



inDICEs

Measuring the Impact of Digital Culture

Deliverable 2.2

Legal comparative analysis for multi-level relationship involving CHIs



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1 Executive Summary

The overall goal of the inDICEs project is to empower policy-makers and decision-makers in the Cultural and Creative Industries to fully understand the social and economic impact of digitization in their sectors. This project aims at providing the cultural heritage institutions (hereinafter 'CHIs') with a specific self-assessment tool to enable them to make strategic decisions in order to advance in the Digital Single Market.

It is essential to ensure that CHIs are fully aware of the impact that intellectual property (hereinafter 'IP') rules, and in particular of copyright legislation, make on their core activities, such as with respect to access, use and re-use of cultural content.

The first WP2 deliverable (Deliverable 2.1) of this project aimed at mapping the relevant IP rights (IPRs) at EU and international level. This deliverable, titled 'Legal comparative analysis for a multi-level relationship involving CHIs' focuses on comparative analysis of the relevant copyright-related provisions that impact the activities carried out by CHIs. The legislative framework of six selected Member States (Belgium, France, Lithuania, Poland, Spain and Sweden) is compared in this study. The jurisdictions were selected based on the agreement made with a partner H2020 project, reCreating Europe, where other EU national jurisdictions will be analysed.

In this report we divided the analysis of the copyright rules in four areas that are specially relevant for fulfilling the public-interest missions of CHIs.

First, we provide a comparative analysis of some exceptions and limitations (Section 3.1) that have a clear impact on CHIs' activities, namely the preservation exception, the research and private study via dedicated terminals exception and the exception for advertising exhibitions and sales of works. In this section, we also provide a brief overview of the state of affairs after the adoption of the Copyright in the Digital Single Market Directive (hereinafter 'CDSM'). Furthermore, we focus on the pre-existing (prior to the CDSM Directive) Text and Data Mining (hereinafter 'TDM') exceptions of some national legal systems.

The second part of the analysis (Section 3.2) is divided according to the rules affecting certain types of works that can be part of the CHI's collections. The regulation (or the lack of regulation) of the uses of those works by CHIs can pose problems from the IP perspective. The types of works that may create the most difficulties are orphan works, out-of-commerce works (hereinafter 'OOCWs'), photographs and databases. The new provision on works of visual arts in the public domain included in the CDSM Directive is also mentioned.

The third part of the report addresses the relevant provisions on the public lending derogation, the moral rights and the adaptation right and derivative works (Section 3.3). Those aspects are essential to analyse since they are of relevance to CHIs for the digital and cross-border activities as explained in Deliverable 2.1.

Finally, in Section 4 we explore provisions that have an impact on the activities of CHIs such as the protection for posthumous works, as well as certain rules on the exercise of moral rights after author's death in selected jurisdictions.

2 Introduction and Objectives

Section 1 of the Deliverable 2.1 of the inDICEs project assessed the IP rules at the EU and international level, highlighting the importance of IPRs for CHIs. In this Deliverable, we provide a comprehensive comparative analysis of the copyright rules in six Member States, namely Belgium, France, Lithuania, Poland, Spain and Sweden.

In the first deliverable, among other IPRs, we also analysed the legislation governing trademarks and designs. Trademarks and designs are not subject to the current deliverable as they are further harmonized at EU level¹. This Deliverable focuses only on the copyright rules as copyright has not been completely harmonized at the EU level and, as a consequence, the national copyright systems may vary considerably from one jurisdiction to another. This study only focuses on the most relevant copyright-related matters for CHIs and for the inDICEs project.

As explained in Deliverable 2.1, the lack of full harmonization of copyright law in the EU entails certain difficulties for CHIs, especially when operating digitally. Multiple problems also arise in the cross-border framework. The legal uncertainty triggered by the unharmonized nature of the relevant legal framework may prevent CHIs from fully benefiting from the Digital Single Market. In addition, it may also restrict the access to the online content provided by these institutions. Such limitations may have negative consequences for access to culture and knowledge at the EU level and may reduce the impact of the goals and missions of CHIs.

The Covid pandemic further exposed the problems of the current IP system for CHIs. It was evident that some CHIs were not completely prepared to provide access to their collections digitally, including within the Digital Single Market framework. The pandemic prevented CHIs from providing access to their collections via a classical physical mode, which shows the CHIs' need to engage and interact with users beyond physical barriers. It is essential for CHIs to be more active in the online environment in the coming years to ensure a broader accessibility of their content, as well as to remain sustainable in order to fulfilling their public-interest missions. However, the digital transformation of CHIs may be complicated from the IP perspective: regulation of the physical access to IP protected CHIs' content may differ significantly from the online access. In addition, CHIs have seen a drop in their revenues which certainly puts the financial sustainability at risk². To ensure that the shift to online access is

¹ See Deliverable 2.1.

² Ekaterina Travkina, Pierluigi Sacco and Benedetta Morari, 'Culture Shock: COVID-19 and the Cultural and Creative Sectors' (Organisation for Economic Co-operation and Development (OECD) 2020).

lawfully done , CHIs must be aware of the IP rules, and specially the copyright rules given that copyright law governs the content creation, access and sharing in the digital environment.

Our comparative analysis aims at observing and understanding where the copyright-related issues for CHIs stand at national level to achieve an operational Digital Single Market. This comparative study shows the main divergences among the Member States, if any, in their copyright laws.

Therefore, the study of the relevant legal provisions of six selected jurisdictions provides us with an in-depth overview of the current copyright situation and serve as a basis for our further evaluative analysis within the inDICES project, especially on IP, digitization and online access of CHIs.

In our upcoming deliverable, we will evaluate the IP-related barriers that CHIs currently encounter and that prevent them from fulfilling their missions. In addition, this analysis will also identify potential opportunities for CHIs which a clear and understandable IPRs management could provide. The overview of these opportunities will be developed jointly with other partners of the inDICES project. Finally, our legal study will contribute to the self-assessment tool for CHIs that is envisaged within the project.

3 Copyright-related provisions

3.1 Exceptions and limitations

Article 5 of the Infosoc Directive³ lays down a general framework in the form of a extensive exhaustive list of (mostly optional) exceptions that the Member States may provide in their national copyright laws. Member States are not permitted to add or maintain exceptions not included in Article 5, but they are given some leeway to decide whether and how to implement the different optional provisions. Additional flexibility is given vis-a-vis the establishment of a remuneration system in relation to all or to some exceptions. Yet, some of the exceptions add the obligation for Member States to introduce, in case such exception is implemented at national level, a fair compensation scheme for rightsholders.

The manner in which the Member States implement these exceptions in their national laws differ considerably. An excellent overview of the implementation status of the 22 exceptions in Article 5 of the Infosoc Directive in the different Member States is provided by *Kennisland* at its interactive site where CHIs will find useful initial information⁴.

The applicable exceptions for CHIs at the EU level have been analysed in Deliverable 2.1 of the inDICEs project. In this section, the most relevant exceptions for CHIs and the manner in which they have been transposed in the selected Member States are more thoroughly assessed.

New exceptions and limitations impacting the activities of CHIs are included in the recent CDSM Directive. This Directive is still in the implementation process at the national level and must be transposed into national laws by June 2021. While the new exceptions are of key relevance for CHIs, only one Member State (Belgium) from the jurisdictions analysed in this study, has made available a draft text implementing the Directive. For this reason, it is not possible for us at the moment to carry out an in-depth comparative analysis of the national laws of selected Member States transposing the CDSM Directive's provisions. Until the transposition is completed, the main reference remains to be the Infosoc Directive.

³ 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.

⁴ <https://copyrightexceptions.eu>

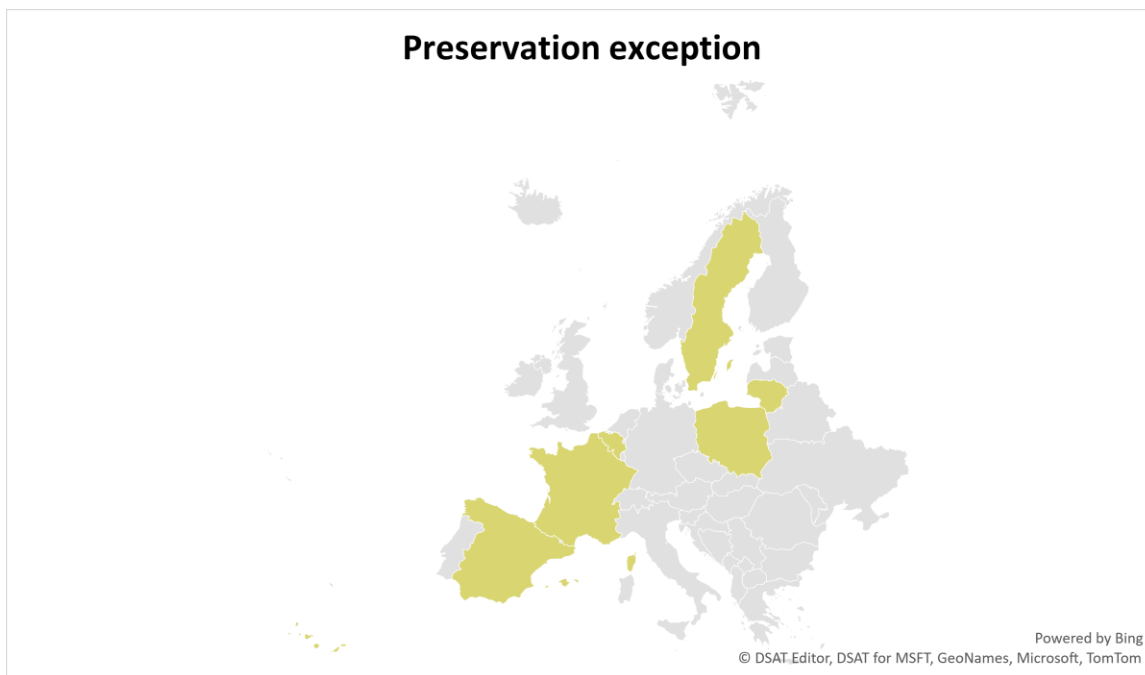
3.1.1 Preservation exception

At the EU level, one of the most relevant exceptions for CHIs included in the Infosoc Directive is the so-called “preservation exception” provided in Article 5(2)(c). This exception allows for ‘specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage’⁵. Due to the optional character of this exception, its scope and conditions of application vary considerably amongst the different Member States.

In this section, an analysis of the scope of this exception as introduced on the national level is provided.

Comparative analysis

While after the adoption of the Infosoc Directive the preservation exception has been introduced (or amended) in all the countries analysed, the provision has been implemented in a different manner in each country. It must be noted that the exception provides for a general framework described as maximum harmonization. This means that Member States cannot go beyond the terms of the Directive. Yet, main divergences arise in the type of beneficiaries that invoke the exception, as well as in certain particularities of the scope of the exception itself. These aspects are further specified below.



⁵ See Deliverable 2.1 for further analysis of the exception in the Infosoc Directive.

Beneficiaries

The Directive explicitly includes non-profit publicly accessible libraries, educational establishments, museums and archives as beneficiaries of the exception⁶. Yet there is a great variety on how the Member States have transposed this provision in relation to the beneficiaries of the exception in each jurisdiction, as a result of their specific legal systems and policies.

Libraries, archives and museums as beneficiaries - For instance, all the countries under the study include publicly accessible libraries and archives as institutions that can benefit from the exception. While museums are also included in almost all countries at stake, surprisingly, they are not included in the statutory provision of the Swedish Copyright Act. In Poland, museums were only explicitly included in the exception after a 2015 amendment of the Copyright Act⁷.

Additions and restrictions of beneficiaries - Despite the fact that France only includes museums, archives or libraries that are accessible to the public⁸, the French Heritage Code also includes to the list of beneficiaries cultural institutions that are in charge of legal deposit as well⁹. Belgium¹⁰¹¹ follows the same approach: only publicly accessible libraries, museums and archives can make use of this exception. On the contrary, Spain¹² enlarges the list of beneficiaries by adding sound libraries, film libraries and newspaper libraries¹³ to the aforementioned list. It is, however, mostly agreed by the doctrine that this list is not fully exhaustive and other institutions could also benefit from the exception as long as they pursue the objective of archiving or custody of works or carry out cultural promotion activities as long as they comply with the statutory requirements¹⁴ (see Annex V).

In Sweden,¹⁵ the only institutions that can benefit from the exception are the governmental and municipal archival authorities, the scientific and research libraries operated by the community at

⁶ See Deliverable 2.1 for a further analysis of the beneficiaries of the exception in the Infosoc Directive.

⁷ See Annex IV for further analysis of the exception in Poland.

⁸ Consolidated Text of the Code de la propriété intellectuelle (Dernière mise à jour des données de ce code : 02 août 2020) art. L-122-5, 8.

⁹ French Heritage Code (last modified in January 2020) L-131-1.

¹⁰ Belgian Code of Economic Law of 28 February 2013 (Copyright and neighbouring rights contained in Title 5 of Book XI in force since 1 January 2015) Art.XI.190(12).

¹¹ See Annex I for further analysis of the exception in Belgium.

¹² See Annex V for a further analysis of the exception in Spain.

¹³ Consolidated Text of the Law on Intellectual Property, Regularizing, Clarifying and Harmonizing the Applicable Statutory Provisions (approved by Royal Legislative Decree No. 1/1996 of April 12, 1996, and amended up to Royal Decree-Law No. 26/2020 of July 7, 2020) 'The Spanish Intellectual Property Law'. Art. 37(1).

¹⁴ María Serrano Fernández, *El Impacto de La Sociedad de La Información En La Propiedad Intelectual* (1st edn, Tirant lo Blanch 2019) 100.

¹⁵ See Annex VI for further analysis of the exception in Sweden.

a large (public authorities) and public libraries. As mentioned above, museums are not included in the exception.

Poland adds higher education institutions, research institutes and scientific institutes of the Polish Academy of Sciences (under certain restrictions) to the list of beneficiaries of the exception.¹⁶

Requirement of public accessibility - The Directive's *requirement of public accessibility* for some institutions, namely for libraries, is not required for archives to benefit from the exception. Yet this requirement has been applied in a different manner by the different Member States.

For instance, in France, this requirement only refers to the possibility of the public to get access to the library and not to the public or private ownership of the institution. Private libraries can also benefit from the exception as long as they are publicly accessible.¹⁷¹⁸

In Belgium, libraries and museums can only benefit from the exception when they are accessible by the public in a non-discriminatory way.¹⁹ No condition for accessibility to the public is required for archives. Yet, a beneficiary institution cannot seek any direct or indirect commercial profit to ensure that libraries or archives that belong to private companies are excluded from the exception even if they are accessible to the public.²⁰ No reference to public or private ownership of the institutions is stated for Belgium, which suggests that private heritage collections are not excluded from the scope of the exception (as long as no commercial advantage is sought).²¹

In Spain, the statutory provision does not impose a public requirement of public accessibility but, on the contrary, the Spanish IP Law imposes other restrictions since it requires that all the beneficiary institutions must be either publicly owned²² or integrated in institutions of cultural or scientific character.

The Swedish law follows a different approach: while public libraries are included in the exception, scientific and research libraries need to be operated by public authorities in order to benefit from the exception. The Swedish government may allow other archives and libraries that are not

¹⁶ Polish Act of February 4, 1994, on Copyright and Related Rights (Journal of Laws 1994, No. 24, item 83, as amended up Act of February 13, 2020) art.28.1.

¹⁷ Christophe Alleaume, 'Les exceptions au bénéfice des bibliothèques, des musées et des services d'archives' (2007) n° 39 Legicom 25, 28.

¹⁸ See Annex II for a further analysis of the exception in France.

¹⁹ Marie-Christine Janssens, 'General Exceptions to the Author's Economic Rights' in Fabienne Brison and Hendrik Vanhees (eds), *Het Belgische auteursrecht: artikelsgewijze commentaar. Huldeboek Jan Corbet; Le droit d'auteur belge commentaire par article. Hommage À Jan Corbet* (4de herziene druk, Bruxelles : Larcier 2018) 238.

²⁰ Janssens (n 19) 239.

²¹ Janssens (n 19) 239.

²² Jean-Paul Triaille and others, *Study on the Application of Directive 2001/29 /EC on Copyright and Related Rights in the Information Society (the "InfoSoc Directive")* (European Union 2013) 275.

included in the statutory provision to benefit from the exception as long as they are accessible to the public.²³

On the contrary, Lithuania²⁴ and Poland²⁵ do not specify any requirement of public accessibility and/or ownership for the institutions to benefit from the exception.²⁶ Yet, for the latter, the requirements of public accessibility result from specific provisions on particular institutions, e.g. museums or libraries.²⁷

Educational establishments are nevertheless not included in the Spanish, French and Swedish exceptions. Belgium has also excluded the educational establishments from the exception but opens the door for their libraries or archives²⁸ (see Annex I). On the contrary, Lithuania²⁹ and Poland³⁰ include them as beneficiaries of the exception.

Scope of the exception

Authorized acts - It must be stressed that only specific acts of reproduction are permitted under the Directive's exception. This approach is followed by the majority of the analysed Member States. Apart from acts of reproduction, France also permits 'the communication to the public of a work' (*représentation*) provided they are carried out via dedicated terminals in the beneficiaries' premises³¹ (see Annex II). These authorized acts aim at preserving the institutions' collections, as stated in all the jurisdictions under study. The wording of the provisions at stake however differs. In particular, while Belgium and Sweden refer to '*preservation purposes*', Spain and France use the term '*conservation*'. Yet, none of the jurisdictions provide a statutory definition of such expressions. Lithuania further elaborates on the purposes by including the need of 'restoring a lost, destroyed or rendered-unusable copy of a work'. Poland enlarges the purposes by adding a reference to 'the purposes of supplementing, preserving, or protecting'³² the collections.

²³ Act on Copyright in Literary and Artistic Works. Act 1960:729, of 30 December 1960 (last amended by SFS 2020:540 on 18 June 2020). Sec. 16.

²⁴ See Annex III for a further analysis of Lithuania.

²⁵ The Polish Copyright Act art.28.1.

²⁶ Law on Copyright and Related Rights of the Republic of Lithuania, 18 May 1999 No VIII-1185 (last consolidated version of 1 July 2019) art.23.

²⁷ See Polish Act of November 21, 1996 on museums (Journal of Laws of 2012, item 987); Polish Act of June 27, 1997 on libraries (Journal of Laws of 2012, item 642, as amended) d.).

²⁸ Janssens (n 19) 239.

²⁹ The Lithuanian Copyright Law art.23.

³⁰ The Polish Copyright Act art.28.1.

³¹ David Pouchard, 'La valorisation des fonds photographiques, ou comment concilier le droit d'auteur et l'accès au patrimoine culturel' [2018] In Situ 9 <<http://journals.openedition.org/insitu/17981>> accessed 11 February 2020.

³² The Polish Copyright Act art.28.1(2).

It seems evident from our research that making copies of the works to preserve them for the future avoiding deterioration or loss of the work is allowed under this exception in all the analysed jurisdictions. The exception also includes making copies of works due to the evolution of technology, namely, the migration from one format to another.³³ Furthermore, none of the provisions impose neither any restriction on the number of copies permitted under the exception nor on the form of such copies as long as they are made for preservation purposes.

No restrictions on the number of copies or the form of reproductions - There is no further requirement in the Spanish statutory provision on the works that fall under the scope of the exception neither on the number of copies that can be made by relying on this exception. Furthermore, there are no restrictions concerning the number of copies that can be made relying on this exception in Belgium. The number of copies are only limited to the ones needed for the purposes of/and justified by the preservation purposes.³⁴ Given that there is no restriction on the form of reproduction, it is agreed that analogue or digital forms of reproductions are allowed.³⁵ In Lithuania, reproductions can be made by any means as the law does not restrict the type of technology used for the reproductions.³⁶ In addition, the Lithuanian exception permits repeated acts of reproductions provided they are carried out on 'unrelated occasions'. The Swedish Copyright Act does not impose any restriction either on the number of copies permitted or on the form of such copies as long as they are made for preservation purposes. No requirements are imposed in France as long as the copies are made for conservation purposes. The beneficiary institutions are also allowed to make copies of the works in both physical and digital formats.³⁷

Furthermore, there are no further restrictions in Poland on the number of reproductions that beneficiary institutions may make on the format of such reproductions. However, reproductions for the purpose of supplementing, preserving or protecting collections may not lead to an increase in the number of copies of the works. In addition, in Poland, the work does not need to be published beforehand and hence institutions have the possibility to digitize works which were not previously made available to the public in any way.

No commercial advantage - All countries assessed explicitly state in their legal provisions that the acts of reproduction are allowed as long as the institutions do not seek any *commercial advantage* (as required by the Infosoc Directive). This requirement has been followed by almost all the

³³ Alleaume (n 17) 27; Serrano Fernández (n 14) 107; Janssens (n 19) 241; Johan Engdahl and others, 'AIPPI Report on Exceptions and Limitations to Copyright Protection for Libraries, Archives and Educational and Research Institutions - Sweden' (2015) 2.

³⁴ Triaille and others (n 22) 277.

³⁵ Janssens (n 19) 241.

³⁶ Rita Matulionyte, 'A Central and Eastern European Perspective on EU Copyright Reform: The Case of Lithuania' [2019] Cambridge handbook of intellectual property in Central and Eastern Europe 259, 270.

³⁷ Pierre-Yves Gautier, *Propriete Litteraire et Artistique* (11e enriche, Paris : PUF 2019) 400.

Member States under study with the exception of Sweden where there is no statutory reference in this regard. In Lithuania, reproductions are permitted as long as they are not made for commercial purposes. In France, institutions should not seek ‘any commercial or economic advantage’. According to the doctrine, this exception must be carried out in a manner that reproductions of the works do not replace the sales of such works and the digital reproductions of the works are not used for the online sharing of the content³⁸. The Spanish legislator opted for the reference to ‘non-profit purposes’ while Belgium states that the reproductions must be carried out provided the institutions do not seek any commercial or economic advantage, directly or indirectly. It is not excluded that these institutions request a fee for the entrance³⁹ or that institutions provide copies against the payment of a fee⁴⁰. In Poland the law conditions the permitted uses to the absence of ‘direct or indirect financial gain’⁴¹

Digitization of the whole collection.- Based on our analysis, it seems clear that this exception does not permit the *digitization of the whole collection* since most of the countries understand that the legislator intentionally limited the scope of the exception by adding similar references to ‘specific acts of reproduction’ as in the Directive. In similar terms, this limitation is provided in Spain⁴² by using the term ‘specific acts of reproduction’ or in Belgium⁴³ by referring to ‘limited acts of reproduction’. In France, even though the matter is not explicitly covered in any legislative provision, the doctrine provides the necessary details. In particular, it specifies that the exception does not allow mass-digitization projects of large amount of works and does not permit the acts of making available to the public apart from the specific cases contemplated in the provision.⁴⁴ In Lithuania and Poland there is no such limitation in the statutory provision.

