale, which is proved in the directive's preamble<sup>91</sup>. Also in the case of orphan works, it was considered to be one of the main problems, which the legal instrument sought to solve.<sup>92</sup>
- 36 3. Type of organisations and configuration of interests. The example of lobbying for extension

of term of protection shows that the sectoral organisations of rights owners were more effective than the horizontal organisations of their opponents (representing users). This was because of the highly specialised profile of their activities and their good knowledge of the sector's problems. Conversely, in the case of lobbying for orphan works, there were a high number of organisations with overly narrow profiles, meaning that they could not reach consensus on the detailed issues (they only managed to achieve a compromise on the general issues).

- 37 4. Way of conducting actions. The cases examined draw our attention to several lobbying strategies that made the actions effective. In general, an overview of the lobbying actions allows us to make a general statement that the more the parties were active and aggressive, the more the lobbying was effective. Moreover, groups who initiated the debate and work on a given issue ended up being particularly effective. This was, at least at the beginning, due to a hidden aspect of their actions. Activities in this form are, by definition, more effective, as they take place before or outside the formal consultation process. They give the parties the time advantage necessary to convince the Commission of their arguments as well as of the need to launch consultations and/or legislative work, without pressure from their opponents.
- 38 The parties used the argumentation cleverly, choosing the most suitable rationale. One example, among many, is the argumentation used during the term extension debate. The music industry seemed to change their focus: while at first the lower protection vis-à-vis the EU was emphasised, later on – especially at the stage of work in the European Parliament – the emphasis was put on the 'weak' position of the poor artists and session musicians.
- 39 Another example of effective lobbying is the stakeholders' activity within the advisory groups in the orphan works case. For instance, representatives of rights holders (especially publishers) were pushing for the 'diligent search' measure from the very beginning, i.e. at the stage of discussions by the HLEG – Copyright Subgroup. In effect, the Subgroup recommended the involvement of a larger group of stakeholders into debate on (*inter alia*) this issue. In consequence, the Stakeholders' Seminar (IX 2007) was held. As groups stressed their willingness to engage in further consultations, the Commission established the Working Groups on due diligent criteria for search of rights holders (2007-2008).
- 40 Also, actions carried out by larger coalitions proved effective. Common actions (regardless of partly divergent interests of the groups acting in concert) provided evidence, in the eyes of the Commission, about the consolidation of the entire sector. They also proved the widespread support among society for

the initiative concerned. Parties that did not manage to build a coalition in order to carry out actions in common did not offer a sufficient counterweight to the well consolidated groups.

## II. Effectiveness factors regarding the consultation process

- 41 The way in which the consultation process was handled by the European Commission's DGs (namely DG MARKT and DG INFSO) differed in the two cases. Nevertheless, in both cases the circumstances for lobbying were favourable for the interested parties, although for different parties in the two cases under discussion. When analysing the effectiveness of lobbying, the following aspects of the consultation process should be taken into account: 1. the coherence of EU policies, 2. the type of consultations, 3. the policy framework, 4. the transparency of the consultation process, 5. the participation of national groups in consultations, 6. the Commission's openness to interest groups.
- 42 1. Coherence of EU policies. The policies pursued by DG MARKT and DG INFSO reveal an internal inconsistency in the European Commission's policy in the field of copyright. Analysis shows that, at the same time, work was being carried out both to strengthen the copyright regime by extending the term of protection of (some) rights and to facilitate the exploitation of protected works. This means that each DG was taking action in favour of groups with opposing interests. This situation was convenient and profitable for lobbyists, as different parties (i.e. representing rights holders on the one hand and users on the other) were directing their demands to the respective Units in the Commission that were favourable to them.<sup>93</sup>
- 43 2. Type of consultation. The consultation is a useful tool for both the Commission and the stakeholders. On the one hand, it serves to achieve the EU policy goals, but on the other hand, it constitutes a platform to conduct effective lobbying actions by stakeholders (it gives access to the Commission officials and to the policy making process), especially in the case of advisory groups.
- 44 It is within the power of the Commission to choose the type of consultation with stakeholders. It may organise public consultations which are addressed to all potentially interested parties (which enable the widespread participation of parties with different interests) or hold consultations in which only certain groups are involved. As this analysis shows, in both cases the consultation processes had the following weaknesses: consultations with selected stakeholders (on bilateral bases) or in closed fora (within advisory groups), the lack of public issue-
- tailored consultations, reliance on expert reports drawn up by stakeholders, not considering the independent experts' analysis. The above-mentioned factors strengthened the hidden lobbying of the parties carrying out strong offensive action (for both the extension of related rights and new provisions on orphan works), while hampering the lobbying opportunities of the opponents.
- 45 The practice of conducting consultations in closed fora, such as the advisory groups appointed by the Commission, raises a number of questions. An analysis of the consultations held in relation to orphan works shows that the Commission may somehow indirectly influence the course of consultations and, in consequence, their results (as it conducts its own policy). First, it often has the power to appoint the members of such groups. Usually, members of advisory groups represent different stakeholders' organisations (i.e. lobbies) and are not independent experts (e.g. researchers). In this way the Commission determines the representation of interests and therefore the lobbying opportunities of the various parties. Also, it is sometimes difficult to obtain information about the selection criteria for groups' members. The practice shows, moreover, that there are often limited opportunities for stakeholders not involved in the work of an advisory group from the beginning to join an established group at a later stage. Next, the Commission may influence who is chosen as chairman<sup>94</sup>, a figure who plays a key role as he/she coordinates a group's works with the aim of leading the parties towards a common position. This was the case for the Working Groups on due diligence criteria for search of rights holders. The chairman was from the International Federation of Reproduction Rights Organisations (IFRRO), an organisation which represented the collective management organisations and the creators' and publishers' associations and which was greatly in favour of the diligent search measure.<sup>95</sup> Work within the Working Groups ended up with the signing of a Memorandum of Understanding on Diligent Search Guidelines for Orphan Works embracing the Sector-Specific Guidelines on Due Diligence Criteria for Orphan Works (Joint Report and Sector Reports). In view of the many contradictory interests of parties, and also having in mind the Digital Libraries' context, achieving a common position by stakeholders was considered by the Commission as a great success.<sup>96</sup> Achieving a consensus is highly positive as it gives evidence of wide-ranging support from various different stakeholders (who usually have different or opposing interests) for the Commission's policy (as the orphan works case shows, sometimes the advisory group's recommendations constitute the basis for future legislative proposals / provisions).
- 46 3. Policy framework. The policy framework is of great significance for the consultation process and lobbying by stakeholders. A good example is the