Communication of the work to the public - In none of the analysed jurisdictions the exception allows for the communication of the works to the public as required by the Directive. Yet in France, the exception allows for the communication to the public of the work via only via dedicated terminals in the beneficiaries’ premises⁴⁵ (see Section 3.1.2). In Sweden, the system of Extended Collective Licenses (hereinafter ‘ECL’) that exist under the Swedish Copyright Act has

³⁸ Alleaume (n 17) 27.

³⁹ Triaille and others (n 22) 268.

⁴⁰ María Serrano Fernández and others, *Estudio de Los Límites a Los Derechos de Autor Desde Una Perspectiva de Derecho Comparado: Reproducción, Préstamo y Comunicación Pública En Bibliotecas, Museos, Archivos y Otras Instituciones Culturales* (1st edn, Editorial Reus 2017) 47 <<https://elibro.net/es/lc/icam/titulos/46668>>.

⁴¹ The Polish Copyright Act art.28.1(2).

⁴² Serrano Fernández (n 14) 107.

⁴³ Janssens (n 19) 241.

⁴⁴ Pouchard (n 31) 9.

⁴⁵ France allows for the communication of the work to the public provided it is carried out via dedicated terminals in the beneficiaries’ premises. In France, the preservation exception and the exception for research via dedicated terminals are included in the same statutory provision.

specific rules for CHIs⁴⁶ which permit other uses as long as these works are in the organizations' collections and have already been disclosed (see Annex VI).

Compensation - None of the assessed jurisdictions impose any compensation to the rightholders for the uses of their works under this exception. In France the lack of compensation for authors has been criticized by the doctrine⁴⁷ (see Annex II).

Types of works

There are no restrictions on the types of works that can be reproduced under the exception in Spain, Belgium, Poland and France. Thus, it can be concluded that in principle all types of works may be eligible. In Lithuania, all works are eligible except from those works 'communicated to the public via computer networks (on the Internet)'⁴⁸. In Sweden, all literary and artistic works can be reproduced under the exception with the sole exclusion of computer programs. According to the legal provision of the jurisdictions under study, works must be permanently in the collections of the institutions even if it is not explicitly mentioned in the legal texts.⁴⁹

Further restrictions

While the exceptions and limitations need to be interpreted in light of the three-step test⁵⁰ in all countries in an implicit or explicit manner, in Belgium, the use of the test is explicitly enshrined in the preservation exception itself.⁵¹

Furthermore, an interesting provision is included in the Belgian law which states that 'the materials produced in this way remain the property of these institutions, which refrain from any commercial or lucrative use'. In addition, the third paragraph of the provision grants the author the possibility to access such materials with strict respect for the preservation of the work and providing a fair remuneration for the work accomplished by these institutions.⁵²

CDSM Directive

At the moment, only Belgium has made a draft text implementing the new preservation exception into Belgian law publicly available. The preliminary draft broadens the scope of the exception in

⁴⁶ Swedish Copyright Act Sec.42(d).

⁴⁷ Alleaume (n 17) 29.

⁴⁸ The Lithuanian Copyright Law art.23.

⁴⁹ In some countries like Lithuania and Poland, the statutory provision states such requirement. However, in other countries such as France or Sweden, the doctrine understand that works must be in the collections of CHIs to fall under the exception. See respective annexes.

⁵⁰ See Deliverable 2.1 for further analysis of the three-step test.

⁵¹ Belgian Code of Economic Law Art.XI.190.(12^o) .

⁵² See Annex I for a further analysis in Belgium.

terms of the works that can be reproduced by certain institutions and it adds certain clarifications to the exception. Yet, given the early stage of the process, the text may still be considerably modified during the legislative process (see Annex I for a further analysis of the preliminary draft of the exception in Belgium).

Interim conclusions

Based on our analysis from the assessed national jurisdictions, we can draw the following conclusions:

- None of the countries assessed go beyond the scope of the exception of the Infosoc Directive although there are still divergences among the implementation of the exception.
- The wide variety of beneficiaries of the exception in each country is one of the main divergencies among the national laws.
- Digitization of the whole collection does not seem to be permitted under the exception in most of the countries at stake. The uses for commercial purposes are also not allowed.
- There are no further restrictions (or clarifications) on the number or format of reproductions allowed.
- None of the countries assessed have a remuneration system for the uses under this exception.
- The new exception under the CDSM will provide further legal certainty to CHIs. Yet, it still needs to be implemented at a national level.

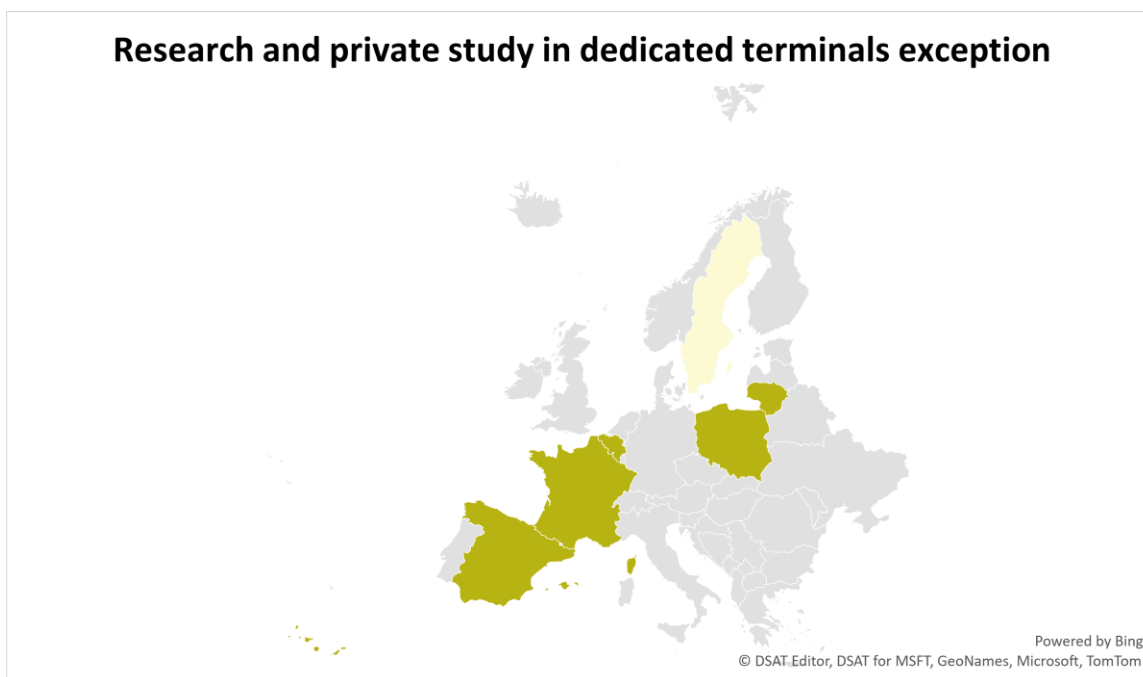
3.1.2 Research and private study standing in dedicated terminals

With respect to making content available, Article 5(3)(n) of the Infosoc Directive provides for an exception at EU level for the ‘use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections’.

Although this exception is narrowly drafted, this section analyses how particular Member States have applied it into their national laws.

Comparative analysis

After the adoption of the Infosoc Directive, this exception has been implemented in Belgium,^{53,54} Lithuania,^{55,56} France,^{57,58} Poland^{59,60} and Spain.^{61,62} Sweden has not implemented this exception in its national jurisdiction.



Beneficiaries

The Directive includes publicly accessible libraries, educational establishments, museums and archives as beneficiaries of the exception (as in the preservation exception). These institutions shall not seek for any commercial or economic advantage.

The 'list' of beneficiaries - All the analysed countries include publicly accessible libraries, museums and archives as beneficiaries. Yet, there are still some differences among jurisdictions.

⁵³ Belgian Code of Economic Law Art.XI.190.(13°), .

⁵⁴ See Annex I for a further analysis of the exception in Belgium.

⁵⁵ The Lithuanian Copyright Law art.22.3.

⁵⁶ See Annex III for a further analysis in Lithuania.

⁵⁷ French IP Code Art.L-122-5,8.

⁵⁸ See Annex II for further analysis of this exception in France.

⁵⁹ The Polish Copyright Act art.28.1.

⁶⁰ See Annex IV for a further analysis of the exception in Poland.

⁶¹ The Spanish Intellectual Property Law Art.37(3).

⁶² See Annex V for a further analysis of the exception in Spain.

For instance in Belgium,⁶³ educational establishments and scientific establishments are also considered beneficiaries of the exception. Similarly, Lithuania adds libraries of educational and research institutions to the list of beneficiaries.⁶⁴ In Poland, higher education institutions, research institutes and scientific institutes of the Polish Academy of Sciences (under certain restrictions⁶⁵) are also as among the beneficiaries of the exception.⁶⁶

Educational establishments are nevertheless excluded from the exception in France.⁶⁷ In addition, France includes organizations that are in charge of the legal deposit to the 'list' of beneficiaries, as stated in the French Heritage Code.⁶⁸ The Spanish legislator explicitly adds sound libraries, film libraries and newspaper libraries.⁶⁹

Accessibility requirement - The Member States also apply the *accessibility requirements* of the Directive in a different manner. In Belgium, only libraries are required to be publicly accessible by the legal provision. Yet, most of the doctrine considers that the accessibility requirements, normally through a registration system, should also be applicable to educational and scientific establishments.⁷⁰ Private institutions may fall within the scope of the exception as long as they do not seek any commercial or economic profit. For Spain, Poland and France, as the exception is the same as the preservation exception, the conditions explained in the previous section apply. Lithuania, on the contrary, does not impose any requirement on the public accessibility of the institutions.⁷¹

Scope of the exception

The authorized acts under the Directive's exception are the communication of works to the public via specific dedicated terminals located in these establishments for research and private study purposes. Although the exception only permits the communication to the public of such works, the CJEU ruled in the *Darmstadt* case⁷² that these institutions are also allowed to digitize the works in their collections under this exception 'if that is necessary in order to make them available to the public on dedicated terminals'⁷³ (see Deliverable 2.1).

⁶³ Belgian Code of Economic Law Art.XI.190.(13°), .

⁶⁴ The Lithuanian Copyright Law art.22.3.

⁶⁵ See Annex IV for a further analysis of the exception in Poland.

⁶⁶ The Polish Copyright Act art.28.1.

⁶⁷ French IP Code Art.L-122-5,8.

⁶⁸ French Heritage Code (last modified in January 2020) L-131-1.

⁶⁹ The Spanish Intellectual Property Law Art. 37(1).

⁷⁰ Janssens (n 19) 242.

⁷¹ The Lithuanian Copyright Law art.22.3.

⁷² Technische Universität Darmstadt v Eugen Ulmer KG (C-117/13) EU:C:2014:2196.

⁷³ Technische Universität Darmstadt v Eugen Ulmer KG (C-117/13) EU:C:2014:2196 para 40.

Research and private study purposes - While Lithuania,⁷⁴ France,⁷⁵ Poland⁷⁶ and Belgium⁷⁷ allow such consultation for research and private study purposes (in Poland, ‘cognitive purposes’), Spain only permits the consultation of works for research purposes. Private study purposes are not allowed under the Spanish exception.⁷⁸ In Belgium, such consultation is allowed provided that it is made by individuals and not for the communication of works to the general public. No further restrictions on the number of individuals that can make the consultation or the category of individuals are introduced in Belgian law, Spanish and Polish law. In France, even though there is no limit on the number or the category of individuals that may be allowed to consult the work, the French Heritage Code establishes a limitation for the institutions in charge of the legal deposit: only accredited researchers are allowed to consult these works.⁷⁹

On-site consultation - Only the making available of works for their consultation for the aforementioned purposes is allowed in all the jurisdictions under study. None of the countries introduce any limitation on the number of copies that can be consulted. Yet, it seems that only the act of consultation is permitted in the sense that making copies of the works or downloading the works is not allowed in Spain,⁸⁰ France,⁸¹ Poland,⁸² Lithuania⁸³ or Belgium.⁸⁴

Dedicated terminals - The on-site consultation must be carried out in dedicated terminals in the beneficiary institutions. This requirement is explicitly stated in all the national laws of the countries examined. Belgium, Poland and France follow the same approach with minor differences in the drafting. Belgium refers to the ‘special terminals accessible in the premises of these establishments’, Poland refers to ‘terminals (IT system) located on the premises of these institutions’, while France mentions ‘dedicated terminals’. On the contrary, Spain further limits the scope of the exception by establishing a further requirement: the consultation not only must be made through ‘specialized terminals installed for this purpose’ but also through a closed and secured network, e.g. an intranet⁸⁵. The Lithuanian statutory provision requires in addition that these institutions must ensure the use of technical protection measures in order to prevent i) the

⁷⁴ The Lithuanian Copyright Law art.22.3.

⁷⁵ French IP Code Art.L-122-5,8.

⁷⁶ The Polish Copyright Act art.28.1(3).

⁷⁷ Belgian Code of Economic Law Art.XI.190.(13°), .

⁷⁸ The Spanish Intellectual Property Law Art. 37(3).

⁷⁹ French Heritage Code (last modified in January 2020) L-132-4 establishes that ‘the consultation of the work on site by researchers duly accredited by each depositary body on individual consultation stations, the use of which is exclusively reserved for these researchers’.

⁸⁰ Rodrigo Bercovitz Rodríguez Cano and others, *Manual de Propiedad Intelectual* (8th edn, Tirant lo Blanch 2018) 121.

⁸¹ Alleaume (n 17) 31.

⁸² See Annex IV for a further analysis in Poland.

⁸³ The Lithuanian Copyright Law art.22.3.

⁸⁴ Technische Universität Darmstadt v Eugen Ulmer KG (C–117/13) EU:C:2014:2196 para 51 et seq.

⁸⁵ The Spanish Intellectual Property Law Art.37(3).

reproduction of the works and that ii) the content of works is not transferred outside these dedicated terminals to any external network.

Compensation - The Spanish legislator imposes the condition according to which the authors should receive an equitable remuneration from the use of their works under this exception.⁸⁶ On the contrary, Belgium, Lithuania and France do not impose the obligation to remunerate rightholders for the uses of their works under this exception.

Types of works

In Belgium, Lithuania, Poland, France and Spain, the statutory provisions do not exclude any category of work from the scope of the exception. As a result, all the types of works are eligible. Yet, it is explicitly stated in the legal provisions that the works must be in the own collections of the beneficiary institutions in Spain, Lithuania and Belgium. This requirement entails that works that an institution holds through, for instance, interlibrary loan do not fall under the exception. The French exception does not include this requirement explicitly but it can be inferred from the purposes of the exception⁸⁷ (see Annex III). Yet, it is not clear whether works must be within the institutions' collections in Poland.

In addition, Lithuania, Spain and Belgium limit the exception to those works that are not subject to any acquisition terms, sale or any licence (or in Lithuania, 'publicly traded') as this could involve different terms or restrictions included in these agreements. This requisite is problematic as digital works are normally under a license. Furthermore, the Lithuanian exception explicitly excludes those works which uses are forbidden by the copyright owners.

⁸⁶ Triaille and others (n 22) 315.

⁸⁷ Alleaume (n 17) 29.

Interim conclusions

Based on the analysis from the national jurisdictions at stake, we can draw the following conclusions:

- Sweden has not introduced this exception in their copyright system, which shows the partial harmonization provided by the Infosoc Directive (on exceptions and limitations).
- The scope of the exception is already rather narrow as required by the Infosoc Directive. Some countries further limits the application of the exception, e.g. Spain.
- The list of beneficiaries still differs from one jurisdiction to another.
- Limiting the exception to works in their own collection excludes certain works from the exception such as works through interlibrary loans.
- Excluding works under licence or any other agreement from the scope of the exception by some countries further limits the application of the exception.

3.1.3 Advertising the public exhibition or sale of artistic works

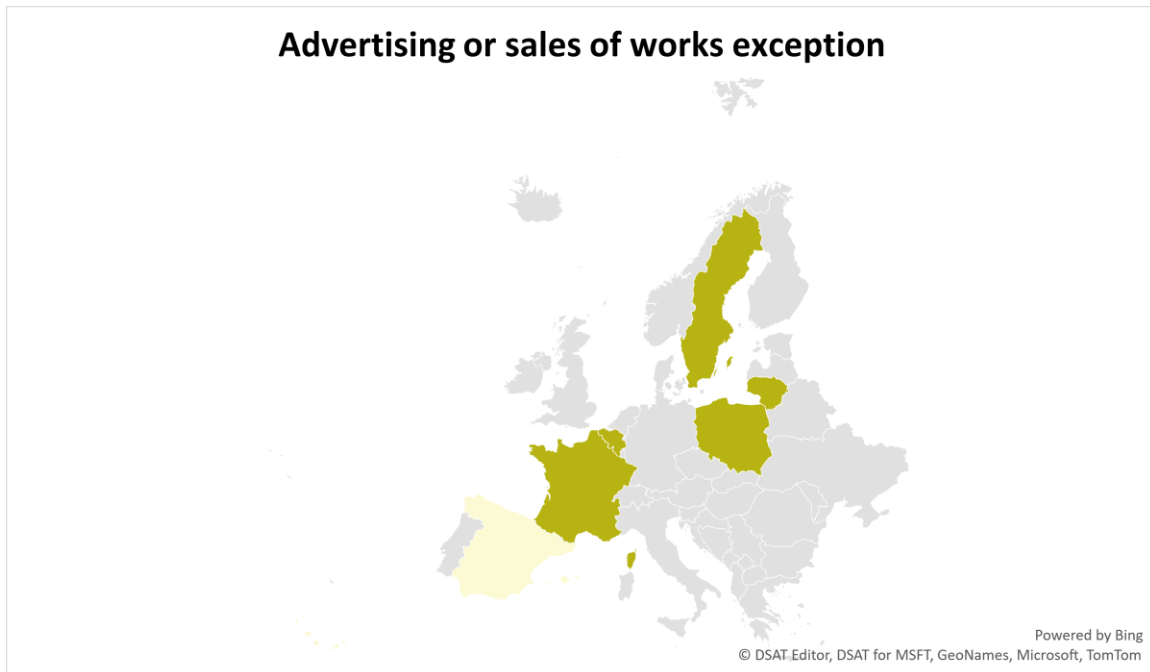
Another relevant exception for CHIs is the exception included in Article 5(3)(j) of the Infosoc Directive which provides for an exception to the right of reproduction and communication to the public ‘for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use’. This exception allows beneficiaries to use copies of a work without the rightsholder’s authorization in order to advertise an exhibition or a sale of a work.⁸⁸

The following section provides for a comparative analysis of the implementation in the Member States under study.

Comparative analysis

⁸⁸ See Deliverable 2.1 for a further analysis of the exception at EU level.

France,⁸⁹ Lithuania,⁹⁰ Belgium,⁹¹ Poland⁹² and Sweden⁹³ have introduced (or amended) this exception into their national jurisdictions after the Infosoc Directive. Spain has nevertheless not implemented the exception into Spanish law.



Beneficiaries

The ‘list’ of beneficiaries - The Infosoc Directive does not impose any limitation in relation to the beneficiaries of this exception. This approach has been followed by Belgium,⁹⁴ Poland,⁹⁵ Lithuania⁹⁶ and Sweden⁹⁷. Yet in Poland, the legislator opted for introducing a non-closed list of potential beneficiaries of the exception, which includes museums, galleries and other entities that own exhibition spaces and that organize publicly accessible exhibitions or sales of works. In Belgium museums and auction houses are the institutions that should normally make use of the

⁸⁹ French IP Code art.L-122-5,3,,d] .

⁹⁰ The Lithuanian Copyright Law art.24.4.

⁹¹ Belgian Code of Economic Law art.XI.190.(16°) .

⁹² The Polish Copyright Act art.33.3.

⁹³ Swedish Copyright Act SEc.24.

⁹⁴ Belgian Code of Economic Law art.XI.190.(16°) .

⁹⁵ The Polish Copyright Act art.33.3.

⁹⁶ The Lithuanian Copyright Law art.24.4.

⁹⁷ Swedish Copyright Act SEc.24.

exception since the exception does not cover any exhibition or sale that have a private character. Exhibitions and sales must be public, in the sense that they have to be publicly accessible⁹⁸.

France is the only analysed jurisdiction that (implicitly) imposes a restriction on the beneficiaries of this exception. This is due to the fact that in France⁹⁹, a law in 2000¹⁰⁰ reduced the scope of application of the exception by only allowing catalogues' reproductions for 'judicial auctions'.¹⁰¹ As a consequence, the aforementioned law also modified the beneficiaries of the exception (although not explicitly). Nowadays, the auctioneers in charge of these judicial auctions ('*les commissaires-priseurs judiciaires*') are the exclusive beneficiaries of the exception.

Scope of the exception

Authorized acts - The only acts authorized by the Directive are the *acts of reproduction and communication to the public*. All of the countries assessed permit the acts of reproduction for the purpose of advertising an exhibition and/or sales of works. Nevertheless, there are still differences in the implementation. The Belgian and the Lithuanian exceptions are the only ones that explicitly allow for the reproduction and the communication to the public of certain work provided they aim at advertising the exhibition and/or sale. Poland, however, does not make any reference to the authorized acts, namely to the reproduction and/or communication to the public but only refers to the 'works may be used' for the particular purposes¹⁰². Lithuania¹⁰³ also adds the 'publication' of works to the list of authorized acts. The Swedish exception however is drafted in a particular manner as it states that 'artworks may be depicted' for the aforementioned purposes¹⁰⁴. The French exception only allows the reproduction of works in a catalogue of a judicial auction.

None of the countries impose further restrictions on the form of reproductions and/or communication to the public. Thus, one could assume that both digital and physical reproductions are allowed (see Annexes). This seems clear in the Polish exception as the current regulation allows the use of the exception for the promotion of online exhibitions and sales.¹⁰⁵ In France only

⁹⁸ Janssens (n 19) 248.

⁹⁹ See Annex II for a further analysis of the exception in France.

¹⁰⁰ Law n ° 2000-642 of July 10, 2000 regulating voluntary sales of furniture by public auction art.42.

¹⁰¹ Sylviane Durrande and others, *Code de La Propriété Intellectuelle 2020, Annoté et Commenté* (20th edn, Dalloz, Paris 2020) 178.

¹⁰² The Polish Copyright Act art.33.3.

¹⁰³ See Annex III for a further analysis of the exception in Lithuania.

¹⁰⁴ With regards to the concept of depiction, the Swedish Supreme Court ruled in a case concerning 'the freedom of panorama' (first paragraph of the exception provided in Section 24 that 'the depict concept was intended to permit reproductions of the work of art by painting, sketch, photography or other technology by which the work of art is reproduced in plane level (two-dimensionally)'). See Annex VI.