legislative process on orphan works, which was very much stimulated by the earlier Commission policy actions, i.e. the Digital Libraries Initiative<sup>97</sup> and the Europeana project. More precisely, the Commission was in favour of introducing a legal mechanism concerning orphan works as, if no legislation on facilitating rights clearance was adopted, the whole project of the European Digital Libraries Initiative (and Europeana) could fail.

- 47 4. Transparency of the consultation process. An analysis of the consultation process held by DG MARKT and DG INFSO allows us to state that European Commission policy was not followed in a transparent way. In particular, in both cases there was no clear information about the consultations that had been held at that time. To give one example, the case of orphan works showed that some individual parties were not aware of the wider context of EU policy or of other parallel consultations relating to this issue. Namely, during the early stage of the Working Groups work, some parties (for instance some publishers) pointed out that they were not aware of the consultations within the HLEG and indicated an unclear link between the framework of Working Groups and the HLEG<sup>98</sup>. Certainly, this lack of transparency resulted from the narrow nature of these consultations (DG MARKT: bilateral consultations; DG INFSO: consultations within advisory groups): the appropriate information reached only those parties whose involvement in the consultations was envisaged. As other parties did not have analogous opportunities to act, they did not have the same chance to lobby effectively.
- 48 5. Participation of national groups in consultations. In the case of lobbying for both the term of protection for sound recordings to be extended and for permitted uses of orphan works to be introduced, it was possible to observe a kind of 'over-representation' of the interests of certain national branches in the EU consultation process. In the case of extending related rights, strong pressures, especially from the British phonographic industry and artists were seen from the very beginning (notably during Gowers' work on the copyright review) and then during the course of the entire legislative process. This culminated in their exerting pressure on the UK position while work on the proposal was under way in the Council<sup>99</sup>.
- 49 In turn, in the case of orphan works, an 'over-representation' of national interests at the EU level could be seen during the consultation process. More precisely, there was a situation where the interests of a given branch were represented twice, i.e. by a national organisation and, in parallel, by its European federation. For instance, British Library (BL), Bibliothèque nationale de France (BNF), Joint Information Systems Committee (JISC), Society of College, National and University Libraries (SCONUL) were acting in parallel

with the European Bureau of Library, Information and Documentation Associations (EBLIDA). Moreover, in the Working Groups, 8 of the 33 members represented national entities, of which 4 were from the UK and 3 from France. In turn, 8 of the 19 participants in the public hearing on orphan works represented national groups (4 representing French entities, and 3 representing British ones). It is worth mentioning that the entire consultation process did not feature any national groups from the former 'new' Member States. In consequence, the strong influence of particular parties on European policy results in the application – throughout Europe – of mechanisms resulting from the needs of certain branches (only) from certain member states (only).

- 50 6. Commission openness to interest groups. The cases of increasing the protection of related rights and of introducing permitted uses of orphan works show that the European Commission is more willing to take into consideration the viewpoint of interest groups that are beneficiaries of its actions than those of other parties. For instance, DG MARKT, by being responsible for regular policy in the field of copyright, by definition was working towards protection of the interests of rights holders (performing artists and phonogram producers). Conversely, DG INFSO, acting in the context of the Digital Libraries Initiative, shaped, in practice, its policy in favour of cultural institutions. The Commission's general statements of openness to stakeholders and willingness to engage in dialogue with interested parties translate, in practice, into openness to claims and arguments from those parties that are the natural targets (beneficiaries) of the policy of its Units (and not necessarily to the claims of other parties or the arguments of independent experts).

## E. Conclusions

- 51 The cases of extending the term of protection of sound recordings and of introducing new provisions for orphan works raise the question of the effects of lobby-making on copyright law-making in Europe. An analysis of the cases allows us to state that lobbying has a noticeable impact on copyright law-making in Europe and that the way in which the EU institutions create policy and law is conducive to lobbying by interested parties. In both cases, strong lobbying by certain interest groups resulted in, first, the Commission undertaking general work on specific issues and, then, in initiating particular consultations with stakeholders. Moreover, lobbying also influenced the content of the directives adopted later. In light of this, an indicator of the effectiveness of the action of particular interest groups could be, firstly, whether consultations and/or legislative work has been initiated under the influence of certain stakeholders and, secondly, whether the content of the EU directives is consistent with the demands of

certain parties, especially when set against critical opinions raised by independent experts (like in both EU legislative processes analysed here) and/or large-scale social movements against the proposed provisions (as in the ACTA case).

- 52 The effective lobbying by certain parties only, had negative consequences on the copyright provisions. Namely, the legal acts issued did not balance the interests of the various different parties in an appropriate way. In particular, they did not take into account (to a sufficient degree) the interests of parties against a given initiative (or campaign) or of the parties that were not engaged in any lobbying actions. In view of the narrowly focused nature of the copyright directives (they regulate only selected issues) and the lack of coherence in EU copyright policy and rules, it is appropriate to ask whether the EU institutions have a broader vision of the development of copyright policy in the long term.
- 53 The best model is where interested parties lobby within the framework of public consultations (dialogue with civil society), which is beneficial for a few reasons: they contribute to enlarging the debate to opponents of a given initiative; to providing more openness in lobbying and to increasing the transparency of the legislative process, thereby making it possible for more balanced legal mechanisms to be issued. This case study shows, however, that even in a situation where public consultations take place, some groups are still more effective than others and can to some extent influence the Commission policy. This leads to the conclusion that effective lobbying by certain interested groups affects policy direction (and eventually legislative initiatives) taken by the EU institutions.
- 54 A case study has shown that, in these two cases, different categories of lobbying groups were effective (this concerns the distinction between rights holders and users). For Directive 2011/77/EU, the effective groups were those representing right holders (phonogram producers and performing artists), as their actions led to the term of protection of their rights being extended (on the other side of the conflict were groups representing users of copyrighted content). Conversely, for Directive 2012/28/EU, more effective (although not entirely winners) were groups representing users in the cultural sector (mainly public libraries and archives) as they managed to convince the Commission of the significance of the problem (in the context of the Digital Library initiative) and, therefore, of the need to establish provisions for 'safe' uses of orphan works (groups representing rights holders were against). In both cases, the interests of end-users (consumers of immaterial goods) and of parties exploiting creative content and/or content being in the public domain were ignored by the EU legislator.
- The ACTA case shows, in turn, that these groups are not effective unless they manage to mobilise the public to undertake (mass) actions in the form of online protests and street demonstrations.
- 55 The above-mentioned observations lead to certain conclusions about the different effectiveness of particular stakeholders. The most effective parties are those especially interested by a given provision, who initiate the debate and lobby offensively at the stage of the early legislative process (within the consultations or independently) and who, at the same time, are the main targets (and beneficiaries) of the Commission Units responsible for EU policy in the area concerned. The effectiveness of lobbying groups also stems from the type and quality of the consultation process. The following weak points of the consultations could be identified: 1. lack of coherence of European Commission policy in the field concerned, 2. consultations of limited character (like on bilateral bases or in advisory groups) being conducted at an early stage of work on the issue concerned, 3. the composition of advisory groups and the procedure for appointing members (especially the lack of balance in the representation of interests and the lack of independent experts), 4. the lack of transparency in the consultation process, 5. an over-representation of national branches in EU-level consultation, 6. the susceptibility of the Commission to the arguments of parties that are the beneficiaries of its policy. It should be noted that the weaknesses of consultations appeared despite the fact that *General Principles and Minimum Standards for Consultation of Interested Parties* and *Principles and Guidelines on the Collection and Use of Expertise* had already been issued. Despite recent changes in the Commission structure, conclusions relating to the lobbying effectiveness of some interest groups seem to be of a general nature.
- 56 The vague character of lobbying poses a challenge to the interest of good regulations governing it. However, as it forms part of the democratic process through being a form of citizens' activity in the public sphere, it should not be restricted. This raises the question of how to regulate lobbying in order to prevent its negative consequences owing to the disproportionate lobbying of some groups. Regulating the lobbyists' access to EU politicians and/or officials (as the Transparency Register does), does not actually solve the practical problems that occur during the consultation process (what is more, for consultations of stakeholders run by the Commission, the registration of lobbyists is not obligatory). Owing to their general character, this is not achieved by the *General Principles and Minimum Standards for Consultation of Interested Parties* or the *Principles and Guidelines on the Collection and Use of Expertise* either. Equally, the further measures of 2010 concerning expert groups do not affect problematic issues (for instance, they guarantee neither a balanced representation of interest nor

the participation of independent experts). An improvement in the quality of the consultation process could come about, to some extent at least, with the *Stakeholder Consultation Guidelines*. In particular, they indicate a possible approach to the analysis of stakeholders' contributions on the basis of the different stakeholder categories (in cases of participation by many different stakeholder groups with differing and potentially conflicting views). It is, moreover, worth stressing that the guidelines concern both the public consultations and the targeted ones.

57 One of the problems with making the process of policy creation and lobbying more transparent is that the EU regulatory initiatives concern particular types of consultation separately and not the consultation process as a whole. In consequence, certain aspects of and problems with the consultation processes are not raised at all. This particularly concerns the following: the criteria by which the Commission chooses a given type of consultation, the coherence of Commission policy in a given area and the transparency of the whole consultation process.

- 1 Research for this paper was financed by a grant from the National Science Centre in Poland for the postdoctoral post (decision No DEC-2014/12/S/HS5/00006).
- 2 Authors' publications until 2011 had been issued under the name of Vetulani, Agnieszka.
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- 4 Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ L 265, 11.10.2011, p. 1.
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- 19 The European Commission places 'lobbying' in the context of the dialogue with the civil society, see Clamen, M. (2005), *Lobbying i jego sekrety: [original title: Le lobbying et ses secrets. Guide des techniques d'influence, 3eme editions, Dunod, 2000, Paris]*, FELBERG SJA, Warszawa p. XIV.
- 20 The Treaty of Lisbon gave more legislative power to the European Parliament, especially by increasing the application of the ordinary legislative procedure (former co-decision) and the consent procedure, see: <http://www.europarl.europa.eu/aboutparliament/en/20150201PVL00008/The-Lisbon-Treaty>.
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- 24 The key element that differentiates lobbying from other kinds of advocacy is the direct relationship between the entity running action toward the legislator and the interest group or third party.
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  - 64 Mainly: The International Confederation of Music Publishers / Confédération Internationale des Editeurs de Musique (ICMP/CIEM); Independent Music Publishers and Labels Association (IMPALA); International Music Publishers Association (IMPA); Global Entertainment Retail Association - Europe (GERA).
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  - 93 Although the copyright Unit moved from DG MARKT to DG CNECT, interest groups will most likely continue to lobby those units that are most favourable for them. Nevertheless, gathering units that coordinate copyright, digital culture and media policies in one DG (here DG CNECT) gives hope for (though does not guarantee) a more coherent and holistic approach of the Commission to policy development in the area of copyright, in general.
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# Is the Knockoff Economy a Knockout for Intellectual Property?