¹⁰⁵ See Annex IV for a further analysis in Poland.

reproductions for catalogues of judicial sales are permitted. Yet, nothing is said about digital reproductions of the catalogue.

Purpose of advertising the public exhibition or sale of artistic works - Belgium, Lithuania, Poland and Sweden envisage the advertising purposes for both events: the exhibition and the sales of works. On the contrary, the French legislator further narrowed the scope of the exception by only permitting the beneficiaries to make reproductions of certain works for a catalogue of a judicial auction that takes place in France for the sale of works. The purpose of advertising an exhibition is hence excluded from the French exception. In Poland, the legislator included some examples of potential uses of the said works under this exception, e.g. advertisements, catalogues and other materials disseminated for the promotion of an exhibition or sale.

Authorized acts - The fact that acts of reproduction and/or communication to the public are allowed for the aforementioned purposes is further emphasized in all countries at stake (alike the Directive) by adding similar references to 'the extent necessary to promote the event'. For instance in France, reproductions are only permitted for the '*sole purpose*' of describing the works that are being sold in the judicial auction. This provision must be interpreted restrictively in order to protect the authors' rights¹⁰⁶. In Sweden, such 'depiction' is only allowed 'to the extent necessary' for the promotion of the exhibition or a sale. The same approach is taken by Lithuania. In Belgium, the exception is further restricted by the reference 'to the extent necessary to promote the event'. In Belgium, some doubts are raised on whether this exception can be used for the promotion of permanent exhibitions as the choice for the term 'event' seems to cover only a concrete exhibition or public sale.¹⁰⁷ In Poland, such uses are permitted 'to the extent justified by the promotion of an exhibition or sale of works'.¹⁰⁸

Types of works

The Directive only allows acts of reproduction and communication to the public with regards to 'artistic works' which has been implemented differently in each Member State. Lithuania and Belgium follow the same approach by referring to 'artistic works' although in Belgium the said works must have been lawfully disclosed, while France only permits reproductions of 'graphic or plastic arts' for the catalogue of a judicial auction made in France. These works of art must have already been disclosed. In Sweden, only 'works of art' without any further specification fall under the exception. Poland, on the contrary, does not make any restriction based on the types of works.

¹⁰⁶ Durrande and others (n 101) 162.

¹⁰⁷ Janssens (n 19) 248.

¹⁰⁸ The Polish Copyright Act art.33.3.

Interim conclusions

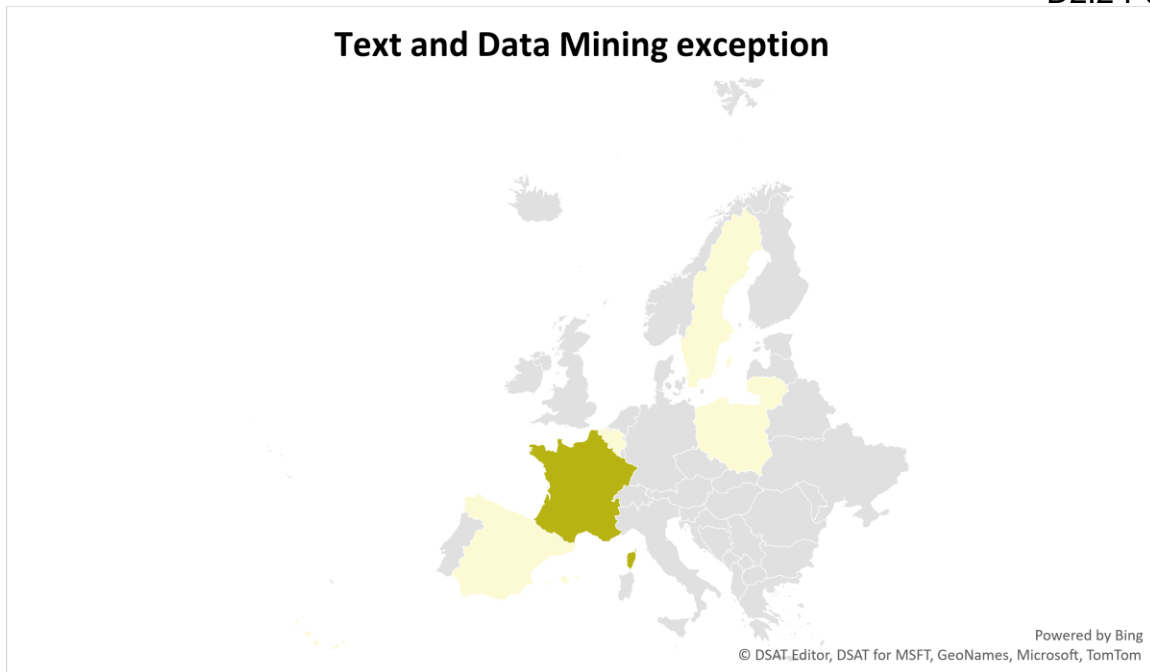
Our analysis of the national jurisdictions at stake allows us to draw the following conclusions:

- The optional character of the exception shows that this exception and the choices made by the Member States show that this exception is not harmonized at the EU level.
- While most of the countries do not impose further limitations to the exception, there are still some limitations in Member States that restrict (even further) the application of the exception.
- At the EU level the exception has already a restrictive character as only artistic works may benefit from the exception. This (already) narrow scope is further limited by some countries e.g. France, which could create certain difficulties for CHIs when they plan multidisciplinary exhibitions.
- In contrast, Poland does not restrict the application of the exception to any type of work.
- Member States do not restrict or clarify the form of reproductions and the act of communication to the public that are permitted.

3.1.4 Text and Data Mining exception

An explicit exception for TDM has only been included in the *acquis communautaire* with the adoption of the CDSM Directive¹⁰⁹ in May 2019. As mentioned before, its implementation at the national level is still ongoing. Yet, some Member States, including France, had already introduced a TDM exception in their national laws prior to the adoption of the CDSM Directive. The French TDM exception is briefly analysed below.

¹⁰⁹ See Deliverable 2.1 for a further analysis of the TDM exception under the CDSM Directive.



(i) TDM exception in France - The French legislator has introduced an exception allowing TDM related acts by the Law of the Digital Republic¹¹⁰ in 2016 which modified accordingly the French IP Code. This law added a new provision according to which, once a work has been disclosed, the author cannot prohibit 'digital copies or reproductions made from a lawful source, with a view to the exploration of texts and data included or associated with scientific writings for the needs of public research, excluding any commercial purpose.'¹¹¹ A similar exception was also included for databases.¹¹²

Beneficiaries

The French rule does not clearly specify the beneficiaries of the exception. Yet, it can be inferred from the text that only researchers carrying out TDM acts for research purposes can benefit from the exception.

Scope of the exception

The law therefore permits the 'exploration of texts and data' that are included or associated with scientific writings for the purposes of public research. To this end, the author of a scientific work that has been previously disclosed cannot prohibit the reproductions of his works – without any

¹¹⁰ LOI n° 2016-1321 du 7 octobre 2016 pour une République numérique.

¹¹¹ French IP Code L-122-5,10.

¹¹² French IP Code Art. L-342-3,5.

limitation on the format of the reproduction or the number of reproductions made¹¹³- obtained from a lawful source. The extraction of text and data must be done for public research purposes excluding any commercial advantage.

However, the broad drafting of the statutory provision does not provide enough clarity. The law does not even provide any definition of ‘text and data mining’.

It must be noted that the exception does not provide for any compensation to the rightholders for the uses of the works made under the exception.

Types of works

The law only permits reproductions for the exploration of data and text associated or included in scientific writings. Hence, only scientific writings fall under the exception. Yet, the broad drafting of the provision does not confer enough clarity. For instance, the law does not provide any definition of ‘text and data mining’ neither of ‘scientific writings’. Thus, it is not clear which kind of texts, e.g. thesis, articles, would fall under the scope of the exception.¹¹⁴

Yet, the conditions to benefit from the exception are rather strict, which increase the risk of reducing the potential impact of such exception.¹¹⁵ Nevertheless, a particular applicable regime should have been established by a Decree.¹¹⁶ However, due to the legislative process of the CDSM Directive, the legislative procedure for approving the implementing rules of the French TDM exception was (and still is) on hold.

(ii) CDSM Directive -The new Directive introduces two mandatory TDM exceptions¹¹⁷ in Articles 3 and 4. Both exceptions apply to the right of reproduction of copyright and the sui generis right of extraction for databases as well as to the new press publisher’s right. The Article 4 exception also applies to the right of reproduction and adaptation of computer programs. In particular, the provision in Article 3 is interesting as CHIs are explicitly mentioned as beneficiaries together with research organizations. These beneficiaries will be able to make reproductions ‘in order to carry out, for the purposes of scientific research, text and data mining of works or other subject matter to which they have lawful access’. The exception in Article 4 has a general character given that

¹¹³ Durrande and others (n 101) 166.

¹¹⁴ Michèle Battisti and Joachim Schöpfel, ‘Quel paysage juridique pour l’exploration de données ?’ (2017) Volume 54 I2D Information, données documents 25, 26.

¹¹⁵ Antoine Latreille, ‘Société de l’information. La fouille de texte et de données à l’épreuve de la propriété intellectuelle’ [2017] Cahiers Droit, Sciences & Technologies 197, 8.

¹¹⁶ French IP Code L-122-5,10.

¹¹⁷ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC 2019 Art.3, art.4.

there is no restriction for beneficiaries and/or specific purposes. Nevertheless, rightholders can restrict its application.

Besides the potential benefits of this exceptions for CHIs, as analysed in Deliverable 2.1 of the inDICEs project, most of the Member States do not have yet a draft law available implementing such exception in national law, except for Belgium. Consequently, it is not possible to carry out a comparative analysis.

Implementation of the TDM exceptions in Belgium - Due to the preliminary character of the Belgian draft the proposed legislative changes are only briefly presented below. Further analysis can be found in Annex I.

The Belgian draft text, which introduces a very similar TDM definition to the one under the CDSM Directive¹¹⁸, adds the TDM exception for research purposes (Article 3 of the CDSM Directive) in the specific section entitled ‘exceptions and limitations for research and educational purposes’. Belgium seems to closely follow the wording of the exception suggested in the Directive. In this regard, the new exception will allow the reproduction of works for which the beneficiaries have lawful access for scientific and research purposes in order to search text and data. The beneficiary institutions are the following: research organizations, libraries accessible to the public, museums accessible to public, archives and cinematographic or sound heritage institutions¹¹⁹. ‘These reproductions of works are stored with an appropriate level of security and can be kept for scientific research, including for verification of search results. The author is authorized to apply measures to ensure the safety and integrity of networks and databases where the works are hosted, for as far as these measures do not go beyond of what is needed to achieve this goal’¹²⁰. See Annex I for a further analysis.

The general TDM exception of Article 4 of the CDSM Directive will be introduced, in principle, with the list of general exceptions and limitations in the Belgian Code.¹²¹

Given the preliminary character of the draft law, it may be subject to modifications during the legislative process.

¹¹⁸ CDSM Directive Art.2(2).

¹¹⁹ ‘Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d’auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE’ <<https://economie.fgov.be/sites/default/files/Files/Intellectual-property/Avis%20Conseils%20Propri%C3%A9t%C3%A9%20intellectuelle/Avis-CPI-19062020.pdf>>.

¹²⁰ ‘Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d’auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE’ (n 119).

¹²¹ ‘Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d’auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE’ (n 119) 134.

Interim conclusion

It follows from our analysis in the jurisdictions at stake that:

- Only France introduced an exception for TDM purposes within its Copyright Law. This exception is narrower than any of the TDM exceptions envisaged in the CDSM Directive.
- The transposition of the CDSM Directive is still being processed at national level and therefore we cannot assess how these exceptions will be implemented.
- Only Belgium has a preliminary draft available implementing the exception but is still subject to changes.

3.2 Specific regime in respect to particular types of works

3.2.1 Orphan Works

The issue of orphan works and CHIs was identified as one of the key copyright challenges in relation to mass digitisation and online dissemination of the cultural heritage. After different initiatives at EU level, the Directive 2012/28/EU¹²² was published in October 2012¹²³ aiming at creating a legally certain framework to facilitate the digitisation and dissemination of orphan works in order to improve the large-scale digitization of collections or archives kept by various cultural heritage organisations¹²⁴. This section analyses the manner in which particular Member States have transposed this Directive in their national laws.

Although most of the countries have opted for a close transposition of the Directive, some differences may be still be found.

¹²² The Orphan Works Directive.

¹²³ See Deliverable 2.1 for further analysis of the Orphans Works Directive.

¹²⁴ Marie-Christine Janssens and Ran Tryggvadottir, 'Facilitating Access to Orphan and Out of Commerce Works to Make Europe's Cultural Resources Available to the Broader Public' [2014] SSRN Electronic Journal 6 <<http://www.ssrn.com/abstract=2538097>>.

Comparative analysis

Most of the analysed Member States started by introducing in their national laws a definition of ‘orphan works’,¹²⁵ the reference is made to the impossibility of identifying or locating the rightholder of a work. The French law adds the requirement of disclosure for an orphan work.

Nevertheless, there are some differences in the conception of the orphan status when more than one rightholder is involved in the work. For instance in France,¹²⁶ when at least one of the rightholders has been identified and found, the work is not considered orphan.¹²⁷ In Belgium and Lithuania, a work is considered orphan even when one or more rightholders have been identified but none of them could be located.¹²⁸ Yet, in the latter, before making use of the orphan works, the authorization of the identified or located rightholders (for the rights they hold) must be previously obtained.¹²⁹ In Poland, a work is considered orphan with respect to the rightholders that have not been identified or located, provided the authorization of the found rightholders is provided.¹³⁰

In addition, the Lithuanian Copyright Law introduced an interesting provision on the presumption of the orphan status of a work. The orphan status of a work may not be presumed due to (i) the lack of mention of the author’s name in a publication or broadcast or where it has been published under a pseudonym or (ii) the lack of mention of the producer of the phonogram and/or performer in a publication or broadcast.¹³¹

In Sweden,¹³² when the work has several rightholders but at least one is still unknown or unlocated, the provisions will only apply in regard to those rightholders.¹³³ Similarly, the Spanish copyright law¹³⁴ included those works owned by different rightholders when not all of them have been identified or have not been located without prejudice to the rights of the identified or located rightholders. An authorization is required when appropriate.¹³⁵

Beneficiaries

¹²⁵ See French IP Code Ar.L-113-10 ; Belgian Code of Economic Law Art.XI.245/1 ; Swedish Copyright Act Sec.16.b; The Spanish Intellectual Property Law Art.37bis; The Lithuanian Copyright Law art.2.

¹²⁶ See Annex II for a further analysis in France.

¹²⁷ French IP Code Art. L-113-10 .

¹²⁸ Belgian Code of Economic Law Art.245/1; The Lithuanian Copyright Law art.2.

¹²⁹ The Lithuanian Copyright Law art.90.2.

¹³⁰ The Polish Copyright Act art.35.5(5).

¹³¹ The Lithuanian Copyright Law art.90.4.

¹³² See Annex VI for a further analysis in Sweden.

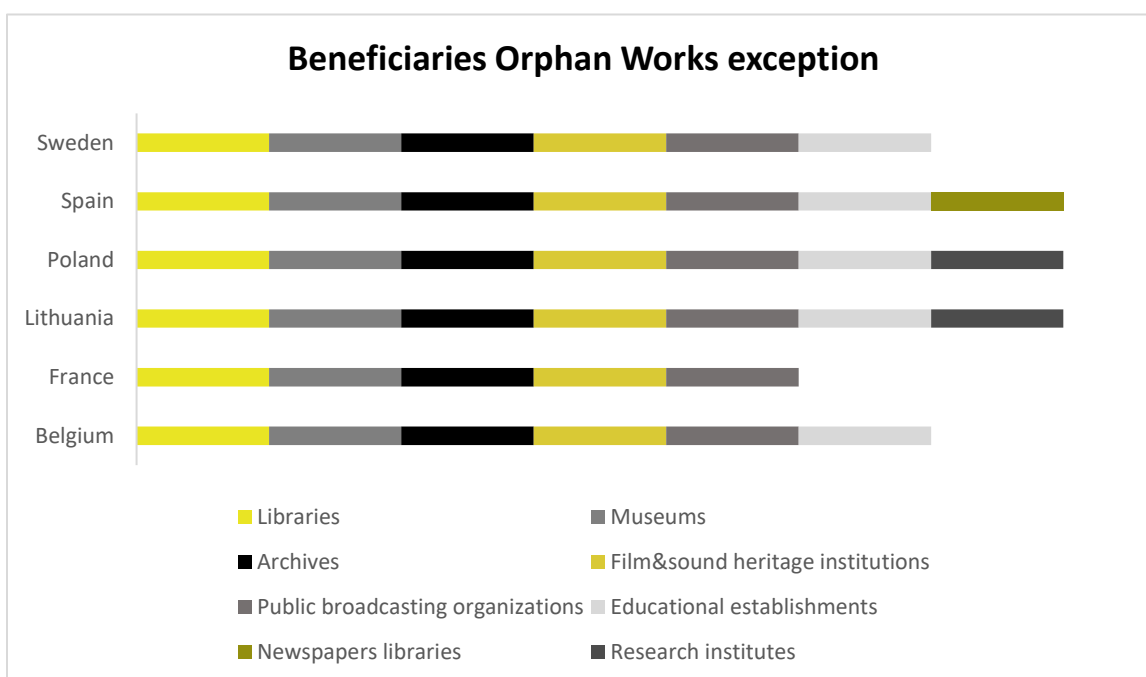
¹³³ Swedish Copyright Act Sec.16b.

¹³⁴ See Annex V for a further analysis in Spain.

¹³⁵ The Spanish Intellectual Property Law art.37bis.2.

The Directive establishes a list of the beneficiaries of the exception which are the following: publicly accessible libraries, educational establishments and museums, as well as archives, film or audio heritage institutions and public-service broadcasting organisations.

The 'list' of beneficiaries - While all of the countries assessed in this study have included publicly accessible libraries, museums and archives, film, audio heritage institutions and public service broadcasting organisations, France excludes educational establishments. Spain adds the newspaper libraries that are accessible to the public to the list of beneficiaries.¹³⁶ Lithuania¹³⁷ adds research institutes to the list.¹³⁸ Poland includes universities, research institutes and scientific institutions of the research institutes of the Polish Academy of Sciences¹³⁹ (same institutions of the preservation exception- see Annex IV).



Requirement of public accessibility - In addition, certain differences can still be found according to the *requirements of accessibility*. For instance in France, while museums or archives are excluded from the public accessibility requirement, libraries need to be publicly accessible in

¹³⁶ The Spanish Intellectual Property Law Art.37bis.

¹³⁷ See Annex III for a further analysis in Lithuania.

¹³⁸ The Lithuanian Copyright Law art.89.1.

¹³⁹ The Polish Copyright Act art.35.5(2).

order to benefit from the exception.¹⁴⁰ In Belgium,¹⁴¹ libraries, educational establishments and museums are all subject to the requirement of being publicly accessible. Archives, institutions that hold sound or cinematographic heritage, and public broadcasting institutions¹⁴² are however not required to be publicly accessible. In Sweden, libraries, educational establishments and museums must be publicly accessible. On the contrary, archives, film and audio heritage institutions do not have such requirement. However, for the latter, the Swedish Copyright Act adds another obligation: these institutions ‘must have been entrusted by the community at large to manage the film or audio heritage’.¹⁴³ In Spain, while educational centres, museums, libraries and newspaper libraries need to be publicly accessible, public broadcasting organizations, archives, sound libraries and film libraries must be publicly owned.¹⁴⁴ In Poland, for archives and cultural institutions responsible for film or sound heritage there is no requirement to be publicly accessible. Lithuania does not explicitly specify any accessibility requirement for these institutions.

Types of works

Eligible works - With regards to the types of works that can fall under the exception, France,¹⁴⁵ Spain,¹⁴⁶ Belgium,¹⁴⁷ Poland¹⁴⁸ and Lithuania¹⁴⁹ follow the Directive closely¹⁵⁰ - books, journals, newspapers, magazines or other writings in the institutions’ collections. On the contrary, Sweden¹⁵¹ only refers to ‘literary works in writings’ without listing them as the other jurisdictions under study. All countries also include, as required by the Directive, audiovisual works and phonograms in the beneficiaries’ collections.

Concerning audiovisual or sound works that were produced by public broadcasting organizations and that appear in their archives, the cut-off date is the same as required by the Directive in

¹⁴⁰ Aura Bertoni, Flavia Guerrieri and Maria Lilla Montagnani, ‘ENDOW Report 2: Requirements for Diligent Search in 20 European Countries · Copyright Cortex’ (CIPPM Bournemouth University, CREATE University of Glasgow, IViR University of Amsterdam, ASK Boconni University of Milan 2017) 60.

¹⁴¹ See Annex I for a further analysis in Belgium.

¹⁴² Belgian Code of Economic Law Art.XI.192/1.

¹⁴³ Swedish Copyright Act Sec.16a(5).

¹⁴⁴ Bercovitz Rodríguez Cano and others (n 80) 122.

¹⁴⁵ French IP Code L-135-1,1.

¹⁴⁶ The Spanish Intellectual Property Law art.37bis.4.

¹⁴⁷ Belgian Code of Economic Law Art.XI.245/2.

¹⁴⁸ The Polish Copyright Act art.35.5.

¹⁴⁹ The Lithuanian Copyright Law art.89.

¹⁵⁰ Works published in the form of books, journals, newspapers, magazines or other writings contained in the collections; cinematographic or audiovisual works and phonograms contained in the collections; cinematographic or audiovisual works and phonograms produced by public-service broadcasting organisations up to and including 31 December 2002 and contained in their archives. See Deliverable 2.1.

¹⁵¹ The Swedish Copyright Act only refers to sound recordings in Sec. 46.

Belgium,¹⁵² Lithuania¹⁵³ and Spain¹⁵⁴. Yet, in Sweden,¹⁵⁵ Poland¹⁵⁶ and France¹⁵⁷ it is drafted differently as it refers to works that were produced before 1 January 2003.

All the countries introduced the same rules for the works and phonograms that had not been published or broadcast but that were made public by the beneficiary institutions.

Embedded works - *Embedded works* or works that constitute an integral part of orphan works are also falling under the scope of the exception. In this regard, Belgium,¹⁵⁸ Sweden,¹⁵⁹ Poland¹⁶⁰ and Spain¹⁶¹ for instance follow the drafting of the Directive closely. France¹⁶² excludes independent photographs and still images instead and Lithuania includes a non-exhaustive list of works that could be ‘embedded’ in the orphan works such as illustrations, photographs, designs, sketches or maps.¹⁶³

Subject matter

Authorized acts - As stipulated in the Directive, all countries only allow beneficiaries to make orphan works available to the public and perform acts of reproduction, to the extent justified for purposes of digitisation, making available, indexing, cataloguing, preservation or restoration¹⁶⁴ and for thus achieving their aims related to their public-interest mission. Yet, there are still some (minor) differences between jurisdictions .