Reflections on Kal Raustiala and Christopher Sprigman, *The Knockoff Economy: How Imitation Sparks Innovation*, Oxford, Oxford University Press, 2012, 272 p.; ISBN 978-0195399783

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## A. Introduction

- 1 Conventional wisdom has it that copyright is essential to ensure that creative efforts will be directed at producing cultural creations of various kinds. Without this or some other stimulus, creative talent would be deployed elsewhere in endeavours where it will earn proper rewards. In the course of history various techniques have been used to create such a stimulus: first mover advantage, secret, favouritism by the powerful, employment contracts, pensions, state procurement contracts, state subsidies, sponsorships, lotteries, to name just a few.<sup>1</sup>
- 2 As a stimulus, copyright, which will concern us here, and intellectual property generally, are thought to outperform these other techniques. Copyright is meant to be granted without discretion once its predefined conditions are fulfilled, is entirely decentralised (does not depend on any one person's view of the value of the creation) and procures a reward that is a function of how much different consumers are willing to pay for the product or service it protects. For this scheme to work, copyright holders have to have control over who can use their creation. Without such control, consumers would free ride, i.e. consume without paying for it. All cultural creations are information goods which can be used by many persons without diminishing their utility for anyone else – a feature which economists refer to as characteristic of “public goods”. Information goods are not naturally scarce in the economic sense, though the talent to create them is.
- 3 For physical goods, whose consumption by one person prevents consumption by another, control over usage is ensured by some form of “fence” that shuts out anyone but the title holders and persons admitted by them. Fences can take a variety of forms: ditches, locks, armoured doors, electronic registration for software that triggers automatic updating, contractual schemes, etc.<sup>2</sup> Where no effective fence can be put in place, the objects in question risk being left in open access and hence over-consumed and under-produced, as the examples of fish in the open sea and unpolluted air illustrate. This risk is known as the “tragedy of the commons” following Hardin's article of that title.<sup>3</sup>
- 4 For information goods, “fences” are more difficult to put in place because of their “public good” character. Once you share an information good with someone else, there is little to stop it from spreading to third persons: copying it is becoming ever cheaper and does not deprive the original holder of use. Besides the danger of consumers free riding, one must also expect competitors to copy the good and bring to market a lower-priced version of it competing with the original, thus undermining the client base of the

original creator. The two effects combine to lead to a risk of shortfall in revenue and hence to a reduced incentive to create: talents would tend to be directed elsewhere. For this reason it is felt that the law needs to step in to shore up the fences as required to create an exclusive right for the original creator and so to ensure that more creative work will be forthcoming.

- 5 Raustiala and Sprigman's book under review here confronts this conventional wisdom head on.<sup>4</sup> It points to a number of industries and activities, such as stand-up comics, haute cuisine cooking recipes, databases, in which the absence of a formal intellectual property right does not appear to stand in the way of a flourishing and innovative industry. In Section I we look at why this works with the informal fences specific to these industries.
- 6 Raustiala and Sprigman also discuss the fashion industry, whose importance in the US alone is a multiple of that of all cultural industries combined and yet which functions without effective intellectual property rights on the fashion designs, and indeed with widespread copying amongst competitors. We look at this industry in Section II.
- 7 In an Epilogue, Raustiala and Sprigman reflect on the future of the music industry, where the internet has led to widespread consumer copying, decried by industry spokespersons as "piracy" and as the cause of declining record sales and the death knell for musical creation ("copying kills creativity").<sup>5</sup> Yet evidence shows that new music creators and new musical creations appear unabated. We look at this in Section III.

## B. Industries with informal fences and no direct formal IP right

- 8 The recipes of haute cuisine. The first phenomenon to be discussed is that of haute cuisine. Fine cooking is an industry doing \$604 billion in the US alone.<sup>6</sup> Recipes for fine food cannot be directly protected and so can be freely copied. The number of eateries is too large for community norms to stop copying, although within the narrow community of top chefs, unduly "stealing" someone else's recipes may be sanctioned, not very effectively, by blacklisting and denial of access to further creations.<sup>7</sup> How then do the best chefs succeed in getting rewarded for their creativity?
- 9 Chefs may make their recipes sufficiently sophisticated so as to defy easy copying. They also use a variety of other strategies. The essential point of them is that what the consumer buys is not so much the recipe of a chef, as the total experience of consuming the dish in the restaurant where the chef prepares it or supervises its preparation. The

recipe is "fenced in" by being tied to the restaurant where it is served. The restaurant itself is protected more easily by its physical location, its trademark and (under the American Trademark Act of 1946) its "trade dress", i.e its appearance, decoration and so on, constituting the "look and feel" of the restaurant. The Chef's reputation can be used as a booster: if chefs publish their recipes, this may draw people to the restaurant, where they may vary their own recipes served there.

- 10 Essentially what happens here is that an information good which is not itself easily fenced in is tied to another good that is. Rewards for creativity are collected by "selling" the two jointly. Essentially the same formula is used to collect on the creation of new formulas for (alcoholic) cocktail drinks.
- 11 Stand-up comedians<sup>8</sup>. For stand-up comedians, fresh jokes and routines are the stock in trade. They must be invented; once told to an audience they can be freely retold and lose their value quickly as they are repeated. So the driving force in this trade is the ability to invent or get one's hands on fresh jokes. This makes it imperative to stop competing comedians from copying these jokes for their own shows ("plagiarism")
- 12 How is "plagiarism" dealt with? Within the small community of stand-up comedians, there is a norm against mounting a show consisting of other persons' jokes. If one person is transgressing the norm by stealing a particular other performer's material, the latter may in the first instance take this up with the plagiariser. Should they be unable to settle their differences, community sanctions of attacks on reputation (with third persons who could employ the performers for their shows) and refusals to deal may follow.
- 13 The industry as a whole is subject to great pressure continually to come up with new jokes and routines. Within the small community of stand-up comedians, fencing against outright plagiarism is successfully accomplished by community norms.
- 14 Sports strategies.<sup>9</sup> In any sport, competition for the top consists in part in inventing new strategies that take the opponent by surprise and allow one to win. This advantage is temporary because the frustrated opponents or their supporters will figure out the magic formula and implement it, possibly improved or "tweaked", as well. So the protection required to cash in on one's creativity stems here from (1) keeping the formula secret, where that is possible (2) first mover advantage for as long as it takes opponents to figure it out. On the whole, competitive sports are quite innovative. Competition for the prizes drives continual innovation in strategies.

- 15 Type fonts<sup>10</sup>. Until a century and a half ago, typefaces were extremely costly to develop (in lead metal, by professionals) and equally costly to copy. As a result, there were few of them and protection was not a problem. Advances in technology made it possible in the early twentieth century to photograph a font and then to transpose it onto metal and thence onto lead type letters. Copying became less costly. With the advent of computers, the cost of designing new typefaces came down radically as did the cost of copying them (a click away). Copying typefaces was no longer an activity restricted to professionals, but could be done by anyone with a computer.
- 16 Ease of copying creates an “open access” space and might signal the need for some form of fencing to secure reward for the efforts involved in designing a type font. Legal protection was not available because of the functional character of type fonts, excluded in copyright legislation. No effective private form of fencing arose, probably due to the huge community of potential copyists. Did this mean the death knell for creativity in typefaces? Not at all. Raustiala and Sprigman report<sup>11</sup> current estimates that put the total number of typefaces in circulation at a quarter of a million. How can this work? In part, it is due to the cost of developing a new typeface being radically reduced by computer technology. This weighs all the more as most new fonts are minor variations (“tweaks”, as the authors call them) on existing ones. Fonts are often provided with computer operating systems or design software (Adobe), in which case tied sales logic operates to reward the creators.
- 17 Financial innovations<sup>12</sup>. The financial industry develops new financial “products” (derivatives) and new computerised ways of managing financial portfolios. The latter are patentable in the US following a Court of Appeals decision in *State Street Bank and Trust Co. v. Signature Financial Group Inc.*<sup>13</sup> There has been debate about the advisability of allowing patents on software, but, according to the authors, allowing it has not changed much within the financial industry. New financial products, in any event, cannot be protected by intellectual property. So how is innovative spirit rewarded here? The authors contend that industry relies on two mechanisms: trade secret within very large firms (backed-up by protective clauses in employment contracts) and first mover advantage.
- 18 Databases<sup>14</sup>. These are huge electronic collections of materials organised for easy search and retrieval. Generally they are regularly updated with new material so as to keep current. Databases are not protected by copyright in the US and in Canada, where court decisions have judged that the facts they assemble do not pass the test of originality required for such a right to arise.<sup>15</sup> In both cases, the contents of telephone directories were considered to be out of bounds for copyright and in the public domain. By contrast, the European Union has adopted a Directive obliging member states to enact legislation protecting databases with a *sui generis* right less encompassing than copyright.<sup>16</sup>
- 19 Significantly, the lack of copyright or similar protection did not spell the (slow) death of the American database industry, as industry spokespersons feared. On the contrary, the database industry is growing in North America and stagnant in Europe. The database industry in part protects itself against copying by clauses in the contracts with users. Users will want to subscribe to have on-line round-the-clock access to up-to-date material. As users log on, the validity of their contract granting them access is checked on the fly. Behind this apparently simple procedure lies an important logic: because copying cannot be prohibited, the industry protects itself by continuing to innovate in order to keep customers happy.
- 20 Altogether, the brief survey of different non-copyright industries by Raustiala and Sprigman shows that where the law is not available to shore up fences thought necessary for innovators to get their reward, innovation does not necessarily grind to a halt. The innovators protect themselves by a variety of informal fences: first-mover advantage, secret, community norms, contractual norms and electronic fencing. In some instances, they seek their reward by innovating faster than competitors, thereby ensuring niche market superior revenues until competitors catch up, which may take a while. Competition, rather than stifling innovation by shaving away the innovator’s reward, may on the contrary be the very condition that stimulates it most.

## C. The fashion industry

- 21 In a 2006 paper, Raustiala and Sprigman reported that the fashion industry then sold more than more than \$750 billion worth of apparel in the US alone.<sup>17</sup> This is more than the cultural and software industries combined. The fashion industry is continuously innovating, very competitive and highly segmented, with a high end, where designer dresses sell for prices in the six figures, through upscale ready-to-wear designs to mass produced confection and cheap knock-offs. Many firms operate within this industry; older ones disappear and new ones appear all the time.
- 22 Fashion designs are not protected by copyright nor another intellectual property right in most countries. What is remarkable about the industry is that it is vibrant in spite of widespread and very rapid copying or imitation: an attractive and possibly trend-setting dress shown at the Oscar ceremonies may be copied and imitated in short order to

appear in less expensive form offered to a different segment of the apparel market. The industry itself has adjusted to this rapid copying phenomenon and is as innovative and competitive as any.