In France, the orphan works can only be used ‘within the framework of their cultural, educational and research missions’. A particular condition is added in the French IP Code since it establishes that institutions cannot pursue any profit-making objective for a maximum period of seven years.¹⁶⁵

The Lithuanian provision further specifies that use of orphan works can be made by the above-mentioned institutions ‘in the ordinary management of their activities aimed at their public-

¹⁵² Belgian Code of Economic Law Art.XI.245/2.

¹⁵³ The Lithuanian Copyright Law art.89.

¹⁵⁴ The Spanish Intellectual Property Law art.37bis.4.

¹⁵⁵ Swedish Copyright Act Sec.16a.

¹⁵⁶ The Polish Copyright Act art.35.5(6).

¹⁵⁷ French IP Code L-135-1,1.

¹⁵⁸ Belgian Code of Economic Law Art.XI.245/2.

¹⁵⁹ Swedish Copyright Act Sec.16a.

¹⁶⁰ The Polish Copyright Act art.35.5.

¹⁶¹ The Spanish Intellectual Property Law art.37bis.4.

¹⁶² French IP Code L-135-1,1.

¹⁶³ The Lithuanian Copyright Law art.89.2.

¹⁶⁴ Orphan Works Directive Art.6.

¹⁶⁵ French IP Code art.L-135-2.

interest missions in the fields of the promotion of culture, heritage protection, education, science and public information'.¹⁶⁶

In Poland, the use of orphan works is permitted for the aforementioned institutions in order to 'implement the statutory tasks serving the public interest, in particular preserving, renewing and sharing for cultural and educational purposes, works from their collections'.¹⁶⁷

In Belgium, while these acts need to be performed only for the purposes of 'digitization, provision, indexing, cataloguing, preservation or restoration' another legal provision adds the condition that the use of orphan works should be justified by 'their public interest missions, in particular the preservation and restoration of works or phonograms present in their collection and the provision of cultural and educational access to them' (see Annex I). This list has not been however considered exhaustive.

A similar provision is introduced in the Spanish IP Law as these acts must be carried out on the non-profit basis aiming at achieving the objectives related to its public interest's mission. The Spanish provision refers, in particular, to the conservation and restoration of the works in their collections and to making these works accessible only for cultural and educational purposes.¹⁶⁸

Diligent search

As required by the Directive, all analysed countries require the aforementioned beneficiaries of the exception to perform a diligent search in good faith as a prerequisite to use the work. Some drafting may differ as France¹⁶⁹ requires institutions to perform a 'diligent, proven and serious search', while Sweden refers to a 'careful investigation'.¹⁷⁰ In Spain¹⁷¹ and Belgium the diligent search needs to be performed in good faith. In Belgium¹⁷² and Lithuania¹⁷³ the results need to be recorded as a precondition for the use of the works.

Place and sources of the diligent search - With regards to the places where the diligent search must be carried out, all countries follow the requirements of the Directive.¹⁷⁴ Concerning the sources, most of the countries (except Sweden) have included detailed instructions on the sources that need to be consulted when carrying out the diligent search. Some countries have included

¹⁶⁶ The Lithuanian Copyright Law art.91.1.

¹⁶⁷ The Polish Copyright Act art.35.5.

¹⁶⁸ The Spanish Intellectual Property Law art 37bis.4.

¹⁶⁹ French IP Code art.L-135-3.

¹⁷⁰ Swedish Copyright Act sec.16b.

¹⁷¹ The Spanish Intellectual Property Law art 37bis.5.

¹⁷² Belgian Code of Economic Law Art.245/3.

¹⁷³ The Lithuanian Copyright Law art.90.1.

¹⁷⁴ Orphan Works Directive Art.3.

these rules in the copyright law itself, such as France,¹⁷⁵ while others have adopted specific legal instruments such as Belgium,¹⁷⁶ Lithuania,¹⁷⁷ Poland¹⁷⁸ and Spain¹⁷⁹. Sweden has not made any mention of the required sources but makes a reference to the sources indicated in the Annex of the Directive.¹⁸⁰

Most of the countries, following the approach of the Directive, distinguish the sources according to the category of works. Yet, there are certain peculiarities.¹⁸¹ For instance, France in addition refers to the information that is available on the work itself and adds the reference to 'unpublished written works' in the list of sources.¹⁸² In Spain, the Annex of the Royal Decree establishes a list of sources that can be consulted. Similarly, Belgium listed the sources in a Royal Decree¹⁸³ classified according to the category of works. This list also includes specific databases such as ARROW or other Belgian sources. While Sweden does not list the sources, it provides two different regimes, one for diligent searches in Sweden and another one for diligent searches in other countries.¹⁸⁴

Registration in the EUIPO database - All countries introduced rules for the communication of the results of the diligent search and their subsequent registration in the orphan works database managed by the EUIPO. The beneficiary institutions need to register and communicate this information to the competent authorities. In France,¹⁸⁵ the competent authority is the Ministry of Culture. In Belgium, the National Library was appointed as the competent authority for all the matters concerning orphan works. In Lithuania, the competent authority is the *Martynas Mažvydas* National Library of Lithuania.¹⁸⁶ In Poland, the competent authority is the Ministry of Culture and National Heritage.¹⁸⁷ In Sweden, further rules are established in the Copyright Regulation on the results of the diligent search: the beneficiary institutions must inform the

¹⁷⁵ French IP Code Chapter V of the applicable rules to orphan works of the French IP Code (Articles R-135-1 and seq.).

¹⁷⁶ Royal Decree of 17 October of 2016 defining the appropriate sources for carrying out the diligent search of right holders in order to determine whether a work or a phonogram is orphan works or not.

¹⁷⁷ Order of the Minister of Culture of the Republic of Lithuania of 28 January 2015 No JV- 46 concerning the sample list of sources for the diligent search of right holders of orphan works.

¹⁷⁸ Regulation of the Polish Minister of Culture and National Heritage of 23 October 2015 regarding the list of sources to be checked in the scope of diligent search for the persons entitled to works and objects of related rights which can be considered as orphan works, and the manners in which the results of the search are recorded.

¹⁷⁹ Spanish Royal Decree 224/2016, of May 27, by which the orphan works legal regime is established. 224.

¹⁸⁰ Swedish Copyright Act Sec. 16c.

¹⁸¹ See Bertoni, Guerrieri and Montagnani (n 140) for a further analysis of the requirements for diligent search.

¹⁸² Bertoni, Guerrieri and Montagnani (n 140) 62.

¹⁸³ Royal Decree of 17 October of 2016 defining the appropriate sources for carrying out the diligent search of right holders in order to determine whether a work or a phonogram is orphan works or not.

¹⁸⁴ Swedish Copyright Act Sec. 16c.

¹⁸⁵ French IP Code art.L-135-3,2.

¹⁸⁶ The Lithuanian Copyright Law art.93.

¹⁸⁷ The Polish Copyright Act art.35.7.

Patent and Registration Office, who will transmit the information to the EUIPO.¹⁸⁸ In Spain, the results of such search must be registered and shared with the specific national authority¹⁸⁹ which is the Intellectual property unit of the Ministry of Culture.

While in all countries the beneficiaries need to keep the results of their searches, in Lithuania it is explicitly stated that the beneficiaries are required to keep all the records of the diligent search until the expiration of the exclusive rights for those works.¹⁹⁰

End of orphan works status

All countries assessed provide the possibility for rightholders to put an end to the orphan status of their works when they reappear.¹⁹¹ This information also needs to be communicated to the competent authority and the EUIPO.

Compensation

As required by the Directive, when/if rightholders reappear, they have the right to obtain compensation for the uses of their works that have been made by the beneficiaries. All the countries have therefore introduced a compensation system for rightholders.¹⁹²

Yet, the mechanism of the compensation system differs in each jurisdiction. For instance in France, such compensation needs to be made in agreement between the beneficiary organization and the rightholder(s) taking into account any tariff or agreement in place for the professional sector concerned.¹⁹³ In Belgium, further practical specifications on the revenues distribution to the authors or on the calculation of the remuneration is established by a Royal Decree. In Lithuania,¹⁹⁴ the rightholder must submit an application to the institution authorized by the Government where a panel of experts will take a decision on the compensation. The said compensation will be paid by the State and will be calculated by evaluating the uses made of the works or the public-interest missions of the institutions. Further compensation and distribution arrangements are established through a Ministerial Order.¹⁹⁵

¹⁸⁸ Copyright Regulation SFS 1993:1212 of 25 November of 1993 (last amended by SFS 2018/1100) Sec. 3.

¹⁸⁹ Spanish Royal Decree 224/2016, of May 27, by which the orphan works legal regime is established. art.4.7.

¹⁹⁰ The Lithuanian Copyright Law art.92.1.

¹⁹¹ French IP Code art.L-135-6; The Spanish Intellectual Property Law art.37bis.7; Belgian Code of Economic Law art.XI.2456/6; Swedish Copyright Act sec.16b; The Lithuanian Copyright Law art.95; The Polish Copyright Act art.35.8.

¹⁹² French IP Code art.L-135-6; The Spanish Intellectual Property Law art.37bis.7; Belgian Code of Economic Law art.XI.2456/7; Swedish Copyright Act sec.16b; The Lithuanian Copyright Law art.96; The Polish Copyright Act art.35.8(5).

¹⁹³ French IP Code Art. L-135-6 .

¹⁹⁴ The Lithuanian Copyright Law art.96.

¹⁹⁵ Order of the Minister of Culture of the Republic of Lithuania of 17 July 2015 No JV-480 concerning the compensation conditions for the former orphan works.

In Spain, the law sets certain criteria that need to be taken into account when determining the compensation due to the rightholder(s), e.g. type, nature and amount of, uses of the orphan work or the potential harm caused to the rightholder(s).¹⁹⁶ Such compensation shall be agreed between the rightholder and the cultural institution. In the absence of agreement, the amount of the compensation will be decided by the national competent authority.¹⁹⁷ In Poland, the compensation is calculated by the nature and scope of the use of an orphan work, the amount of revenues obtained from such exploitation, and the damage caused to the rightful owner in connection with this use.¹⁹⁸

Interim conclusions

As a result from our analysis in the relevant jurisdictions, we can draw the following conclusions:

- All the countries studied have implemented the Orphan Works Directive provisions very strictly.
- A broader category of beneficiaries, in comparison with the other exceptions analysed in the this study, is included in the Directive and therefore in the Member States.
- Yet there are differences in the application of the exception, especially with regards to the concrete application of the diligent search and its sources.
- The concrete modalities for the application of the obligation to compensate rightholders varies depending on the national systems.
- In all countries, the main difficulties applying the Directive are not so much the result of a lack of harmonization but are mainly due to the very stringent requirements of the Directive.

3.2.1 Out-of-commerce works

Despite some soft law initiatives at EU level, there were not yet clear provisions in the *acquis communautaire* to tackle the problem of the out-of-commerce works (hereinafter 'OOCWs') prior to the adoption of the CDSM Directive.¹⁹⁹ Such earlier initiatives aimed first at fostering voluntary licensing agreements (see the Licenses for Europe Initiative). Later, there was some improvement

¹⁹⁶ Spanish Royal Decree 224/2016, of May 27, by which the orphan works legal regime is established. art.7.2.

¹⁹⁷ Spanish Royal Decree 224/2016, of May 27, by which the orphan works legal regime is established. art.7.3.

¹⁹⁸ The Polish Copyright Act art.35.8(5).

¹⁹⁹ See Deliverable 2.1 for a further analysis of the CDSM Directive.

with the signature of the Memorandum of Understanding of Key Principles on the Digitisation and Making Available of Out-of-Commerce Works²⁰⁰ (MoU) in 2011, but this instrument was not binding for the signatories and only addressed literary works.

Some Member States, such as France and Poland, have therefore taken initiatives themselves to allow for the use of OOCWs under certain conditions. Other countries, including Sweden, made use of their already existing systems of ECL. These particular regimes are briefly analysed below.

National systems

(i) French regime on OOCWs.²⁰¹ The French IP Code regulates the use of particular OOCWs in its Chapter on '*digital exploitation of 'unavailable books'*' introduced in 2012.²⁰² This regime responds to the objective of making non-commercially available books available to the public in digital or tangible form.²⁰³

Under the French IP law '*unavailable books*' (*'les livres indisponibles'*) are defined as books published in France 'before 1 January 2001 which are no longer the subject of commercial distribution by a publisher and which are not currently the subject of a publication under a printed or digital form'.²⁰⁴

The French provision requires the creation of a free and accessible database of unavailable books managed by the National Library of France. Every person can request the inclusion of an unavailable book in this database.²⁰⁵ After six months of such inclusion, a CMO that is created according to certain criteria,²⁰⁶ can exercise the rights of authorising the reproduction and the representation into a digital format for a period of five years that can be renewed against payment.²⁰⁷ These licenses are therefore handled by a specific CMO,²⁰⁸ which also handles the revenues of the exploitation of the works.

An opt-out system is provided to safeguard the exclusive rights of the authors and rightholders of the works concerned. The latter can notify their opposition to the collective management during a period of six months from the inclusion in the database.

²⁰⁰ European Commission, Memorandum of Understanding: Key Principles on the Digitisation and Making Available of Out-of-Commerce Works (2011).

²⁰¹ See Annex II for a deeper analysis of the provisions in France.

²⁰² LOI n° 2012-287 du 1er mars 2012 relative à l'exploitation numérique des livres indisponibles du XXe siècle 20.

²⁰³ Gautier (n 37) 644.

²⁰⁴ French IP Code L-134-1.

²⁰⁵ French IP Code Art. L-134-2 .

²⁰⁶ French IP Code L-134-3.

²⁰⁷ French IP Code L-134-3.

²⁰⁸ French IP Code L-134-3.

The provisions of this law have been seriously criticized by the Court of Justice in its *Soulier* judgment.²⁰⁹ This has led to the annulment of the Decree establishing the implementing rules for the unavailable books²¹⁰ by the State Council.²¹¹ As a result, the practical influence of this provision remains limited if at all existent.

(ii) Swedish extended collective licenses. The ECL system that exists in Sweden (and in other Nordic countries) should be briefly mentioned since it allows for the making available of OOCWs. This system has been considered as a solution for the mass-digitization as well as the online dissemination of works by CHIs, including OOCWs. Through an ECL, the application of a freely negotiated agreement between a CHI and a CMO is extended to other rightholders that are not represented by the CMO, under certain conditions. For CHIs, the ECL system is a very useful instrument to solve the issue of rights clearance.

In Swedish copyright law both a general ECL regime²¹² and a specific regime for archives and libraries, among others, exist. The general ECL regime does not include specification as regards the works covered by the agreement, the permitted uses of works or the users of a license. These details can be freely negotiated between the contracting parties of the license. The only requirement for using ECL is that individual licensing is 'impracticable'. Therefore, the system is often used in 'mass-use' situations when it is difficult to predict the number of works that will be used.²¹³ In addition, an ECL will typically provide for an opt-out system for rightholders.

The specific regime for archives and libraries, on the other hand, has sought to solve the problem of OOCWs in their collections. The license agreement may allow for reproduction of these works and for further uses of such copies, which may be communicated to the public unless there are reasons to think that the author could oppose such use (see Annex VI).

Yet, the system has built in certain limits. First, only works from their own collections may form part of the ECL. Second, only works that have been made available to the public can form part of the ECL, excluding unpublished works from the scope. However, these limitations can be overridden by an agreement with rightholders or by way of instructions from them on how unpublished works could be used.²¹⁴

²⁰⁹ *Marc Soulier and Sara Doke v Premier Ministre and Ministre de la Culture et de la Communication (C-301/15)* EU:C:2016:878.

²¹⁰ Décret n° 2013-182 du 27 février 2013 portant application des articles L. 134-1 à L. 134-9 du code de la propriété intellectuelle et relatif à l'exploitation numérique des livres indisponibles du xxe siècle.

²¹¹ Conseil d'État, 10ème - 9ème chambres réunies, 07/06/2017, 368208, Inédit au recueil Lebon.

²¹² Swedish Copyright Act Sec.42.

²¹³ R Tryggvadottir, *European Libraries and the Internet: Copyright and Extended Collective Licences* (Mortsel : Intersentia 2018) 177.

²¹⁴ Tryggvadottir (n 213) 184.

Finally, the author has a right to obtain remuneration for the exploitation of his works. The amount and conditions of the remuneration should be specified in the ECL agreement. The distribution of the remuneration by the instrumental CMO must be in accordance with the principle of equal treatment, meaning that the so-called ‘outsiders’ (i.e. rightholders that are not represented by the CMO) should receive the same remuneration as those represented by the CMO.²¹⁵

(iii) Polish regime on OOCWs.²¹⁶ The issue of OOCWs is regulated in Articles 35 (10) – 35 (12) of the Polish Copyright Act. These rules were introduced into the Polish legal system by the 2015 amendment. These provisions constitute a statutory authorization for CMOs to manage certain OOCWs which have not been entrusted to them by the rightholders.

Under the Polish Copyright Act, OOCWs are defined²¹⁷ as those works that were first published in the territory of the Republic of Poland before 24th of May of 1994, in the form of books, newspapers, magazines or other forms of printed publications, when those works are not available to the public in the commercial trade.

According to the Polish Copyright Act, OOCWs may be used by archives, educational institutions, and other entities referred to in the Law on higher education and science, and cultural institutions²¹⁸. These institutions are allowed to reproduce OOCWs in their collections and make them publicly available online as long as there is an agreement with the CMO in place.²¹⁹

For an OOCW to be used, it needs to be registered (upon a CMO’s request) in a registry held by the Ministry of Culture and National Heritage.²²⁰ The registry is publicly available and contains information of the work such as the title, the name of the author, the publisher, the date of first publication and an indication of the CMO which introduced the work into the list.

Rightholders that are not represented by the CMO could oppose to the introduction of their work in the registry and oppose to such uses (see Annex IV). Such objections must also be recorded in the registry.

CDSM Directive

The recently adopted CDSM Directive puts in place, in Articles 8 to 11, a legal framework addressing the legal and practical problems with OOCWs. The new regime consists in a bifold

²¹⁵ Swedish Copyright Act Sec. 42.a.

²¹⁶ See Annex IV for a further analysis in Poland.

²¹⁷ The Polish Copyright Act art. 35(10).

²¹⁸ The Polish Copyright Act art.35(10)(2).

²¹⁹ The Polish Copyright Act art.35(10)(2).

²²⁰ The Polish Copyright Act art.35(11).

mechanism for the use of OOCWs by CHIs which mainly comprises a licensing mechanism in the first place and a mandatory exception in the second place (see Deliverable 2.1 for a further analysis of the new CDSM provisions).

As mentioned above, Belgium is the only country that has so far provided a draft text (rather working document) implementing the CDSM Directive. As a consequence, only the Belgian preliminary draft is analysed in this section. In brief, in the preliminary version of the law, Belgium has so far opted for implementing these provisions in different sections of the Belgian Code. First, it introduces a sub-section on OOCWs in the general exceptions' provisions and a different sub-section concerning the licensing system for OOCWs²²¹ (see Annex I for a further analysis of the preliminary provisions in Belgium).

The draft starts from the presumption that it will be difficult for CHIs to actually ascertain whether an existing CMO sufficiently represents the rights and works concerned in practice. It is therefore proposed to work with a system in which, by way of an implementing decree (Royal Decree), a particular CMO is designated that is representative of all CMOs that manage the rights in Belgium for certain types of works that may be the subject of a license to be granted to CHIs.²²² This system will facilitate the CHIs' task to find out whether there are CMOs available for a certain type of work and whether such CMOs fulfil the requirements for entering into these licenses. In this way, the system aims at reducing the administrative burden by creating a one-single contact mechanism.²²³

Where no representative CMO can be identified, the use of an OOCW will be allowed through a new exception that is added to the list of the already existing exceptions and limitations²²⁴ (see Annex I).

Interim conclusions

We can draw the following conclusions from our analysis in the selected countries:

²²¹ 'Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d'auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE' (n 119).

²²² 'Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d'auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE' (n 119) 259.

²²³ 'Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d'auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE' (n 119) 313.

²²⁴ 'Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d'auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE' (n 119).

- Only France and Poland have included provisions to facilitate the uses of OOCWs in their national laws with a narrow scope, before the adoption of the CDSM Directive.
- However, Sweden has the ECL system in place that allow for the uses of OOCWS (and other works) for libraries and archives. This system has been proved as a solution for CHIs in areas where the clearance of rights is more complicated, e.g. OOCWs or orphan works.
- The CDSM Directive will certainly improve the situation of OOCWs for CHIs once implemented at national level, even for France and Poland as the new system is broader in scope than the current regimes.

3.2.2 Works of visual arts in the public domain

This section will only discuss challenges and opportunities offered by Article 14 of the CDSM Directive. As was underlined in Deliverable 2.1 this provision is of particular importance for the inDICEs project since it deals with the possibility to make reproductions of works in the public domain, many of which are part of the collections of such institutions.²²⁵

In brief, Article 14 of the CDSM Directive states that once the copyright of a work of visual arts has expired and the work is reproduced, this reproduction may be reproduced, communicated or used without the author's consent since it is in the public domain. No exclusive rights shall attach to any copy of a public domain work of art, unless the reproduction constitutes its author's own intellectual creation.

As mentioned earlier, none of the countries under review, with the exception of Belgium, has a preparatory draft available implementing the CDSM Directive yet.

However, even in the latter case, it is proposed not to transpose Article 14 into national law²²⁶ given that the principle reflected therein is enshrined in, or logically follows from, the general rules of copyright law²²⁷ (see Annex I for a further explanation). Adding the text of Article 14, would only generate confusion and might create legal uncertainty given that all copyright-related

²²⁵ See Deliverable 2.1 for a further analysis of Article 14 of the CDSM Directive.

²²⁶ 'Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d'auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE' (n 119) 41, 222–223.

²²⁷ See Annex I for a further analysis of this provision in Belgium.

principles are applicable to all categories of works (not merely works of visual art that are the subject of Article 14).²²⁸

3.2.3 Non-original photographs

The protection of photographs remains particularly unharmonized in the EU and varies considerably from one jurisdiction to another. At EU level, the Term Directive²²⁹ only harmonizes the protection of photographs that satisfy the criterion of originality²³⁰ in the sense that they are the author's own intellectual creation.²³¹ The possible protection for 'non-original' photographs, on the other hand, is entirely left to the discretion of the Member States²³² who may e.g. decide to introduce or maintain a neighbouring or related right to protect these photographs.

Within this framework, some countries have or had created a specific neighbouring right that grants limited exclusive rights to non-original photographs during a short(er) term which are described below. An important note has to be made in this respect: Article 14 CSDM (see previous section) remedies the fragmentation as regards the protection of such photographs, but only for the reproduction media of 'works of visual art'. If such works are in the public domain, it will no longer be possible for Member States to provide for a specific shorter-term right as from the date the CSDM comes into effect.