- 23 In an earlier age, upscale American clothiers attempted to protect their designs from cheap knock-offs by setting up a wholesalers coalition that would only sell to retailers if they refrained from selling cheaper knock-offs and maintained certain prices for the coalition's upscale wares. Inspectors for the coalition would visit retail outlets to ensure the conditions were observed and, if not, would trigger blacklisting of the infringer. By the late 1930s, the Federal Trade Commission looked into the scheme and brought suit for violation of antitrust legislation. In 1941, the Supreme Court of the United States declared the scheme in violation of anti-trust laws.<sup>18</sup>
- 24 End of creative fashion design? Not at all. The industry changed its business model to stress the value of owning a designer dress or one that is part of a fashion trend set by a conspicuous designer dress. While the trend is building up, it becomes desirable for the fashion conscious to join the movement. Once the trend has reached all corners of the market, it loses its appeal and is replaced by a newer trend. Freedom to copy accelerates the spreading of a trend (and the demise of the preceding one) and thereby promotes innovation in the industry. This in itself will promote sales for the industry as a whole. It is what Raustiala and Sprigman call the "piracy paradox".<sup>19</sup>
- 25 In this set-up, having one's design copied by knock-off operators may be, paradoxically, a quality signal for fashion designers. It may bring them new wealthy customers for new, possibly trend-setting designs. Fashion operators may actually encourage copying in as much as it contributes to setting a new trend. But the real money is made with the lower-priced mass produced knock-offs of these designs, when the trend takes off. In a sense, the haute couture serves as advertising for the knock-offs. Of course, it is important to keep the reputation for top-level design separate from that relating to lesser-priced designs. The fashion industry operators may be active in all segments of the market, but under different brand names. Hence, whilst no intellectual property right is available for the designs, the trademarks protecting brands in different segments in the market are extremely important and strictly enforced. The haute couture designer may sell its own designs in slightly modified form and under a different brand name in knock-off markets, where it faces competitors doing the same thing.
- 26 The fashion industry's business model appears to work quite well. In a graph displayed at p. 46 of their book, Raustiala and Sprigman show how the

price of top-level women's dresses has doubled over the period of 1998 till 2010, whereas for all other segments of the market the price of dresses has remained relatively stable or declined. To explain the phenomena we observe here, Barnett and co-workers have proposed a model in which low level copying could lead to a stable equilibrium in the industry, with high revenues and lively competition.<sup>20</sup>

- 27 What should be noted about the fashion industry is that, whilst highly innovative and fiercely competitive, it is less concentrated than the cultural industries (book, music, film), where there is formal IP protection for creations. Could IP protection, when too strong, lead to higher concentration within the industry than would be desirable for maximising welfare?

## D. The music industry<sup>21</sup>

- 28 Musical creations are normally subject to copyright, automatically granted upon creation in countries that have adhered to the Berne Convention.<sup>22</sup> The traditional business model provided that revenue for musical creations would be secured through royalties on physical recordings or printed sheet music and through admission charges to live performances. Production of physical records involved substantial capital outlays, first for the recording (in specialised studios, with specialised personnel) and then for the printing of the records and for advertising and distribution amongst an extensive network of retailers. Until a few decades ago these "fences" would be secure enough to guarantee such revenue as the work could fetch, without much concern for unauthorised copying or recording. Copying such as it was resulted in copies of lesser quality – and hence desirability – than the original.
- 29 The advent of digital recordings of music and of broadband internet radically changed this setting. Music could be shared amongst consumers simply and without quality loss. As a result it became quite common. The fences that were effective in the earlier period no longer worked so well. The watershed, in the eyes of the industry, was the advent, in 1999, of Napster, the system that allowed consumers worldwide to find and share music peer-to-peer in a radically simplified way.<sup>23</sup> The formula was wildly successful with consumers. Record sales, which in 1999 stood at a high of \$20 billion, no doubt boosted by the recent conversion from records to CDs, steadily declined from thereon to \$7 billion, in 2011, which is below the level attained in 1985.<sup>24</sup>
- 30 The industry did not hesitate to attribute the decline to unauthorised file sharing or "piracy". Whether this causality can be proven empirically is disputed in the scientific literature.<sup>25</sup> Quite possibly shared music whets the appetite and leads to purchase of

records. Be that as it may, the industry reasoned that an unauthorised copy represents a lost sale and that lost sales lead to lost revenue and in turn to lessened incentive to create. It sued the initiators of Napster and was successful in shutting the service down in 2001.<sup>26</sup> This led to the development of peer-to-peer sharing software without a central server and harder to trace: Aimster, Grokster, Gnutella and others. The industry sued their operators as well and won again. But consumers kept sharing files. So the industry sued individual consumers who shared files, and it won these battles too, obtaining cease-and-desist orders.<sup>27</sup> As this still did not stop file sharing, the industry then tried to enlist Internet service providers to shut out customers who it deemed to be engaging in piracy activity.

- 31 All this did not, however, make a serious dent in file sharing amongst consumers. Based on Cisco data, Lunney estimates file sharing in 2012 to amount to the equivalent of 7.5 billion CDs per month, with the expectation that it would triple over the next four years.<sup>28</sup>
- 32 If revenue from record sales is down, one may expect artists to change their business model and turn to other sources of revenue.<sup>29</sup> They could self-publish and sell on the internet (all the more successfully as the internet allows one to reach the “long tail”<sup>30</sup>); rely on sales by convenient and simple on-demand services, initiated by Apple’s iTunes<sup>31</sup> in 2001 and now offered by Amazon, Spotify, Netflix for films and many others; live performances, where access can be more easily fenced in and for which the records act as advertising;<sup>32</sup> merchandising;<sup>33</sup> endorsement deals; contributions from fans wishing to favour particular artists specifically<sup>34</sup>; or they could exit music creation altogether.
- 33 There is evidence that revenues from these sources have gone up.<sup>35</sup> We do not know directly whether additional income from these sources is sufficient to offset the decline in record sales, and neither do we know whether the total amount of music consumed has increased. But if industry doomsayers are correct, one would expect reduced incentive to lead to fewer new creators entering the market and fewer new creations being offered. On these we do have data.
- 34 As regards new albums being brought out, it should be noted that the cost of recording music and of distributing it has dramatically gone down. Scale economies are no longer a *conditio sine qua non*: home recording with ordinary software does the job.<sup>36</sup> This in itself would tend to increase the number of new albums brought out.
- 35 As regards new artists attempting entrance into the highly competitive world of music, revenues from creative endeavour are distributed in a very skewed manner, with top performers earning fortunes, some others earning a living and the tail end of the distribution losing their shirt.<sup>37</sup> By all accounts, it is an “unfair lottery”. One must presume artists attempting entrance into this unfair lottery to be driven by the idea of a “pot of gold” if successful.<sup>38</sup> If revenue drops as a result of piracy, one may expect the pot of gold to be less rich and so its incentive potential to be smaller, and hence to see some potential music creators direct their talents elsewhere. In this regard, it would be particularly significant to find new creators making hits on first trial, outclassing established creators.
- 36 Several field studies have attempted to measure new musical creations in the post-Napster era.<sup>39</sup> Various dimensions may be relevant. For established artists lesser revenue might lead to renewed creative effort, reversing a tendency to substitute leisure for work as they raked in revenue earlier.<sup>40</sup> If new creations and new creators are less numerous, one might expect more musicians to resort to producing new renditions of existing success numbers, the so-called “covers”.
- 37 The tricky part of the measurement is that, because of widespread copying, one cannot rely on sales figures supplied by the industry. Copying is likely to focus most on popular hits. In his fieldwork Lunney relied on songs that appeared in the Top 50 of the Billboard Hot 100, played by radio stations, over the period 1985–2013. Over this period the proportion of new artists appearing in the Top 50 with their first creation remained relatively constant,<sup>41</sup> as did the proportion of new artists appearing on the Top 50 list with a second or later creation.<sup>42</sup>
- 38 As regards “cover songs”, which might be substitutes for original creations where incentives are insufficient for the latter, Lunney finds a clear and steady decline over the period studied.<sup>43</sup> The proportion of new songs in the post-Napster area remains relatively constant and in the same range as before Napster.<sup>44</sup> And the number of new artists appearing on the hit list remains roughly the same between pre- and post-Napster, with an increase in very recent years.<sup>45</sup> To this it should be added that the number of new albums brought out more than doubled between 2000 and 2007, a third of which appeared as digital albums in 2007.<sup>46</sup>
- 39 Taken together, this evidence suggests that significant new music creation and widespread filesharing can coexist.<sup>47</sup> In a sense, widespread filesharing might be seen as a natural experiment reducing the scope of copyright.<sup>48</sup> Looked at this way, it suggests that for significant music creation to take place, we do not need as extensive a copyright as we now have on paper. In particular, there is little reason to think that extending copyright duration from fifty years after the creator’s death to seventy

years has any useful effect in bringing forth more original creations.<sup>49</sup> All these copyright extensions seem to result from highly successful lobbying by the cultural industries in the face of unorganised consumer interests.<sup>50</sup>

- 40 What a too long lasting copyright does was brought to light in a recent study by Heald dealing with the book industry and incidentally with the music industry.<sup>51</sup> Heald looked at a random sample of 2000 books available on Amazon.com. As expected, he found that availability decreased steadily with the age of the book. But books published in the United States before 1923 were placed in the public domain. In the sample studied, the availability curve took a significant upturn for books originally published in the 1850s till 1923. This suggests that copyright prevents republication even though there appears to be a market for reissuance of older titles, as entrepreneurial initiatives in the public domain reveal. For older music, the availability is much better, thanks to Amazon and Youtube amongst others and in part no doubt because the pieces are shorter, the conversion simpler and the commercial risk smaller.

## E. Conclusion

- 41 The fields of creative endeavour reviewed here show that where formal copyright is not available or is not working as well as hoped, industry participants adapt their business model to focus on activities sufficiently “fenced in” for revenues to be effectively secured. How this is done, how well it works and how this affects competition varies from industry to industry: fashions and trends, community norms, first mover advantage, brand name protection, live performances, open content (reducing the cost of creation) and other ways. Industry specificity is not normally considered in IP law, as it is in competition law.<sup>52</sup> The absence or ill-functioning of IP does not mean the death of creativity. Activities may be reoriented towards forms in which reward can be better ensured. In some instances, copying may actually stimulate innovation. In the case of Wikipedia, content is made entirely by volunteer effort and is explicitly offered free for copying under a creative commons licence. Without any IP protection, it is by far and away the most consulted encyclopedia in the world. It competed Microsoft’s Encarta encyclopaedia, protected by copyright, out of existence.<sup>53</sup>
- 42 Whether the resulting set-up is optimal as regards reward for existing creations as well as openness to future creations, in other words whether we have the optimal amount of innovation, is an open question. We know that this involves a trade-off,<sup>54</sup> but reliably

measuring the costs and benefits involved has so far eluded us.<sup>55</sup>

- 43 The studies reviewed here do not authorise the conclusion that we can do without IP.<sup>56</sup> A recent historical study looks at the creation and performance of operas in Italian states between 1780 and 1821, comparing those that introduced copyright during Napoleonic occupation to those that did not.<sup>57</sup> It finds that the copyright states had more and better opera and that composers born elsewhere moved to those states. Introducing copyright had a perceptible incentive effect on creation there.
- 44 Our review also shows, however, that IP has non-negligible drawbacks. Industrial concentration in the cultural industries is higher than in the fashion industry, which has no formal IP protection. Industrial concentration makes for effective lobbies and one may surmise that the continual extension of copyright in duration and scope is the result of lobbying where the forces opposing such extension are dispersed and unorganised. Too extensive copyright would lead to lock-up of cultural creations beyond what is necessary to motivate the initial creators in the first place. The study of the “disappearing” books provides some indication that we have reached this stage.
- 45 The studies on the effects of music “piracy” show that music sharing has not killed musical creation, quite the contrary. With the cost of creation coming down quickly, we have all at once more albums produced, more new creations, fewer “covers” and widespread copying. This raises the question of whether what we see is the existing distribution formula being questioned and new formulae being explored.
- 46 If intellectual property has a role to play in stimulating innovation, we must find ways to prevent lobbying efforts from extending it well beyond this role, where it becomes rent-seeking and leads to unnecessary lock-up. As for the duration of copyright, a 14-year term, renewable upon demand, might be a good starting point, as *The Economist* put it.<sup>58</sup> Raustalia and Sprigman, although insisting that intellectual property still has an essential role to play<sup>59</sup> and that there are instances where “copying is neither benign nor beneficial”,<sup>60</sup> do not offer precise advice on where that role lies and should be enforced. They offer ample evidence that copying does not kill creativity and indeed may stimulate it. They document changes in business models adopted by those seeking revenues and being unable to stop copying. The key to focus on, they insist, is return on innovation, not restrictions on copying.<sup>61</sup>