Comparative analysis

Although the Term Directive grants the Member States the possibility to protect non-original photographs, our analysis shows that not all the Member States under review have made use of such possibility. For instance, the Belgian, the Polish, the Lithuanian and the French legislator decided to not introduce any neighbouring right for the protection of photographs that do not achieve enough original character to be granted copyright protection. Thus photographs in Belgium,²³³ Lithuania²³⁴ and France²³⁵ are only subject to copyright protection if they meet the usual protection requirements.

²²⁸ 'Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d'auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE' (n 119) 222–223.

²²⁹ See Deliverable 2.1 for a further analysis of the Term Directive.

²³⁰ JAL Sterling, *Sterling on World Copyright Law* (4th ed., London : Sweet & Maxwell 2015) 1026.

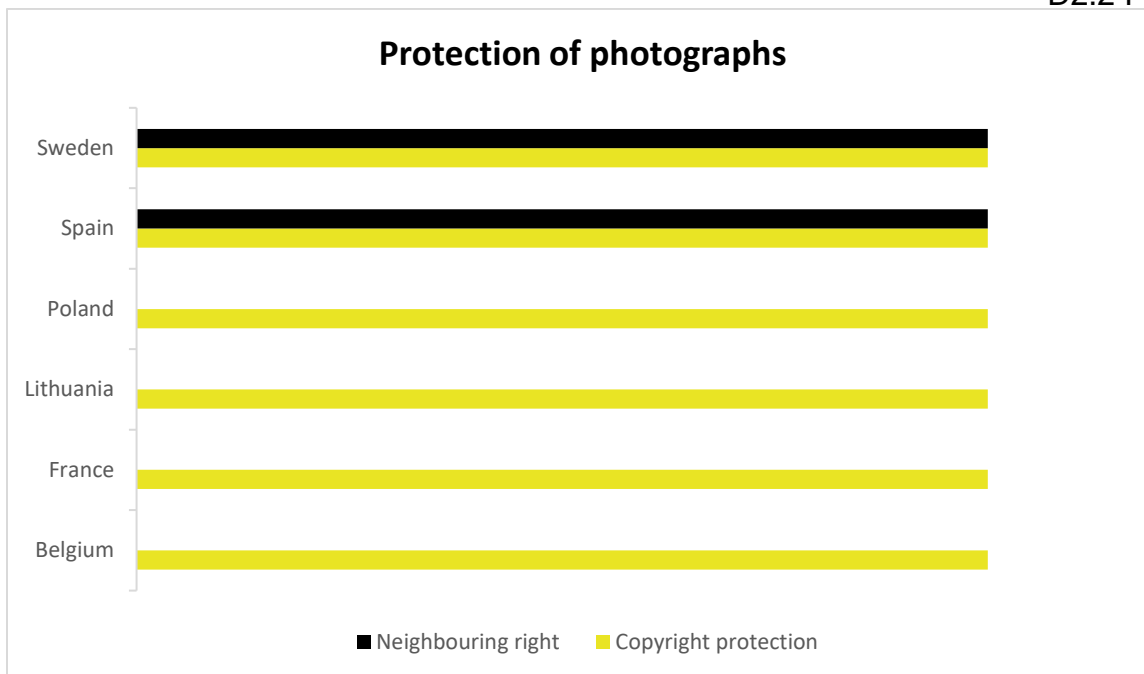
²³¹ Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights art 6.

²³² Term Directive art 6.

²³³ See Annex I for a further analysis of the protection of photographs in Belgium.

²³⁴ See Annex III for a further analysis of the protection of photographs in Lithuania.

²³⁵ See Annex II for a further analysis of the protection of photographs in France.



Neighbouring right

On the other hand, both Spain²³⁶ and Sweden²³⁷ have exclusive rights for the protection of such non-original photographs in their copyright laws. Although the denomination of these photographs may differ in each jurisdiction, e.g. in Spain they are named ‘mere photographs’ (*meras fotografias*)²³⁸ and in Sweden ‘*photographic image*’²³⁹ they all confer protection for photographs that do not merit copyright protection.

Definition

Neither the Swedish law nor the Spanish IP law provide a definition of this kind of photographs. While in Spain the law does not define the ‘simple photograph’, the doctrine understands that these photographs aim at reproducing common objects and daily events, even with a high technical level, but without meeting the threshold for copyright protection.²⁴⁰

The Swedish copyright Act does not provide a definition of ‘photographic image’ either and refers to a photographic image ‘that has been produced by a procedure comparable to photography’²⁴¹

²³⁶ See Annex V for a further analysis of the protection of photographs in Spain.

²³⁷ See Annex VI for a further analysis of the protection of photographs in Sweden.

²³⁸ The Spanish Intellectual Property Law art.128.

²³⁹ Swedish Copyright Act Sec.49(a),2.

²⁴⁰ Bercovitz Rodríguez Cano and others (n 80) 292.

²⁴¹ Swedish Copyright Act Sec.49(a),2.

since it does not need to be made by a 'traditional' specific technique. Hence the right applies to the image regardless of the technology used for the creation of the photograph.

Ownership

In Spain, the owner of the right is the photographer or the person that takes the photograph. Nevertheless, in those cases where there is more than one person involved in the process, e.g. one person involved in the creative process and another person involved in the technical process such as in the photo printing, the person that actually takes the photograph (not the person involved in a preparatory or printing phase) will be considered the author of the work. In cases where the photographs are taken by machines, the responsible company will be considered as the rightholder.

In Sweden, the law distinguished between two situations. First, and, in general, the exclusive right is attributed to 'anyone' that produces a photographic image (as in Spain).²⁴² Second, in cases of original photographs that do deserve copyright protection but where not only the photographer taking the picture (the author of the work) is involved but also an additional person, a distribution of two different rights is made. In these cases, the latter person that, for instance, may have arranged the subject, will benefit from the special exclusive right for non-original photographs, alongside the copyright protection of the author.²⁴³

Scope of protection

In the Swedish and Spanish jurisdictions the rights are similar in their scope, being narrower than the protection granted to copyrighted works. In both jurisdictions the exclusive right is provided to photographs regardless of the technology used. In Spain, the reference to an 'analogous procedure' opens the door to include those digital photographs or those analogical photographs that are made without a film.²⁴⁴ In Sweden, it is explicitly stated that 'the right applies regardless of whether the image is used in its original or altered form and regardless of which technology is used.'²⁴⁵

While in both jurisdictions the exclusive right includes acts of reproduction and communication to the public, there are still certain differences. In Spain, the person that takes the photograph (or any reproduction in an analogous manner) will have the exclusive right of authorizing its reproduction, distribution and communication to the public. However, this right does not confer

²⁴² Swedish Copyright Act Sec.49(a).

²⁴³ Helena Andersson, 'Comments of the Law (1960: 729) on Copyright in Literary and Artistic Works' <<https://lagen.nu/1960:729#P49>>.

²⁴⁴ The Spanish Intellectual Property Law art.128.

²⁴⁵ Swedish Copyright Act Sec.49(a).

the right to oppose the making of two identical photographs but only the making of copies of the photograph itself.

In Sweden, the exclusive right includes the possibility of ‘producing a copy of the image and make it available to the public’. To be infringing, a photographic image must be created by using the originator’s photograph, i.e. situations of direct copying²⁴⁶. The right includes the possibility to oppose, e.g. by painting using certain parts of the photograph as a motive or pattern, as the Swedish Supreme Court ruled.²⁴⁷

Interestingly in Sweden, the exclusive right of producers of non-original photographs also includes the moral rights of attribution and integrity.²⁴⁸ This is not the case in Spain, where photographers are not even given an adaptation right.²⁴⁹

Term of protection

The term of protection of this exclusive right is shorter than the copyright term, but the duration varies considerably from one jurisdiction to another.

In Spain the duration is twenty-five years ‘counted from January 1 of the year following the date of taking the photograph or reproduction’.²⁵⁰ The period of protection starts running from the moment the photograph is communicated to the public. In the absence of publication, it starts running from the moment of the making of the photograph which is the moment when the image is ‘captured’ on a film or any other medium, namely the moment of first fixation.²⁵¹

In Sweden, the protection lasts for 50 years ‘after the year in which the image was produced’.²⁵² This term is in line with the other neighbouring rights provided for in the Swedish law.

Interim conclusions

The following conclusions can be drawn from the analysis of the jurisdictions at stake:

²⁴⁶ Li Westerlund, *Intellectual Property Law in Sweden* (Hendrik Vanhees (ed.) ed, Wolters Kluwer 2011) 61.

²⁴⁷ *NJA 1967, 264, NIR 1968, 129 (Gell Stalformar)*.

²⁴⁸ Swedish Copyright Act Sec. 49.4.

²⁴⁹ Fernando Bondía Román, ‘Los derechos sobre las fotografías y sus limitaciones’ (2006) 59 *Anuario de derecho civil* 1065, 1088.

²⁵⁰ The Spanish Intellectual Property Law art.128.

²⁵¹ Román (n 249) 1092.

²⁵² Swedish Copyright Act Sec. 49.a.3.

- Protection for non-original photographs is one of the less harmonized areas of copyright in the EU countries.
- Such lack of harmonization entails different levels of protection in each Member State.
- Even amongst the countries that recognize this form of neighbouring right's protection, there are significant differences as regards the nature, scope and term of protection.
- This situation creates confusion and increases legal uncertainty in particular in cases of cross-border and online use of non-original photographs.

3.2.4 Databases

At EU level a two-tier regime for the protection of databases was introduced by the Database Directive²⁵³. This regime grants i) copyright protection to original databases,²⁵⁴ and ii) a sui-generis right for databases that do not qualify for copyright protection but where a substantial investment (e.g. technical, financial or human resources' efforts) has been made.²⁵⁵

Most of the countries transposed closely the provisions of the Directive,²⁵⁶ as is demonstrated in our brief analysis below, yet a number of differences can be identified.²⁵⁷

Comparative analysis

Copyright protection

Databases may be granted copyright protection as literary and artistic works in all the countries assessed²⁵⁸ (as required by the Database Directive). In these cases the general rules for author's copyright protection will apply.

²⁵³ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

²⁵⁴ Database Directive art.3.

²⁵⁵ Database Directive Chapter III.

²⁵⁶ See Deliverable 2.1 for a further analysis of the Database Directive.

²⁵⁷ See Lionel Bently and others, 'Study in Support of the Evaluation of Directive 96/9/EC on the Legal Protection of Databases' (European Commission DG Communications Networks, Content & Technology 2018) for a further analysis of the implementation of the Database Directive.

²⁵⁸ Swedish Copyright Act Sec.5; The Spanish Intellectual Property Law art.12; French IP Code art.L-112-3 ; Belgian Code of Economic Law Art.XI.186; The Lithuanian Copyright Law art.4.3(2); The Polish Copyright Act art.3.

There are some differences as regards terminology. For instance, the Spanish legislator provides protection for ‘collections’²⁵⁹ while in France, the *droit d’auteur* protection is given to authors of ‘anthologies or collections’.²⁶⁰

As regards the definition of a database France,²⁶¹ Belgium,²⁶² Lithuania,²⁶³ Poland²⁶⁴ and Spain²⁶⁵ have adopted almost the exact wording of the Directive. Nevertheless, the Lithuanian and Polish provisions do not explicitly include the requirement of ‘independence’ of the works or data that are included in the database. The Swedish Copyright Act lacks a definition of a ‘database’. This is due to the fact that Sweden had already an exclusive right in its jurisdictions for ‘catalogues’ which was simply adapted after the Directive.²⁶⁶

Differences also exist with regards to exceptions and limitations which are not part of this study. However, it is important to note that all countries forbid the application of the reproduction for private purposes exception to digital databases, as established by the Directive. In addition, the French exception for TDM²⁶⁷ permits making digital copies of the database by a person who has lawful access to it for the purposes of text and data mining.

With regards to the rights and obligations of the lawful user, it must be noted that the Swedish Copyright Act does not implement such provisions,²⁶⁸ even though such an exception is prescribed in Article 6 of the Database Directive in a mandatory way.

Sui-generis right protection

In all the countries examined, a *sui-generis* protection is provided for databases that do not meet the threshold of originality²⁶⁹ as established by the Directive (see Annexes for a further analysis of the provisions in each country). It must be noted that Poland²⁷⁰ is the only country that regulates the protection of databases in two different legal acts, namely, databases that qualify

²⁵⁹ The Spanish Intellectual Property Law art.12.

²⁶⁰ French IP Code art.L-112-3.

²⁶¹ French IP Code art.L-112-3.

²⁶² Belgian Code of Economic Law art.I.13.6 .

²⁶³ The Lithuanian Copyright Law art.2.7.

²⁶⁴ Polish Database Protection Act of 27 July 2001 (Journal of Laws of 2001, No. 128, Item 1402) art.2.1.

²⁶⁵ The Spanish Intellectual Property Law art.12.2.

²⁶⁶ Robert Fisher and others, ‘Annex.1 Legal Analysis. Study in Support of the Evaluation of Directive 96/9/EC on the Legal Protection of Databases’ (European Commission DG Communications Networks, Content & Technology 2018) 8.

²⁶⁷ Introduced by the LOI n° 2016-1321 du 7 octobre 2016 pour une République numérique.

²⁶⁸ Bently and others (n 257) 74.

²⁶⁹ Swedish Copyright Act Sec.49(a); See The Spanish Intellectual Property Law Title VII; French IP Code art. L-341 and seq; Belgian Code of Economic Law Title VII; The Lithuanian Copyright Law art.61; Polish Database Protection Act of 27 July 2001 (Journal of Laws of 2001, No. 128, Item 1402).

²⁷⁰ See Annex IV for a further analysis in Poland.

for copyright protection are included in the Copyright Act while databases protected by the *sui-generis* right are regulated in a separate Database Act.²⁷¹

Conditions of protection. In all the countries studied, the granting of the right is made dependent on a substantial investment as a core condition for protection as is prescribed by the Database Directive. Importantly, none of the jurisdictions at stake provide for a definition of ‘substantial investment’, which was also lacking in the Directive.²⁷²

In Sweden,²⁷³ as the right is given to ‘anyone who has produced a catalogue, a table or another similar product in which a large number of information items have been compiled or which is the result of a significant investment, has an exclusive right to prepare copies of the product and to make it available to the public’.²⁷⁴ The *sui-generis* right protects databases in the following two situations: i) when a large amount of data has been compiled and, ii) when the database is the result of a substantial investment. The meaning of the substantial investment refers both to the creation of the database as well as the maintenance of the database.²⁷⁵

The Spanish law²⁷⁶ grants a *sui-generis* right for databases protecting the ‘substantial investment, qualitatively or quantitatively evaluated, carried out by its manufacturer, whether of financial means, use of time, effort, energy or others of a similar nature, to obtain, verify or present its content’.²⁷⁷ As regards the concept of ‘substantial investment’ explicit mention is made of an investment in ‘time, effort or energy’, apart from the already-mentioned financial investment.²⁷⁸

Interestingly in France,²⁷⁹ the term ‘*sui-generis*’ right does not appear in the legal text. Still, such protection of the database is granted ‘when the compilation of the database, the verification of the content of the database or the presentation of database and its elements attest to ‘a substantial financial, material or human investment’²⁸⁰.

Belgium and Lithuania follow closely the wording of the Directive. The Belgian Code grants the right to the database producers in respect of ‘databases regardless of their form, where the obtaining, the verification or the presentation of the content attests a qualitative or quantitative substantial investment’.²⁸¹ In Lithuania that the right is given to a ‘maker of a database who shows

²⁷¹ Polish Database Protection Act of 27 July 2001 (Journal of Laws of 2001, No. 128, Item 1402).

²⁷² See Deliverable 2.1 for a further analysis.

²⁷³ See Annex VI for a further analysis in Sweden.

²⁷⁴ Swedish Copyright Act Sec.49(a).

²⁷⁵ Westerlund (n 246) 56.

²⁷⁶ See Annex V for a further analysis in Spain.

²⁷⁷ The Spanish Intellectual Property Law art.133.1.

²⁷⁸ Bently and others (n 257) Annex 6.

²⁷⁹ See Annex II for a further analysis in France.

²⁸⁰ French IP Code L-341-1.

²⁸¹ Belgian Code of Economic Law Art.XI.305.

that he has made a substantial qualitative and/or quantitative (intellectual, financial, organisational) investment in obtaining, arrangement, verification and presentation of the contents of that database' will have the right to (...).²⁸²

In Poland the requirement of substantial investment is included in the definition of a database. Accordingly, a database may be protected when, among others, a significant investment in terms of quality or quantity in order to prepare, verify or present its contents has been made.²⁸³

In Belgium,²⁸⁴ the required 'substantial investment' is measured in the deployment of human, financial or technical resources. The investment can be assessed quantitatively, when it can be quantified, but also qualitatively, e.g. an intellectual effort.²⁸⁵ Such investment must be aimed at obtaining, verification and presentation of the data. All in all, this wording stays very close to the text of the Directive.

Acts of extraction and re-use. The *sui generis* right grants rightholders the possibility to oppose the extraction and/or re-utilization of the whole or substantial part of a database.

Belgium, France, Poland and Spain have all very faithfully followed the wording of the Directive in their national laws. In Spain the rightholder 'may prohibit the extraction and/or re-utilization of the whole or substantial part of the database'.²⁸⁶ According to the French law, the *sui generis* right gives the database producer the possibility to prohibit: 'the extraction and reuse'.²⁸⁷ In Belgium, the producer has the right to 'prohibit the extraction and/or reuse of all or part, qualitatively or quantitatively substantial, of the content of his database'.²⁸⁸ In Poland, the database producer is granted the right to 'extract and reutilise data in whole or in a substantial part, evaluated qualitatively and/or quantitatively'.²⁸⁹ The concepts of extraction and re-utilization are defined in the Belgian,²⁹⁰ Polish²⁹¹ and Spanish²⁹² jurisdictions in a comparable manner to the definitions in the Directive. In Lithuania, the maker of the database has the right to oppose i) the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form and to ii) make available to the public

²⁸² The Lithuanian Copyright Law art.61.1.

²⁸³ Polish Database Protection Act of 27 July 2001 (Journal of Laws of 2001, No. 128, Item 1402) art.2.

²⁸⁴ See Annex I for a further analysis in Belgium.

²⁸⁵ Sari Depreeuw, 'Title VII. Databases' in Fabienne Brison and Hendrik Vanhees (eds), *Het Belgische auteursrecht: artikelsgewijze commentaar. Huldeboek Jan Corbet; Le droit d'auteur belge commentaire par article. Hommage À Jan Corbet* (Bruxelles : Larcier 2015) 987–988.

²⁸⁶ The Spanish Intellectual Property Law art.133.1.

²⁸⁷ French IP Code L-342-1.

²⁸⁸ Belgian Code of Economic Law Art.XI.307.

²⁸⁹ Polish Database Protection Act of 27 July 2001 (Journal of Laws of 2001, No. 128, Item 1402) art.6.

²⁹⁰ Belgian Code of Economic Law art.I.17.

²⁹¹ Polish Database Protection Act of 27 July 2001 (Journal of Laws of 2001, No. 128, Item 1402) art.2.

²⁹² The Spanish Intellectual Property Law art.133.3.b].

in any form ‘all or a substantial part of the contents of a database (...)’.²⁹³ Although the Lithuanian exclusive right does not refer to the rights of extraction and re-utilization, they are mentioned in further provisions in the Lithuanian Copyright Law.

Sweden, however, has opted for a different wording. The Swedish Copyright Act states that the person who produced the database ‘has the exclusive right to produce copies of the work and make it available to the public’.²⁹⁴ Nothing is mentioned about the concepts of extraction or re-utilization. This is most likely explained by the fact that the Swedish legislator adapted the text that was used for the previously exclusive righting granted to catalogues producers

Ownership. The Database Directive imposes that the right shall be given to the maker of a database²⁹⁵ which ‘is the person who takes the initiative and the risk of investing’.²⁹⁶ In essence, these provisions can be found in the legislation of all the countries surveyed, albeit sometimes in alternative wordings.

In Sweden, the Copyright Act does not explicitly establishes any requirement for the ownership of the database and refers to ‘anyone who has produced a catalogue, a table or another similar product’.²⁹⁷ The rightholder in Spanish law is the ‘manufacturer or producer of the database’, who is the natural or legal person that makes the substantial investment aimed at obtaining, verifying or presenting the content of the database.²⁹⁸ The French IP Code grants a neighbouring right to ‘the producer of a database, understood as the person who takes the initiative and the risk of the corresponding investments’. The producer must have the interest and the means to engage in the production of the database.²⁹⁹ In Lithuania, the owner of the *sui-generis* right is the ‘maker of a database’ who is the person that made the substantial (intellectual, financial, organizational) investment, when selecting, arranging, verifying and presenting the contents of the database’.³⁰⁰ Under Belgian law, this *sui-generis* right is granted to the producers of the database.³⁰¹ In Poland, also the producer of the database is named as the owner of the *sui-generis* right. The producer is a the natural or legal person who bears the risk of investment involved in the production of the database.³⁰²

Term of protection

²⁹³ The Lithuanian Copyright Law art.61.1.

²⁹⁴ Swedish Copyright Act Sec.49(a).

²⁹⁵ Database Directive Art. 7.1.

²⁹⁶ Database Directive Rec. 41.

²⁹⁷ Swedish Copyright Act Sec.49.

²⁹⁸ The Spanish Intellectual Property Law art.133.3(a).

²⁹⁹ Durrande and others (n 101) 479.

³⁰⁰ The Lithuanian Copyright Law art.2.40.

³⁰¹ Belgian Code of Economic Law Art.XI.307.

³⁰² Polish Database Protection Act of 27 July 2001 (Journal of Laws of 2001, No. 128, Item 1402) art.2.4.

The protection of the *sui-generis* right should last 15 years from the production of the database as required by the Database Directive. Yet, any substantial new investment in the database can lead to a new term of protection. These provisions have been very faithfully implemented by all the countries assessed.³⁰³

Interim conclusions

As a result from the foregoing, we can draw the following conclusions from our analysis:

- Most of the Members States implemented the provisions of the Database Directive closely.
- Only in Sweden are there differences, which can be explained by the existence of their former ‘catalogue rule’ for the protection of catalogues.
- All in all, one can conclude that the protection of databases is harmonized in the EU to a high extent.
- However, differences may still exist in the application of these harmonised rules, since it ultimately belongs to the courts to apply the criteria and to judge whether a database is original or the result of a substantial investment. Some relevant guidance has been provided by the CJEU in this regard.