1 Mackaay 2013a, 303f.

2 Mackaay 2013a, 239f.

3 Hardin 1968.

- 4 Raustiala 2012, 7. The book synthesises arguments developed in earlier papers in 2006 and 2009.
- 5 Raustiala 2012, 171; Levine 2011 .
- 6 Raustiala 2012, 58, quoting numbers given by the (US) National Restaurants Association.
- 7 See also Fauchart 2008.
- 8 Raustiala 2012, 105 ff.
- 9 Raustiala 2012, 126 ff.
- 10 Raustiala 2012, 145 ff.
- 11 Raustiala 2012, 150.
- 12 Raustiala 2012, 155 ff.
- 13 149 F.3d 1368 (Fed. Cir. 1998), leave to appeal to the US Supreme Court denied 119 S Ct 851 (1999).
- 14 Raustiala 2012, 162 ff.
- 15 US: *Feist Publications Inc v. Rural Telephone Service Company*, 499 U.S. 340 (1991), 113 L.Ed.2d 358, 18 U.S.P.Q.2d 1275; Canada: *Tele-Direct (Publications) Inc. v. American Business Information Inc.*, (1994) 58 C.P.R. (3d) 10 (CF); [1998] 2 CF 22 (CFA); leave to appeal to the Supreme Court of Canada denied.
- 16 *Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases*. OJ L 77, 27.3.1996, p. 20–28; <http://old.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1996:077:0020:0028:EN:PDF>
- 17 Raustiala 2006, 1693.
- 18 *Fashion Originators' Guild v. FTC*, 312 US 457 (1941).
- 19 Raustiala 2012, 38, 44.
- 20 Barnett 2010.
- 21 Raustiala 2012, 213 f. (Epilogue).
- 22 *Berne Convention for the Protection of Literary and Artistic Works* of 1886, [http://www.wipo.int/treaties/en/text.jsp?file\\_id=283698](http://www.wipo.int/treaties/en/text.jsp?file_id=283698)
- 23 <http://en.wikipedia.org/wiki/Napster>
- 24 Lunney 2014a, text at nt 21 f.; Lunney 2012, 2; Raustiala 2012, 216.
- 25 Rob 2006; Peitz 2006; Liebowitz 2006; Oberholzer-Gee 2007, 2010; Waldfoegel; for Canada, Andersen 2010, contradicted by Barker 2012.
- 26 Lunney 2014a, text at nt 9 f.; Carrier 2012.
- 27 Lunney 2014a, text at nt 11 f.
- 28 Lunney 2014a, text at nt 18 f.; see also Oberholzer-Gee 2010.
- 29 Darling 2014 documents such a shift for the adult entertainment industry.
- 30 Anderson 2007.
- 31 <https://en.wikipedia.org/wiki/iTunes> ; Raustiala 2012, 220. Apple's iPod and the associated iTunes store were a runaway success. They still occupy 75% of the market for paid downloaded music.
- 32 Oberholzer-Gee 2010; Lunney 2014a, text at nt 24.
- 33 Lunney 2014a, text at nt 9.
- 34 Lunney 2009; this paper (25) relates how Stephen King used this method for his book *The Plant*.
- 35 Raustiala 2012, 222.
- 36 Raustiala 2012, 215.
- 37 Scherer 2001.
- 38 Raustiala 2012, 204; Oberholzer-Gee 2010, 22; Scherer 2001.
- 39 See Rob 2006; Waldfoegel 2011a, 2011b, 2012; Oberholzer-Gee 2007, 2010; Lunney 2012, 2014a and b.
- 40 Leonard Cohen, having been swindled by his manager, had to engage in new creation and new touring efforts. These turned out to be extremely successful, in terms of live performance

attendance as well as record sales, and largely sufficient to wipe out the losses suffered from swindling. Scherer reports that Verdi reduced creative effort when, as a result of the introduction of copyright, he could maintain his income with less effort. (Scherer 2008, 11). See also Lunney 2014a, 13 for the same substitution effect by the contemporary artist Garth Brooks.

- 41 Lunney 2014a, Fig. 3.
- 42 Lunney 2014a, Fig. 4.
- 43 Lunney 2014a, Fig. 5.
- 44 Lunney 2014a, Fig. 6.
- 45 Lunney 2014a, Fig. 7.
- 46 Oberholzer-Gee 2010, 24; see also Waldfoegel 2012.
- 47 Raustiala 2012, 7; Lunney 2014b, 296.
- 48 Lunney 2014a, 7; Waldfoegel 2011.
- 49 Lunney 2012, 19, 23-24; Mackaay 2013b.
- 50 Lunney 1996, 629.
- 51 Heald 2014.
- 52 Hovenkamp 2015.
- 53 Raustiala 2012, 185.
- 54 Mackaay 2013a, 342-343.
- 55 Darling 2014, 708.
- 56 Raustiala 2012, 9, 202; Darling 2014, 660; contra: Boldrin 2008.
- 57 Giorcelli 2014.
- 58 *The Economist* 25 January 2003, p. 15; repeated *The Economist* 2 July 2005, p. 14; and again 8 April 2010
- 59 Raustiala 2012, 203.
- 60 Raustiala 2012, 211.
- 61 Raustiala 2012, 203.

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