3.3 Other copyright matters in a nutshell

3.3.1 The public lending derogation

Article 6(1) of the Rental and Lending Directive³⁰⁴ establishes a derogation to the authors’ exclusive right ‘to authorise or prohibit the rental and lending of originals and copies of copyright works’, that allows libraries to lend books without the copyright owners’ consent on the condition that remuneration to the authors and other rightholders is provided. This derogation is commonly known as the ‘public lending right’.³⁰⁵

³⁰³ See Swedish Copyright Act Sec. 49.2; The Spanish Intellectual Property Law art.136.1; French IP Code L-342-5; Belgian Code of Economic Law art.XI.309; The Lithuanian Copyright Law art.64; Polish Database Protection Act of 27 July 2001 (Journal of Laws of 2001, No. 128, Item 1402) art.10.

³⁰⁴ Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

³⁰⁵ E Linklater-Sahm, ‘The Libraries Strike Back: The “Right to e-Lend” under the Rental and Lending Rights Directive: Vereniging Openbare Bibliotheken’ (2017) 54 Common Market Law Review 1555.

Within this framework, Member States can freely determine the amount of the remuneration taking into account, *inter alia*, their ‘cultural promotion objectives’.³⁰⁶ Member States may also exempt certain establishments from the payment of such remuneration. The Directive leaves much leeway to the Member States to select the applicable remuneration schemes, even allowing them to continue to apply their already-settled systems outside copyright laws.³⁰⁷

The wide discretion left to the Member States obviously results in significant differences between the laws of the legal systems under examination. as will be shown in the following section.

Comparative analysis

All the countries under review introduced a public lending derogation in their copyright systems although some of them already had such mechanism in their original copyright system³⁰⁸.

In Belgium,³⁰⁹ Lithuania,³¹⁰ Poland³¹¹ or Spain³¹² this derogation is included in the copyright acts, while in Sweden a different approach was chosen since it did not opt for an explicit derogation for a public lending but opting for the introduction of a remuneration right for those uses related to public lending made by specific beneficiaries.³¹³

In all mentioned jurisdictions the beneficiaries of the public lending right (see below) will not need an authorization from the author in relation to the loans of works they make.

Differences mainly relate to the remuneration right, in particular as regards the beneficiaries, the types of works and the calculation and distribution of the compensation. But as is shown below, also the scope (type of works and beneficiaries) varies.

Beneficiaries

The Rental and Lending Directive does not specify the beneficiaries of the public lending right, which leaves the Member States a great margin of maneuver. As a result, the beneficiaries of the derogation vary in the countries under review. While in all of them libraries are named as beneficiaries, variations can be found. For instance, in Sweden³¹⁴ the derogation is applicable to

³⁰⁶ Rental and Lending Directive art 6.

³⁰⁷ See Deliverable 2.1 for a further analysis of the Rental and Lending Directive.

³⁰⁸ Sweden was one of the first countries to introduce a public lending right system in 1955.

³⁰⁹ Belgian Code of Economic Law art.XI.192 .

³¹⁰ The Lithuanian Copyright Law art.16.3.

³¹¹ The Polish Copyright Act art.28.1(1).

³¹² The Spanish Intellectual Property Law art.37.

³¹³ ‘Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the Public Lending Right in the European Union, 12 September 2002, COM(2002) 502 Final.’

³¹⁴ See Annex VI for a further analysis of the public lending right in Sweden.

D2.2 Public

public libraries and school libraries.³¹⁵ In Lithuania,³¹⁶ the libraries that are included are ‘the Lithuanian National Library, the public, county and municipal libraries’.³¹⁷ In Poland,³¹⁸ only public libraries that are identified in a separate legal act concerning the functioning of libraries³¹⁹ are considered as beneficiaries. In Belgium, the lending acts must be carried out by an institution that is officially recognized for such purposes by the government.³²⁰ In France,³²¹ only libraries that are open to the public are named as beneficiaries. They include State and other public libraries: i) State libraries are the National Library of France, university libraries and some specialized libraries; ii) public libraries are regional lending libraries and municipal libraries, among others.³²²

In Spain the circle of beneficiaries is not limited to libraries but also includes ‘museums, archives, libraries, newspaper libraries, sound libraries or film libraries of public ownership or that belong to non-profit entities of general interest of a cultural, scientific or educational nature, or to educational institutions integrated in the Spanish educational system’.³²³ As a general condition, these institutions must be publicly accessible.³²⁴

Types of works

It must be noted that building and works of applied art are excluded from the scope of the derogation in the Directive and this is respected in all the countries.³²⁵

Eligible works. In this regard, in Belgium, only literary works, databases, photographic works, worksheet music, sound works and audiovisual works can be subject to the loans.³²⁶ In Sweden, although in general, copies of literary and artistic works can be lent, there are some explicit exclusions, namely, computer programs in machine-readable form or cinematographic works.³²⁷ The system is mainly aimed at public lending of books, phonograms and music sheets.³²⁸ In

³¹⁵ Ordinance (1962: 652) on the Swedish Authors’ Fund Sec. 3.

³¹⁶ The Lithuanian Copyright Law art.16.3.

³¹⁷ Vytautas Mizaras, ‘Lithuanian Copyright: Historical and Modern Aspects and Trends of Development’ (2007) 54 *Journal of the Copyright Society of the U.S.A.* 829, 848.

³¹⁸ See Annex IV for a further analysis of the public lending right in Poland.

³¹⁹ Polish Act of June 27, 1997 on libraries (*Journal of Laws of 2012*, item 642, as amended) d.).

³²⁰ Belgian Code of Economic Law Art.XI.298.

³²¹ See Annex II for a further analysis of the public lending right in France.

³²² Fabrice Reneaud, ‘La Loi Du 18 Juin 2003 (1) : Une Nouvelle Réglementation Du Prêt Public Des Livres Dans Les Bibliothèques’ [2004] *La Loi du 18 Juin 2003 (1) : une nouvelle réglementation du prêt public des livres dans les bibliothèques* 65, 76.

³²³ The Spanish Intellectual Property Law art 37.2.

³²⁴ The Spanish Intellectual Property Law art.19(4).

³²⁵ Rental and Lending Directive art.3(2).

³²⁶ Belgian Code of Economic Law Art.XI.298.

³²⁷ Swedish Copyright Act Se. 19.1 & 2.

³²⁸ ‘Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the Public Lending Right in the European Union, 12 September 2002, COM(2002) 502 Final.’ (n 313).

D2.2 Public

France, only works that have been the subject of a publishing contract in the form of books fall under the scope of the exception.³²⁹ In Spain, the statutory provision does not impose any limitation to the types of works that can fall under this exception. The public lending derogation in Lithuania only applies to books and visual arts publications. With regards to what should be considered as visual art publications, the statutory provision refers to ‘art and photo albums’.³³⁰ In Poland, only copies of distributed works are covered by the exception. Therefore, libraries have the possibility to lend only those works which have been previously made available to the public with the consent of the author.³³¹ The scope of the public lending right only includes copies of works expressed in words, created or published in the Polish language in a printed form.³³² In addition, the Polish legislator limits the scope of the regulation to authors creating written works in Polish.³³³

Computer programs. Computer programs are explicitly excluded from the public lending derogation in Belgium³³⁴ and in Sweden³³⁵ and implicitly (due to the narrow scope) in France.

Audiovisual works. In Sweden, cinematographic works are excluded from the loans³³⁶ as well as in France and Poland. In Lithuania, ‘phonograms and audiovisual works released in various audio and visual media’ are out of the scope of the derogation as well.³³⁷ In Belgium, the Belgian legislator opted for the introduction of a ‘grace period’ according to which the loan can only be carried out two months after the distribution of the sound- and audiovisual works to the public.³³⁸

E-books. The question of whether e-books are covered by the public lending right is still debated in most of the Member States even after the CJEU judgement of *Openbare Bibliotheken*.³³⁹ In brief, the CJEU ruled³⁴⁰ that loans of e-books should be regarded as having the same characteristics as lending printed books.³⁴¹ Therefore, libraries could, under the public lending derogation, provide e-lending as long as authors are remunerated for the use of their works.

³²⁹ French IP Code L-133-1.

³³⁰ The Lithuanian Copyright Law art.16.3.

³³¹ See Annex IV for a further analysis of the derogation in Poland.

³³² The Polish Copyright Act art.28.4.

³³³ The Polish Copyright Act art.28.5.

³³⁴ Belgian Code of Economic Law Art.XI.298.

³³⁵ Swedish Copyright Act Se. 19.1 & 2.

³³⁶ Swedish Copyright Act Se. 19.1 & 2.

³³⁷ Mizaras (n 317) 848.

³³⁸ Belgian Code of Economic Law Art.XI.192.2.

³³⁹ *Vereniging Openbare Bibliotheken v Stichting Leenrecht (C-174/15) EU:C:2016:856.*

³⁴⁰ See Deliverable 2.1 for a further analysis of this judgement.

³⁴¹ *Vereniging Openbare Bibliotheken v Stichting Leenrecht (C-174/15) EU:C:2016:856.* (n 339) para 53.

Nevertheless, e-lending needs to be treated in the same way as the lending of traditional books – i.e. one copy, one user – and the necessary technical infrastructure should guarantee this.³⁴²

Furthermore, in Belgium there is a particular provision that extends the exception to loans requested by a beneficiary residing in another EU Member State. This article in the law moreover, moreover, allows a Belgian beneficiary institution to import copies of works which have been legally sold outside the EU but are not yet available in the EU territory when ‘this importation is carried out for purposes of public lending for educational or cultural purposes and provided that it does not relate to more than five copies of the work’.³⁴³

Scope of the derogation

Authorized acts. The only act authorized by the derogation is the lending of certain categories of works by specific beneficiaries. In some countries the public lending derogation is only allowed for ‘not for profit’ uses. For instance, Spain only allows the lending of works for non-commercial purposes³⁴⁴ and Lithuania states that the loans should be made ‘free of charge’ by libraries.³⁴⁵ Belgium prescribes that the loans must be organized for educational or cultural purposes only.³⁴⁶ Libraries in Poland must carry out the lending-related activities provided that they are ‘not made in order to achieve direct or an indirect financial benefit’.³⁴⁷ In France, the exception seems much narrower in scope since it only provides the possibility for libraries to carry out loans without the authorization of the author in relation to books.³⁴⁸

Compensation system

As required by the Directive, France,³⁴⁹ Lithuania,³⁵⁰ Poland,³⁵¹ Belgium,³⁵² Spain³⁵³ and Sweden³⁵⁴ provide that authors obtain a remuneration to compensate for the derogation of the exclusive lending right.

³⁴² Marie-Christine Janssens and Benoit Michaux, ‘Intellectual Property Rights: Copyright and Trademark Issues’ in Laurent Garzaniti and others (eds), *Electronic Communications, Audiovisual Services and the Internet. EU Competition Law & Regulation*. (Sweet & Maxwell; London 2020).

³⁴³ Belgian Code of Economic Law art.XI.192 .

³⁴⁴ The Spanish Intellectual Property Law art.19(4).

³⁴⁵ The Lithuanian Copyright Law art.2.38.

³⁴⁶ Belgian Code of Economic Law Art.XI.192.2.

³⁴⁷ The Polish Copyright Act art.28.1(1).

³⁴⁸ French IP Code art. L-133-1 .

³⁴⁹ French IP Code L-133-4.

³⁵⁰ The Lithuanian Copyright Law art.16.3.

³⁵¹ The Polish Copyright Act art.28.5.

³⁵² Belgian Code of Economic Law Art.XI.243.

³⁵³ The Spanish Intellectual Property Law art 37.2.

³⁵⁴ Ordinance (1962: 652) on the Swedish Authors’ Fund Sec.3.2.

It must be recalled that Belgium had to change its compensation system for authors as a result of the CJEU *Vewa* judgement³⁵⁵. Briefly, the CJEU ruled that the obligation to pay the remuneration to authors originates from the making available of works by the public establishments and not from the actual number of loans made by the persons registered with such institutions. In addition, it stated that the establishments in charge of the loans should pay the remuneration³⁵⁶. Importantly, the Court held that the concept of remuneration must be given an autonomous and uniform interpretation throughout the EU, meaning that Member States are no longer allowed to apply their own interpretation.³⁵⁷ As regards to the criteria for the quantification of the remuneration, the CJEU ruled that the number of borrowers registered in an institution is relevant but it is not the only criterion to take into account. Therefore, a system that is solely calculating the remuneration on the basis of a flat-rate amount fixed per borrower and per year is not allowed. Rather the amount of remuneration to be paid should also take account of the number of works made available to the public which means that large public lending establishments should pay a greater level of remuneration than smaller establishments³⁵⁸. As a result of this decision, the previous Belgian Royal Decree³⁵⁹ had to be modified and was replaced by the Royal Decree of 13 December 2012.³⁶⁰

The aforementioned guidelines given by the CJEU, do not prevent that remuneration systems and the calculation and distribution of the remuneration may continue to vary per country (see Annexes for a further explanation of the compensation systems in each of the surveyed countries). In some countries such as Belgium,³⁶¹ France,³⁶² Poland³⁶³ or Spain³⁶⁴ this system is regulated in the statutory copyright provisions (even if there are further implementing regulations) while other countries have systems outside the copyright rules.³⁶⁵

Brief description of the remuneration systems. In Belgium³⁶⁶ the legal basis for the calculation of the remuneration is laid down in the copyright act. The amount must be calculated based on i)

³⁵⁵ *Vereniging van Educatieve en Wetenschappelijke Auteurs (VEWA) v Belgische Staat (C-271/10) EU:C:2011:442* [23].

³⁵⁶ *Vereniging van Educatieve en Wetenschappelijke Auteurs (VEWA) v Belgische Staat (C-271/10) EU:C:2011:442* (n 355) para 23.

³⁵⁷ *Vereniging van Educatieve en Wetenschappelijke Auteurs (VEWA) v Belgische Staat (C-271/10) EU:C:2011:442* (n 349) para 25.

³⁵⁸ *Vereniging van Educatieve en Wetenschappelijke Auteurs (VEWA) v Belgische Staat (C-271/10) EU:C:2011:442* (n 349) para 38-39

³⁵⁹ Royal Decree of 25 April 2004 on the remuneration rights for public lending of authors, performers, producers of phonograms and producers of first fixations of films.

³⁶⁰ Published in the Official State Journal of 27 December 2012.

³⁶¹ Belgian Code of Economic Law Art.XI.243 et seq.

³⁶² French IP Code L-133-1 et seq.

³⁶³ The Polish Copyright Act art.35.1 et seq.

³⁶⁴ The Spanish Intellectual Property Law art.37.2.

³⁶⁵ The Swedish system is regulated by the Law 1962:652 which was last modified in 2019.

³⁶⁶ See Annex I for a further analysis of the Belgian public lending derogation system.

the volume of the lending institution's collection; and or ii) the number of loans per institution and it is managed by the Belgian CMOs.³⁶⁷ Further details are established by the aforementioned the Royal Decree of 13 December 2012.

In Sweden,³⁶⁸ the compensation is paid by the State and it is managed by the Swedish Authors' Fund depending on the 'number of home loans of physical copies from libraries and for the number of physical reference copies of the work'.³⁶⁹ The Law established rules for the specific calculation of the fees to be paid and how the remuneration must be distributed. In Spain³⁷⁰ this compensation is made through the CMOs in charge of copyright and related rights. The amount that will need to be paid to the rightholders for the loans made by the institutions is determined by a lump sum.³⁷¹

In Lithuania, the amount of the remuneration is decided by the Government following the recommendations of the copyright and related rights' Commission and is based on the calculation of the loans made.³⁷² The collection and distribution of the compensation is compulsory managed by a CMO³⁷³ and is paid from the national budget funds.³⁷⁴

In France,³⁷⁵ the compensation mechanism system for authors provided in the law will be financed by the French State. The system, managed by CMOs,³⁷⁶ is established in two parts. The first part, which is financed entirely by the State, takes the form of a lump-sum fixed by a Decree and is calculated based on the number of users registered in the open libraries.³⁷⁷ The first part is supplemented by a second system which is calculated based on the number of purchases of the books (without taxes) made by specific legal persons (*'prix public de vente hors taxes des livres achetés'*).

In Poland, the compensation system is paid by the Ministry of Culture and is managed by a CMO selected in this regard. The calculation of the remuneration shall be based on information on the number of loans of works in a given calendar year provided by public libraries, collecting societies and the minister responsible for culture and national heritage protection. On the basis of that

³⁶⁷ Belgian Code of Economic Law art.XI.244.

³⁶⁸ See Annex VI for a further analysis of the Swedish public lending derogation system.

³⁶⁹ Ordinance (1962: 652) on the Swedish Authors' Fund Sec. 5.

³⁷⁰ See Annex V for a further analysis of the Spanish public lending derogation system.

³⁷¹ This amount is established in the Spanish Royal Decree 624/2014, of July 18, which develops the right of remuneration to authors for the loans of their works carried out in certain establishments accessible to the public.

³⁷² Ana-Maria Marinescu, 'The Public Lending Right' [2019] Challenges of the Knowledge Society 916, 918.

³⁷³ The Lithuanian Copyright Law art.65.2(4).

³⁷⁴ Mizaras (n 317) 848.

³⁷⁵ See Annex II for a further analysis of the French public lending derogation system.

³⁷⁶ French IP Code L-133-2.

³⁷⁷ French IP Code L-133-3.

information, the collecting society shall divide among the entitled rightsholders the funds available for paying out lending fees.³⁷⁸

Remuneration to other rightholders. Besides the remuneration of authors of works, some countries also provide such remuneration to other authors and/or rightholders. For instance, in Belgium the public lending right also includes sound and audiovisual works and consequently, beside the author, also the performer and the producer are entitled to remuneration.³⁷⁹ In Sweden, the provisions referring to authors ‘shall also apply to illustrators, visual artists and photographers in the case of such literary works which essentially consist of illustrations, visual art or photographs’.³⁸⁰ In France, apart from the authors, publishers will be also able to benefit from the remuneration from the lending³⁸¹ since publishers are considered to take the financial risks when publishing books and thus they may also suffer an economic damage from the lending of the books.³⁸²

It must be noted that in Sweden the system is only addressed at Swedish authors, writers that write in Swedish or that are Swedish residents. For translators, they must translate from or to Swedish in order to form part of the compensation system.³⁸³ The Swedish system was questioned by the European Commission in case 2003/2193 as it would not comply with the principle of non-discrimination in the internal market. Nevertheless, the case was closed as ‘it is felt that appropriate balancing needs to be maintained between the fundamental principle of non-discrimination on the basis of nationality and the principle that Member States should be supportive of national and regional diversity by setting up funds to promote local culture or language’.³⁸⁴ Similarly, the Polish system of the public lending right also aims at remunerating authors and publishers of works that are originally created in the Polish language, as well as translators and publishers of works translated into the Polish language.³⁸⁵

Distribution other than remuneration of authors. Finally, apart from a remuneration system to compensate authors, some countries, allocate certain parts of the amount perceived to accomplish other cultural policy objectives. For instance in Sweden, the amount collected by the Fund is also aimed at providing scholarships and grants to individual authors of literary works, grants to the authors' organizations for efforts to strengthen the position of literary authors, and

³⁷⁸ The Polish Copyright Act art.35.1 et seq.

³⁷⁹ Belgian Code of Economic Law Art.XI.243(2).

³⁸⁰ Ordinance (1962: 652) on the Swedish Authors' Fund Sec.3.2.

³⁸¹ French IP Code L-133-4.

³⁸² Reneaud (n 322) 80.

³⁸³ Ordinance (1962: 652) on the Swedish Authors' Fund Sec. 5.3 & 5.4.

³⁸⁴ ‘Report of the 5th European Public Lending Right Conference Proceedings, 2008. Bucharest 19-21 September 2008, European Writers' Congress 2008 & Fédération Des Associations Européennes d'écrivains A.I.S.B.L.’ (2008) 10.

³⁸⁵ The Polish Copyright Act art.28.5.

contributions to special events relating to literary activities.³⁸⁶ In France, part of the remuneration is invested in a supplementary pension scheme for writers and translators.³⁸⁷

Exemption from the compensation to rightholders

The Rental and Lending Directive grants Member States the possibility to exempt certain institutions from the obligation to compensate rightholders from the loans of their works.³⁸⁸ While most of the analyzed countries make use of this possibility, Sweden does not provide any remuneration's exemption for any type of beneficiary.

Belgium exempts educational establishments, scientific research institutions and health care institutions that are recognized or officially organized for this purpose by the public authorities from paying such remuneration. On top of this, officially recognized institutions created for the benefit of the blind, visually impaired, deaf and hard of hearing are also exempted.³⁸⁹

In Lithuania, the legislator decided to exempt libraries of educational and scientific institutions.³⁹⁰

In Poland, the payment of compensation to rightholders does not apply to the lending of copies by the National Library.³⁹¹

In Spain, the exemption applies to publicly owned establishments that provide services in municipalities with fewer than 5,000 inhabitants and libraries of educational institutions integrated into the Spanish educational system'.³⁹²

The French system only excludes school libraries from the obligation to remunerate rightholders for the lending of their books. However, the same provision leaves open the possibility to apply different contribution regimes for university libraries.³⁹³

Interim conclusions

The following conclusions can be drawn from the foreground analysis:

³⁸⁶ Ordinance (1962: 652) on the Swedish Authors' Fund Sec.7.

³⁸⁷ Reneaud (n 322) 82.

³⁸⁸ Rental and Lending Directive art.6(3).

³⁸⁹ Royal Decree of 13 December 2012 relating to remuneration for public lending and withdrawing the Royal Decree of April 25, 2004 relating to remuneration rights for public lending of authors, performers, producers of phonograms and producers of Art.5.

³⁹⁰ The Lithuanian Copyright Law art.16.3.

³⁹¹ The Polish Copyright Act art.28.7.

³⁹² The Spanish Intellectual Property Law art.37.2.

³⁹³ French IP Code art.L-133-3 .

- The public lending right is subject to a limited form of harmonization, which still leaves a lot of room for individual accents by the different jurisdictions.
- The differences in the regulations are especially significant with regard to the permitted derogations from the author's lending right, in particular in relation to the types of works and beneficiaries.
- Remuneration systems also vary considerably according to each Member State's national laws and policies.
- Not all countries made use of the possibility to exempt certain organisations from paying a remuneration; where this is the case, there is a broad variety of the beneficiaries exempted.

3.3.2 Moral rights

Moral rights are those rights granted to authors of protected works which relate to the protection of the personality of the author and the integrity of his work.³⁹⁴ Although moral rights however have not been harmonized at the EU level,³⁹⁵ the Berne Convention mandates, at international level, the recognition of the moral rights of attribution and integrity³⁹⁶. Besides these two rights and depending on the jurisdiction, the right of divulgation and the right of retraction, among others, may form part of the system of moral rights. There are clear differences between countries, including within the EU, in terms of the scope and significance of all these rights.³⁹⁷

Comparative analysis

Given the lack of harmonization at EU level, each of the countries surveyed has introduced a different system of moral rights in their national jurisdictions. The main differences relate to the types of rights and the term of their protection.

General characteristics of moral rights. Yet, moral rights have certain exclusive aspects that are inherent to the character of moral rights. These aspects can be found in every jurisdiction assessed. First, moral rights are independent from economic rights in the sense that moral rights

³⁹⁴ Sterling (n 230) 392.

³⁹⁵ Marie-Christine Janssens, 'Invitation for a "Europeanification" of Moral Rights', *Research Handbook on Copyright* (Edward Elgar Publishing 2017) 3.

³⁹⁶ Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, revised at Paris July 24, 1971 25 U.S.T. 1341; 1161 U.N.T.S. 3 (the Berne Convention) art.6bis.

³⁹⁷ See also Deliverable 2.1 for a further analysis of moral rights at international and EU level.

continue to ‘belong’ to the author irrespective of whether the author retains the economic rights or not.³⁹⁸

Second, moral rights are inalienable as a matter of principle. An author cannot deprive himself of his moral rights through a contract even if the author would want to do so³⁹⁹. This inalienable character is expressly confirmed in the copyright acts in Belgium,⁴⁰⁰ Spain,⁴⁰¹ Poland,⁴⁰² Lithuania,⁴⁰³ France⁴⁰⁴ and Sweden.⁴⁰⁵ However, different (alternative) wording is often used. For instance, in Spain,⁴⁰⁶ moral rights are called ‘irrevocable’⁴⁰⁷ and Sweden states that they are ‘non-transferable’⁴⁰⁸. In France,⁴⁰⁹ the right of respect (which comprises both the integrity and the attribution right), is ‘attached to his person and is perpetual, inalienable and imprescriptible’⁴¹⁰. France adds the adjective ‘imprescriptible’ to highlight that the right cannot be subject of any prescription affected by the lack of use⁴¹¹. In Lithuania,⁴¹² moral rights cannot be transferred, inherited or waived.⁴¹³ In Poland, moral rights are also not the subject of a transfer, revocation or waiver.⁴¹⁴

Nevertheless, in practice certain jurisdictions allow that moral rights can be waived under certain conditions. In Belgium,⁴¹⁵ although the legal provision establishes that ‘the overall waiver of the future exercise of this right is void’, this provision could be read *a contrario*, in the sense that a well-defined consent to not exercise a specific moral right for a particular work is deemed valid by courts.⁴¹⁶ In Sweden, the Copyright Act explicitly provides for the possibility to waive moral rights: ‘the author may, with binding effect, waive his right under this article only in respect of

³⁹⁸ See The Spanish Intellectual Property Law art.14; Belgian Code of Economic Law art.XI.165.2; Swedish Copyright Act sec.3; French IP Code art.L-111-1; The Lithuanian Copyright Law art.14.

³⁹⁹ Mira T Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (Oxford University Press 2011) 68 <<https://www.oxfordscholarship.com/10.1093/acprof:osobl/9780195390315.001.0001/acprof-9780195390315>>.

⁴⁰⁰ Belgian Code of Economic Law art.XI.165.2.

⁴⁰¹ The Spanish Intellectual Property Law art.14.

⁴⁰² The Polish Copyright Act art.16.

⁴⁰³ The Lithuanian Copyright Law art.14.

⁴⁰⁴ French IP Code L-121-1.

⁴⁰⁵ See Swedish Copyright Act Sec.27.1.

⁴⁰⁶ See Annex V for a further analysis of the moral rights in Spain.

⁴⁰⁷ The Spanish Intellectual Property Law art.14.

⁴⁰⁸ See Swedish Copyright Act Sec.27.1.

⁴⁰⁹ See Annex III for a further analysis of the moral rights in France.

⁴¹⁰ French IP Code L-121-1.

⁴¹¹ Gautier (n 37) 218.

⁴¹² See Annex X for a further analysis of the moral rights in Lithuania.

⁴¹³ Mizaras (n 317) 843.

⁴¹⁴ The Polish Copyright Act art.16.

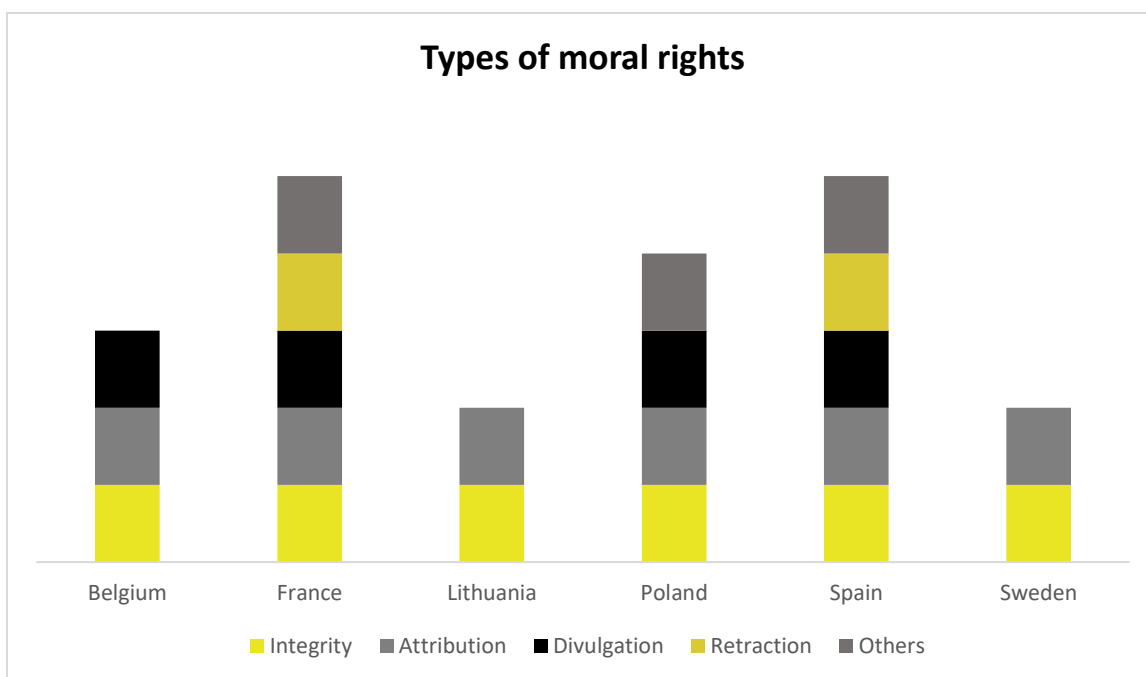
⁴¹⁵ See Annex X for a further analysis of moral rights in Belgium.

⁴¹⁶ Frank Gotzen, ‘Section 1. - Copyright in General’ in Fabienne Brison and Hendrik Vanhees (eds), *Het Belgische auteursrecht: artikelsgewijze commentaar. Huldeboek Jan Corbet;Le droit d’auteur belge commentaire par article. Hommage À Jan Corbet* (4de herziene druk, Bruxelles : Larcier 2018) 67.

uses which are limited in character and scope'. While the general principle reads that moral rights cannot be waived for literary and artistic works, an exception is made for certain limited uses of some works such as for computer programs or cinematographic works.⁴¹⁷

Types of moral rights

There is a broad variety of moral rights in the EU jurisdictions. While countries like Lithuania⁴¹⁸ and Sweden⁴¹⁹ provide only the (Berne Convention) rights of attribution and integrity, France,⁴²⁰ Poland,⁴²¹ Belgium⁴²² and Spain⁴²³ envisage a broad catalogue of moral rights.



All the countries assessed within this study have included, in their national laws, the right of attribution and the right of integrity⁴²⁴ although in some cases with different denominations. In

⁴¹⁷ Jan Rosén, 'Moral Right in Nordic Law' [2014] ALAI 13, 3.

⁴¹⁸ The Lithuanian Copyright Law art.14.

⁴¹⁹ Swedish Copyright Act sec.3.

⁴²⁰ French IP Code art.L-121-1; Belgian Code of Economic Law art.XI.165.2 .

⁴²¹ The Polish Copyright Act art.16.

⁴²² Belgian Code of Economic Law Art.XI.165.2.

⁴²³ The Spanish Intellectual Property Law art.14.

⁴²⁴ See Deliverable 2.1 for an analysis of these rights at international level.

France and Belgium the right of integrity is known as the right of respect⁴²⁵ which, in France, also involves both the right of attribution and the right of integrity. In Lithuania this right is known as the ‘the right to the inviolability of a work’.⁴²⁶

Without entering into details (see respective Annexes for further details in each jurisdiction), **the right of attribution** is the right of the author to be recognised as author of his/her work and to claim this right to be respected. It has a similar scope in all analysed national laws.⁴²⁷ It must be noted that Lithuania distinguishes two independent components, namely, the right of attribution and the ‘right to the author’s name’ (as an independent right). The latter includes the right to claim or prevent the mentioning of the author’s name in connection with any use of the work, or the right to claim that the work is disclosed to the public under a pseudonym⁴²⁸. Poland⁴²⁹ also adds as a separate exclusive right ‘the right to sign a work with one's name or pseudonym or to make it available anonymously’.⁴³⁰ These situations are normally included in the broad concept of the right of attribution in other jurisdictions.

The right of integrity is the right that guarantees that the author can shield his creative personality by giving him the right to oppose distortions or other derogatory action amounting to misrepresentation of his honour and reputation.⁴³¹

Damage to the author’s honour or reputation. While some countries such as Lithuania,⁴³² Sweden⁴³³ and Spain,⁴³⁴ condition the application of this right to proof of prejudice to the author’s honour or reputation, other countries do not limit the application of the integrity right to situations where there exists such prejudice. This is the case in Poland,⁴³⁵ Belgium⁴³⁶ and France.⁴³⁷ In the latter country, nothing is even mentioned in the legal provision with regards to the obligation of proving a certain damage to the author’s honour or reputation as a condition to enforce such rights.⁴³⁸ In Belgium, a distinction is made between a general right to oppose to any type of changes without any qualifying criterion, on the one hand, and the core of the integrity

⁴²⁵ French IP Code art.L-121-1; Belgian Code of Economic Law art.XI.165.2 .

⁴²⁶ The Lithuanian Copyright Law art.14.1(3).

⁴²⁷ See The Spanish Intellectual Property Law art.14; French IP Code art.L121-1; Belgian Code of Economic Law art.XI.165.2; Swedish Copyright Act sec.3; The Lithuanian Copyright Law art.14.1(1).

⁴²⁸ The Lithuanian Copyright Law art.14.1(2).

⁴²⁹ See Annex IV for a further analysis of moral rights in Poland.

⁴³⁰ The Polish Copyright Act art.16.2.

⁴³¹ Janssens and Michaux (n 342) 396.

⁴³² The Lithuanian Copyright Law art.14.1(3).

⁴³³ Swedish Copyright Act sec.3.

⁴³⁴ The Spanish Intellectual Property Law art.14.4.

⁴³⁵ The Polish Copyright Act art.16.3.

⁴³⁶ Belgian Code of Economic Law Art.XI.165.2.

⁴³⁷ See Annex II for a further analysis of moral rights in France.

⁴³⁸ Durrande and others (n 101) 102.

right that requires proof of harm to the author's honour and reputation. This second attribute is declared inalienable, as is foreseen in the Berne Convention. It will therefore never be possible to include a clause in an agreement whereby the author agrees to never oppose modifications of the work even if these constitute distortions or other derogatory action amounting to misrepresentation of his honour and reputation.⁴³⁹

In Spain,⁴⁴⁰ the legislator also subjects the situations in which the author can claim his right of integrity to the condition that the use harms the author's 'legitimate interests'. Although assessing the concept of 'legitimate interests' is an arduous task, scholars agree that it refers to the moral or personal interests of the author, excluding the economic interests from any assessment⁴⁴¹. In Sweden,⁴⁴² not only the modification of the work is actionable, but author's may also oppose the making available of a work 'in a form or in a context which is prejudicial to the author'.⁴⁴³

Interpretation of the right of integrity in national courts. While the enforcement of moral rights has always been complex, case law involving such rights mostly deal with problems relating to the right of integrity. While a decision regarding a potential infringement of the right of integrity often involves a fact-based assessment certain insights can be identified. For instance, in Spain, the Supreme Court ruled in early cases that most of the modifications made to the work would entail an infringement of the right of integrity.⁴⁴⁴ However this approach has changed over the years as now the court decided that also the scope and the degree of the modification need to be taken into account.⁴⁴⁵ In Belgium, the *Cour de Cassation* held that the right of respect also includes the right of the author to oppose to non-material modifications of the work that may affect the 'spirit of the work'.⁴⁴⁶ In the same line, the French courts stated that the moral right of respect revolves around two aspects. First, the respect to the physical integrity of a work (the right to oppose to modifications, mutilations, retouches...etc.) and second, the respect to the intellectual integrity of the work.⁴⁴⁷ In Sweden, the courts have clarified that the concept of being 'prejudicial to the authors' reputation' is an objective matter which does not depend on the 'originators' notion'.⁴⁴⁸ In the Max Walters case, the Supreme Court ruled that not only must the author be offended by a certain exploitation of his work, there should moreover be an infringement in an

⁴³⁹ Gotzen (n 416) 70.

⁴⁴⁰ See Annex V for a further analysis of moral rights in Spain.

⁴⁴¹ Bercovitz Rodríguez Cano and others (n 80) 137.

⁴⁴² See Annex VI for a further analysis of moral rights in Sweden.

⁴⁴³ Swedish Copyright Act sec.3.

⁴⁴⁴ See STS 421/1991, 3 June 1991 of the Spanish Supreme Court.

⁴⁴⁵ See STS 1082/2006, 6 November 2006 of the Spanish Supreme Court.

⁴⁴⁶ Belgian court of Cassation 8 of May 2008, AM 2009.

⁴⁴⁷ The Court of Appeal of Versailles (20 December 2001, D Pontoreau v Front National).

⁴⁴⁸ Westerlund (n 246) 52.

objective sense.⁴⁴⁹ In Lithuania, while Courts have not yet adopted a clear position as to whether an infringement of the right of integrity should be accompanied by harm to the author's honor or reputation, the trend seems to follow the presumption according to which the respect of the works should be associated with the respect of the author. The Supreme Court⁴⁵⁰ considered that any alterations or distortions caused to a work, even if they are considered minor, could be painful for the author and considered by him as disrespectful.⁴⁵¹

In Poland there is an interesting provision in relation to all the moral rights. According to it, an author whose moral rights have been threatened by someone's actions may demand that such actions be prohibited. If an infringement is established, the author may also demand its negative effects be remedied and demand that the infringer makes a public statement on the issue, in an appropriate content and form. If the infringement was intentional, then the court may oblige the offender to make an appropriate monetary compensation.⁴⁵²

The right of disclosure (or divulgation right), is the right of the author to decide if his/her work can be disclosed and as well as in which manner this may occur. This right is recognised in Belgium,⁴⁵³ Spain,⁴⁵⁴ Poland⁴⁵⁵ and France⁴⁵⁶. The decision on the manner and the moment to disclose the work to the public can only be made by the author. None of these jurisdictions surveyed None of the laws examined contained any restrictions on the author's broad right of decision and any form of initial disclosure seems, in principle, allowed by the law.⁴⁵⁷

It is nevertheless relevant to briefly mention a French statutory provision concerning abuses of the right of divulgation made by the descendants or representatives of the author, after his death. In case of abuse in the use or the non-use of the right of disclosure, the Court could impose 'any appropriate measure'.⁴⁵⁸ For instance, when it is considered that the heirs of the author are unreasonably opposing the divulgation of the works, the court could grant the necessary permission.⁴⁵⁹ It is also possible for the Ministry of Culture to initiate such a procedure (see Annex II).

⁴⁴⁹ Swedish Supreme Court, NJA 1979 (Max Walters).

⁴⁵⁰ Decision of the Supreme Court of Lithuania of 19 February 2003, civil case, *J Jakitas v UAB Mis0 gaires*, No 3k-3-273/2003, category 78.

⁴⁵¹ Mizaras (n 317) 845.

⁴⁵² The Polish Copyright Act art.78.1.

⁴⁵³ Belgian Code of Economic Law art.XI.165.2 .

⁴⁵⁴ See Annex V for a further analysis of moral rights in Spain.

⁴⁵⁵ The Polish Copyright Act art.16.4.

⁴⁵⁶ French IP Code art.L-121-2 .

⁴⁵⁷ Carlos Rogel Vide and others, *Derechos morales de los creadores: características, ambito y limites* (Editorial Reus 2019) 46.

⁴⁵⁸ French IP Code L-121-3.

⁴⁵⁹ Sterling (n 230) 401.

A similar provision is found in the Spanish IP law. When the successors of an author exercise the right to not disclose a work and exercise it in a manner that infringes Article 44 of the Spanish Constitution⁴⁶⁰ on access to culture, the Spanish IP law⁴⁶¹ allows any person with a legitimate interest to ask the national Court to intervene (in order to disclose the work). It is generally understood that this provision is mainly invoked by cultural associations or cultural institutions⁴⁶² (see Annex V).

Besides the aforementioned moral rights, a few jurisdictions recognise additional moral rights. There is first **the right of retraction or withdrawal**, which is the right according to which the artist can withdraw a work from circulation after it is published. This right is recognised in the Spanish⁴⁶³ and French⁴⁶⁴ copyright acts. Both systems grants however a preferential right to the first assignee in the sense that if the author decides to exploit the work again after the withdrawal, the first assignee obtains a preference for the exploitation of the work under the same conditions that were originally offered (see Annexes II and V).

Additionally, the Spanish legislator grants the author **the right of modification**, allowing the author to modify the work as long as he/she respect the rights acquired by third parties and the regulations regarding the protection of cultural goods where works are officially protected under Spanish cultural heritage laws⁴⁶⁵ (see Annex V).

The right of access is also explicitly envisaged in the Spanish IP law. This is a particular moral right which gives the author the opportunity to ‘access the unique or rare copy of the work, when it is in the physical possession of another person, in order to exercise the right of disclosure or any other’⁴⁶⁶ (see Annex V for a further analysis). This right also exists in Belgium, even though it is not labelled as ‘moral right’.⁴⁶⁷

The Polish Copyright Act also mentions a **right to control the manner in which a work is used**.⁴⁶⁸ According to it, the user of a work should allow the author to carry out a supervision before the work is disseminated. If the author does not react in due time, he shall be deemed to have agreed to the dissemination of the work (see Annex IV for a further analysis).

⁴⁶⁰ Article 44 of the Spanish Constitution of 1978 establishes that ‘the public authorities will promote and protect access to culture, to which everyone has the right’.

⁴⁶¹ The Spanish Intellectual Property Law art.40.

⁴⁶² Bercovitz Rodríguez Cano and others (n 80) 147.

⁴⁶³ The Spanish Intellectual Property Law art.14.6.

⁴⁶⁴ French IP Code art.L-121-4 .

⁴⁶⁵ The Spanish Intellectual Property Law art.14.5.

⁴⁶⁶ The Spanish Intellectual Property Law art.14.7.

⁴⁶⁷ Belgian Code of Economic Law art.XI.167.

⁴⁶⁸ The Polish Copyright Act art.60.

Finally, in France there are **particular quasi moral rights'** provisions in relation to specific types of works, in particular for cinematographic works,⁴⁶⁹ computer programs⁴⁷⁰ and the works of journalists⁴⁷¹ (see Annex II for a further analysis of these rights). In Poland specific moral right exists in relation to musical works.⁴⁷²

Term of protection

The term of protection may be different from the term of economic rights given that the Berne Convention only provides that moral rights must be maintained at least until the expiry of economic rights.⁴⁷³

In Lithuania,⁴⁷⁴ Poland,⁴⁷⁵ Spain⁴⁷⁶ and France⁴⁷⁷ moral rights are perpetual, while in Belgium⁴⁷⁸ and Sweden⁴⁷⁹ moral rights expire with economic rights, namely 70 years after the death of the author. Public domain works are therefore still protected by moral rights in France, Poland, Lithuania and Spain.

In Spain, however, only the rights of attribution and integrity⁴⁸⁰ have a perpetual character. The right of divulgation expires after 70 years of the death of the author (as the economic rights) while the rest of moral rights lasts until the death of the author. There is an important provision for CHIs in Spanish law according to which, in cases where the rightful successors in title cannot be found or located, the State, the Autonomous Communities or the cultural institutions may exercise the rights of attribution, integrity and divulgation⁴⁸¹. A similar provision exists in Poland where, besides the legal successors in title, an action for the protection of moral rights may also be brought by the competent authors' association for the given type of works or by a CMO which manage the copyright of the deceased author.⁴⁸²

Interim conclusions

We can draw the following conclusions based on our analysis of the selected jurisdictions:

⁴⁶⁹ French IP Code L-121-5.

⁴⁷⁰ French IP Code L-121-7.

⁴⁷¹ French IP Code L-121-8.

⁴⁷² The Polish Copyright Act art.16.5.

⁴⁷³ The Berne Convention art 6bis(2).

⁴⁷⁴ The Lithuanian Copyright Law art.34.2.

⁴⁷⁵ The Polish Copyright Act art.16.

⁴⁷⁶ The Spanish Intellectual Property Law art.15.

⁴⁷⁷ French IP Code art.L-121-1, 2.

⁴⁷⁸ Belgian Code of Economic Law art.XI.166.

⁴⁷⁹ Swedish Copyright Act Sec.43.

⁴⁸⁰ The Spanish Intellectual Property Law art.15.2.

⁴⁸¹ The Spanish Intellectual Property Law art.16.

⁴⁸² The Polish Copyright Act art.78.3.

- Due to the complete lack of harmonization of moral rights, important differences remain between Member States in this domain.
- Since moral rights also have a significant impact on the activities of CHIs, the lack of harmonization for these institutions presents a significant obstacle to their activities of dissemination of cultural content, especially in a cross-border context.
- The unharmonized situation is particularly problematic in respect of works that fall in the public domain, as in some jurisdictions moral rights continue to have effects.
- The above-mentioned problems are particularly relevant in the digital environment⁴⁸³.

3.3.3 Adaptation and translation right

The Berne Convention explicitly mentions the right of adaptation as a separate exploitation right. Article 12 states that ‘translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work’⁴⁸⁴. In some jurisdictions the right of adaptation is seen as part of the right of reproduction⁴⁸⁵. Furthermore, and even though the Berne Convention mentions it as a separate right, some national legislations conceived the translation right as part of the right of adaptation.⁴⁸⁶

At the EU level,⁴⁸⁷ it is considered (but also disputed) that the adaptation right (and the translation right) are not included in the harmonisation process that was carried out by the Information Society Directive. Obviously, this right remains applicable in all Member States as a consequence of the Berne Convention.

The right of adaptation is of crucial importance for the status of derivative works, which can be defined as those works that are based on pre-existing works.⁴⁸⁸ If it is accepted that the right of

⁴⁸³ Janssens (n 395).

⁴⁸⁴ The Berne Convention art.12.

⁴⁸⁵ Sterling (n 230) 785.

⁴⁸⁶ Sterling (n 230) 1251.

⁴⁸⁷ See Deliverable 2.1 for practical implications of the right of adaptation for CHIs.

⁴⁸⁸ Thomas Margoni, ‘The Digitisation of Cultural Heritage: Originality, Derivative Works and (Non) Original Photographs’ [2014] SSRN Electronic Journal 18 <<http://www.ssrn.com/abstract=2573104>>.

adaptation remains outside the *copyright acquis*, the regulation of derivative works is left to the discretion of Member States.⁴⁸⁹

Comparative analysis

In most of the national jurisdictions assessed in this study, the right of adaptation is perceived as part of the right of reproduction. This is the case in Belgium,⁴⁹⁰ France⁴⁹¹ and Sweden.⁴⁹² On the contrary, Lithuania⁴⁹³ recognizes the adaptation right as an independent economic right⁴⁹⁴ and Spain has included an independent adaptation right in its copyright regulation.

(I) Spanish and Lithuanian adaptation rights: in the Spanish IP law, the adaptation right is referred to as the ‘transformation right (in Spanish, ‘*derecho de transformacion*’)⁴⁹⁵. Lithuania’s Copyright Act recognises the separate exclusive right of the author to authorize and prohibit the ‘adaptation, arrangement, dramatization or other transformation of a work’.⁴⁹⁶

In Spain, the statutory provision starts by defining the concept of transformation⁴⁹⁷ in a broad manner: any modification, translation or adaptation of the form of the work that creates another independent work is subject to the transformation right. A transformation of the original work that is original, will obtain own copyright protection as a derivative work (in Spain, *obra compuesta*)⁴⁹⁸. Any unsubstantial modification must thereby be excluded.⁴⁹⁹ The Spanish IP law grants copyright protection to the author of the work resulting from the transformation of the original work.⁵⁰⁰ This is without prejudice of the right of the author of the original work to authorize the exploitation of the new work for the whole duration of protection (as it also happens in other countries that do not have an independent adaptation right, see below). In Lithuania, derivative works are those works which ‘are created on the basis of other literary, scientific or artistic works (translations, dramatizations, adaptations, annotations, reviews, essays, musical arrangements, static and interactive Internet homepages, and other derivative works)’.⁵⁰¹ Accordingly, these works can also be subject of copyright protection as long as they are ‘the result of creative activities of an author’. The copyright protection granted to derivative

⁴⁸⁹ Margoni (n 488) 21.

⁴⁹⁰ Belgian Code of Economic Law art.XI.165.1 .

⁴⁹¹ Gautier (n 37) 649.

⁴⁹² Swedish Copyright Act sec.2.

⁴⁹³ See Annex III for a further analysis of the right of adaptation in Lithuania.

⁴⁹⁴ The Lithuanian Copyright Law art.15.

⁴⁹⁵ The Spanish Intellectual Property Law art.21.

⁴⁹⁶ The Lithuanian Copyright Law art.15.

⁴⁹⁷ See Annex V for a further analysis of the right of adaptation in Spain.

⁴⁹⁸ See definition in art.9 of the The Spanish Intellectual Property Law.

⁴⁹⁹ Patricia Mariscal, *Derecho de Transformación y Obra Derivada* (1st edn, Tirant lo Blanch 2013) 63.

⁵⁰⁰ The Spanish Intellectual Property Law art.21.2.

⁵⁰¹ The Lithuanian Copyright Law art.4.3.

works applies regardless of the copyright or related rights protection of the pre-existing work in which the derivative work is based on.⁵⁰²

Importantly, the transformation right can be assigned and revoked. In case it is assigned, it must be noted that under Spanish law the assignment of this right only applies to the specific types of transformation.⁵⁰³ For instance, if the right is assigned to translate a novel, the assignment only applies to this specific mode of transformation and it cannot be used for any other transformation of the work, e.g. adapting the work into a cinematographic work.⁵⁰⁴ It should be noted that other jurisdictions, that do not have particular provisions regarding the adaptation or translation rules, often apply similar rules by way of the regulation for copyright contracts (see e.g. Belgium⁵⁰⁵).

Term of protection. The term of protection for this right is 70 years after the authors' death in Lithuania⁵⁰⁶ and in Spain.⁵⁰⁷

(II) For the countries where the right of adaptation is part of the reproduction right, namely Belgium,⁵⁰⁸ France⁵⁰⁹ and Sweden,⁵¹⁰ no specific provisions or regimes are set up (in France, there is a particular regime for audiovisual adaptations of written works⁵¹¹ - this is also the case in Belgium⁵¹²).

Nevertheless, some statutory provisions do apply to authors of derivative works in some of the national jurisdictions as is briefly mentioned below.

Derivative works are normally characterized by the absence of the author of the first work's collaboration meaning that the author of the derivative work adapts on his own the original work. The French, Polish⁵¹³ and Swedish jurisdictions⁵¹⁴ explicitly grant copyright protection to derivative works provided these works have a sufficient degree of originality and without prejudice of the rights of author of the original work.

⁵⁰² The Lithuanian Copyright Law art.4.4.

⁵⁰³ The Spanish Intellectual Property Law art.43.1.

⁵⁰⁴ Mariscal (n 499) 57.

⁵⁰⁵ Belgian Code of Economic Law art.XI.167.

⁵⁰⁶ The Lithuanian Copyright Law art.34.1.

⁵⁰⁷ The Spanish Intellectual Property Law art.26.

⁵⁰⁸ See Annex I for a further analysis in Belgium.

⁵⁰⁹ See Annex II for a further analysis in France.

⁵¹⁰ See Annex VI for a further analysis in Sweden.

⁵¹¹ Valérie-Laure Benabou, 'Rapport de La Mission Du CSPLA Sur Les "Œuvres Transformatives"' (2014) 33.

⁵¹² Belgian Code of Economic Law art.XI.184.

⁵¹³ See Annex IV for a further analysis in Poland.

⁵¹⁴ French IP Code art.L-112-3; Swedish Copyright Act sec.4; The Polish Copyright Act art.2.

The right of the author of the original work is also confirmed in France, Poland and Sweden⁵¹⁵. Therefore the author of the derivative works will have to obtain the consent of the author of the original work when the work is protected by copyright or related rights. Adapting the original work without the authors' authorization, when the work is still protected by exclusive rights, will entail infringement of such exclusive rights. This is explicitly stated in France⁵¹⁶ where the provision makes a specific reference to the translation, adaptation or transformation of the work as 'reproductions' of the work. It follows from this provision that the author can oppose such transformations of the work. In Poland, the author retains the exclusive right to authorize the creation of the derivative work, even when there is a transfer agreement in place and the agreement provides for the transfer of the entire economic copyright (unless the agreement provides otherwise but this must be clearly indicated in such an agreement).⁵¹⁷

A particular difficulty associated with the creation of derivative works is the application of both the economic and moral rights of the underlying work which should in principle be fully respected by the maker of the adaptation⁵¹⁸. Especially the moral right of integrity comes into focus here. Interestingly, the French Courts have recognized that a certain infringement of the moral rights of the author of the pre-existing work could be permitted.⁵¹⁹ They reasoned that the author of the derivative work should enjoy a certain level of artistic freedom in order to provide a new expression of the substance of the work⁵²⁰ (see Annex II for a further analysis in France).

Interim conclusions

The analysis carried out in the selected countries shows that:

⁵¹⁵ Swedish Copyright Act sec.4; French IP Code art.L-113-4; The Polish Copyright Act art.2 and 46.

⁵¹⁶ French IP Code art.L-122-4.

⁵¹⁷ The Polish Copyright Act art.46.

⁵¹⁸ Durrande and others (n 101) 83.

⁵¹⁹ Pauline Léger, 'Liberté de Création et Droit d'auteur Évolutions En Matière d'emprunt Créatif à l'œuvre d'autrui' (2020) 55 (1) L'Observatoire 83, 84.

⁵²⁰ *Arrêt n° 788 du 22 juin 2017 (15-28467 et 16-11759) - Cour de cassation - Première chambre civile ('Dialogue des Arrêt n° 788 du 22 juin 2017 (15-28467 et 16-11759) - Cour de cassation - Première chambre civile ('Dialogue des carmelites')*.

- The regulations on the right of adaptation leave a confused picture because there is no clarity about its harmonization in the EU.
- It is certain that all countries recognize this right as one of the attributes of the exclusive right of an author, as part of the reproduction right or as a separate economic right.
- Some countries establish an independent right while other countries include this right within the scope of the reproduction right. This implies that the modalities of application vary per country.
- Yet, it is accepted in all Member States that a derivative work is entitled to copyright protection if it itself fulfils the originality criterion.
- The author of the pre-existing work will always have the right to authorize or forbid the adaptation of the work.

4 Other rules on matters relevant for CHIs

4.1 Protection of public domain/cultural heritage

There are particular provisions in the copyright systems of all countries analysed that are worth mentioning given the importance for CHIs and, in consequence, for the inDICEs project. Such provisions are particularly relevant for the (re)use of public domain works.

Posthumous works

Most countries provide for a protection regime for posthumous works, i.e. works that are disclosed for the first time after the author's death. They all grant 25 years of protection to be calculated from the day of first disclosure of the work. We will list hereafter the relevant provisions and some particularities in some of the jurisdictions.

In France⁵²¹ and Spain,⁵²² where moral rights are not subject to a time limit, there are special rules obliging the holder of the right to seek the authorization of the heirs of the author or any other owner of the moral rights and, specifically, the right of divulgation^{523 524} (see also below).

⁵²¹ See Annex II for a further analysis of this provision in France.

⁵²² Spanish IP Law art.129

⁵²³ French IP Code L-123-4.

⁵²⁴ Gautier (n 37) 435.

In Belgium,⁵²⁵ it is merely confirmed that the right is given to anyone who lawfully publishes or communicates to the public for the first time a work that had not been previously published.⁵²⁶ While this provision is included in the copyright regulation, it is generally understood that is not equal to copyright protection but rather a sort of neighbouring right for the person that makes the investment and effort to communicate the work to the public.

Sweden⁵²⁷ and Lithuania⁵²⁸ also confirm the rule that an exclusive right is conferred on the person who publishes an unpublished work for the first time with no further conditions.⁵²⁹

This is also the case in Spain,⁵³⁰⁵³¹ but the legal provision is more elaborated. It lists three limitations: i) the work in the public domain needs to be original to qualify for copyright protection; ii) the work must be unpublished (this is an absolute requirement as otherwise it would not fall under the scope of this provision) and iii) the work must be in the public domain as a result of the expiration of copyright protection.⁵³²

Unprotected works in Spain. In Spain, a similar right of reproduction, distribution and public communication is also provided to publishers of unprotected works for particular publications (*ediciones*).⁵³³ The condition is that such edition should have a certain level of creativity 'by their typesetting, presentation and other editorial characteristics'. 'Unprotected works' means works in the public domain or other unprotectable data or information. Only the edition will get the special protection, not the works included in/or isolated from the editing. It is envisaged in the law to give particular editions of works protection due to the 'singularity' of the edition itself.⁵³⁴ Therefore the publisher cannot enforce any rights against the reproduction or distribution of the 'unprotected work'.⁵³⁵ This provision could in theory be used to secure protection over digital versions of public domain works. However, it seems unlikely that the requirement of 'creativity' can be demonstrated. E.g. there is doubt that protection should indeed be given to the digital versions of old books produced by the National Spanish Library (and which it also claims).⁵³⁶

⁵²⁵ See Annex I for a further analysis of this provision in Belgium.

⁵²⁶ Belgian Code of Economic Law Art.XI.166.6.

⁵²⁷ Swedish Copyright Act sec.44(a).

⁵²⁸ The Lithuanian Copyright Law art.36.1.

⁵²⁹ See Annexes VI and III for a further analysis of this provision in Sweden and Lithuania.

⁵³⁰ See Annex V for a further analysis of this provision in Spain.

⁵³¹ The Spanish Intellectual Property Law art.129.1.

⁵³² The Spanish Intellectual Property Law 301.

⁵³³ The Spanish Intellectual Property Law art.129.2.

⁵³⁴ Bercovitz Rodríguez Cano and others (n 80) 304.

⁵³⁵ Bercovitz Rodríguez Cano and others (n 80) 303.

⁵³⁶ Rocío Ameneiros Rodríguez and Concha Varela-Orol, '¿Dominio público o copyfraude de copias digitales? Prácticas en bibliotecas patrimoniales españolas' (2018) 21 Anales de Documentación 4.

Provisions concerning moral rights

Public domain works and the moral rights of the author

In Spanish law there is an explicit statutory provision⁵³⁷ concerning the ‘conditions for the use of works in the public domain’. It provides that, while public domain works can be used by anyone (due to the lack of IP protection on the work), the moral rights of paternity and integrity need to be observed. Only works that have fallen in the public domain as result of the expiration of the copyright-related protection, fall under the scope of this article.⁵³⁸

Moral right of divulgation and the prevention of abuse provision

As previously mentioned, the French IP Code includes special rules that deal with the issue of the perpetual moral rights. Yet at the same time, it also safeguards that the descendants or representatives of the author who own moral rights, do not abuse these rights after the death of the author. This provision also applies to works that have already fallen in the public domain⁵³⁹. In case of abuse in the use or non-use of such right, the Court, upon request of the Ministry of Culture, could impose any appropriate measure⁵⁴⁰. For instance, when it is considered that the heirs of the author are unreasonably opposing the divulgation of the works, and there is a public interest at stake, the Court could grant the necessary permission⁵⁴¹ to e.g. disclose the work. As Dusollier explains ‘rather than a substitution of the State in the exercise of a perpetual moral right, this competence ensures a balance between safeguarding cultural heritage and the public interest in the access to culture’.⁵⁴² Thus far, this possibility has been rarely exercised in practice.

Protection of works in the ‘cultural interest’

Although it does not concern a moral right *per se*, there is a special provision related to the protection of the cultural interest in the Swedish Copyright Act.⁵⁴³ Scholars refer to it as a sort of moral right that lasts perpetually after author’s death as long as ‘cultural interests’ are infringed.⁵⁴⁴ In particular, the legal provision grants the State, acting through specific authorities, the possibility to request the courts to issue an injunction in order to stop the reproduction of a

⁵³⁷ The Spanish Intellectual Property Law art.41.

⁵³⁸ Rogel Vide and others (n 457) 237.

⁵³⁹ Severine Dusollier, ‘Scoping Study on Copyright and Related Rights and the Public Domain’ (Social Science Research Network 2011) SSRN Scholarly Paper ID 2135208 38 <<https://papers.ssrn.com/abstract=2135208>> accessed 23 March 2020.

⁵⁴⁰ French IP Code L-121-3.

⁵⁴¹ Sterling (n 230) 401.

⁵⁴² Dusollier (n 539) 38.

⁵⁴³ Swedish Copyright Act sec.51.

⁵⁴⁴ Rosén (n 417) 3.

work that would undermine the cultural interest under the obligation to pay a penalty. This is a rather exceptional circumstance and the application of this rule is therefore limited in practice to cases of true violations of the cultural heritage or the classical masterpieces.⁵⁴⁵ The only sanction that is envisaged in the prohibition is an economic penalty (see Annex VI).

Longer term of protection

The transitional provisions of the Term Directive allow Member States to keep a longer period of copyright protection if it was already in place before 1 July 1995. As a result, France⁵⁴⁶ and Spain⁵⁴⁷ (of the countries subject to this study) have particular provisions in their national systems providing a longer term of protection for certain works.

In Spain,⁵⁴⁸ the Spanish legislator kept a 80 years copyright protection for all those authors that died before 7 December 1987.⁵⁴⁹ As a result, a number of Spanish authors enjoy a longer protection of exclusive rights than other EU authors in Spain, e.g. Pablo Picasso or Vicente Aleixandre⁵⁵⁰. This provision also applies to other European authors as it was stated by the CJEU in the case *Phil Collins*⁵⁵¹ where the Court of Justice ruled that any advantage given in a Member State to its nationals should also be provided to a national of the other EU Member States. Such protection is territorial and only applies to Spain.

In France,⁵⁵² there are three provisions extending the term of protection of works. Two of them⁵⁵³ extend the term of protection of works created between the First World War (WWI) and the Second World War (WWII). A third provision extend the protection of works of authors who died for France during WWI and WWII, e.g. Apollinaire, Saint-Exupery, by 30 years.⁵⁵⁴ Such protection is territorial and only applies to France.

Protection of old photographs in Polish law

It should be noted that there is a special regulation in the Polish legal system for 'old photographs' (the so-called "revival of rights"), i.e. those which were created before the entry into

⁵⁴⁵ Johan Axhamn, 'The Nordic Countries', *Moral rights* (2nd., Sweet & Maxwell; London 2016) 527.

⁵⁴⁶ French IP Code L-123-10.

⁵⁴⁷ The Spanish Intellectual Property Law Fourth transitory provision.

⁵⁴⁸ See Annex V for further analysis of these provisions in Spain.

⁵⁴⁹ The Spanish Intellectual Property Law Fourth transitory provision.

⁵⁵⁰ Christina Angelopoulos, 'The Myth of European Term Harmonisation: 27 Public Domains for the 27 Member States' [2012] SSRN Electronic Journal 9 <<http://www.ssrn.com/abstract=2145862>> accessed 13 February 2020.

⁵⁵¹ *Collins and Patricia Im- und Export v Imtrat and EMI Electrola (C-92/92) EU:C:1993:847.*

⁵⁵² See Annex II for a further analysis of these provisions in France

⁵⁵³ French IP Code art. L-123-8,9.

⁵⁵⁴ French IP Code L-123-10.

force of the currently binding Copyright Act, and which were subject to protection under the previously existing provisions (see Annex IV).

Accordingly, with the entry into force of the current regulation these previously expired copyrights became effective again on the condition that they comply with the requirements under the current act⁵⁵⁵. This is the case for photographic works created in the following years:

- 1926-1952 - under the Copyright Act of 29 March 1926,
- 1952-1994 - on the basis of the Copyright Act of 10 July 1952

In order for such photographs to be protected, the author had to make an express reservation of his/her copyrights on the work (e.g. on the prints). Hence copyrights have returned to the creators of photographic works only if they had reserved the copyright - otherwise they had never been protected, so there are no rights that could be 'revived'.

Other provisions on works of fine arts

An interesting provision is found in the Spanish IP Code⁵⁵⁶ which precludes the owner of the physical work to exercise certain exclusive exploitation rights. The law includes namely a legal presumption that an author of visual arts or photographic works when selling his work to a third party, will also transfer the right of public exhibition in a museum or any other exhibition, even if they work was not disclosed, unless this right was expressly excluded in the sales agreement.⁵⁵⁷ Yet, being a presumption and not an obligation, the author of the work may still oppose to the exercise of such right 'when the exhibition is carried out under conditions that damage his honor or professional reputation'⁵⁵⁸. The law does not impose any form for the opposition of the author to prevent the owner from exercising this right but the burden of proof falls on him. It must also be noted that when the author retains the right of public exhibition, the author will need to exercise his right access under certain restrictions⁵⁵⁹ as seen in Section 3.3.2. A comparable legal presumption can be found in the Belgian Copyright Act.⁵⁶⁰ This provision states that the transfer of a work of art entails, unless otherwise agreed, the transfer of the right to exhibit the work provided it is not prejudicial to the honor or reputation of the author.

A similar provision is also included in the Lithuanian Copyright Law. This exception permits, without having the author's consent (or his successor), 'unless this turns out to be impossible',

⁵⁵⁵ The Polish Copyright Act art.124.1(3).

⁵⁵⁶ The Spanish Intellectual Property Law art.56.2.

⁵⁵⁷ Bercovitz Rodríguez Cano and others (n 80) 179.

⁵⁵⁸ The Spanish Intellectual Property Law art.56.2.

⁵⁵⁹ Carlos Rogel Vide and others, *Museos y propiedad intelectual* (Editorial Reus 2012) 41.

⁵⁶⁰ Belgian Code of Economic Law Art.XI.173.

the public display of an original or a copy of work of art for non-commercial purposes ‘if the work has been sold or its ownership has been otherwise transferred to another natural or legal person’. The public display of works of art is only permitted when the author or his successor is aware of the public display or has ‘reasonable grounds’ to believe that such public display or exhibition of works constitutes an integral part of the regular activities of the natural or legal person that acquired the work.⁵⁶¹ No remuneration is envisaged for the rightholders for these kind of uses.

There is another particular provision in Lithuania according to which the owner of a work of art must permit the author of the work to reproduce or display the said work in an exhibition provided that neither the reproduction right nor the right to public display have been transferred to the owner of the work of art. This permission must ensure the safety of the work and the legitimate interests of the owner of the work must not be prejudiced.⁵⁶²

In addition, the second paragraph of the same provision establishes that ‘the owner of an original work of fine art may not destroy the work before offering it back to the author’. Nevertheless when the return of the original work is no longer possible, the conditions for the author to create a copy of the work must be provided.

Special provisions on digital content

Legal provision on digital reproductions of works of fine arts

The Swedish Copyright Act⁵⁶³ introduces an interesting provision according to which works of art cannot be reproduced in digital form in connection with a text in a critical presentation. Therefore, the reproduction of works of arts in connection with text in critical articles can only be used in analogue reproductions.⁵⁶⁴ In addition, reproductions of fine arts cannot be reproduced in connection with commercial scientific presentations.

In other words, published works of arts may be reproduced ‘in connection with the text of a non-commercial scientific presentation, in connection with the text in a critical presentation, but not in digital form and in a newspaper or magazine in connection with an account of a daily event, but not if the work has been created to be reproduced in such a publication’ as long as they are reproduced in accordance with good practices and only for such purposes’.⁵⁶⁵

Interim conclusions

⁵⁶¹ The Lithuanian Copyright Law art.33.

⁵⁶² The Lithuanian Copyright Law art.18.1.

⁵⁶³ Swedish Copyright Act Sec. 23.

⁵⁶⁴ Brigitte Lindner and Ted Shapiro, *Copyright in the Information Society: A Guide to National Implementation of the European Directive* (2nd ed., Cheltenham : Edward Elgar Publishing 2019) 940.

⁵⁶⁵ Swedish Copyright Act Sec. 23.

The following conclusions result from the foreground analysis:

- It is important to be aware of special provisions in the national copyright systems that provide rules that deviate from the basic principles of copyright. This is especially true for undisclosed/unpublished (posthumous) works and works of fine art.
- Some countries grant the State a certain control on the uses of works after the author's death.
- More in general, it may not too easily that works in the public domain can always be freely used, as there may be limitations in some jurisdictions stemming from the perpetual term for moral rights or extensions of the term of copyright protection in some jurisdictions.
- These different rules on the term of protection may make that some works have fallen in the public domain in one country while they are still protected in other.
- In addition, the perpetual moral rights in some jurisdictions entail that CHIs need to be careful with particular uses of certain works.

4.2 Open Data Directive for CHIs

At the moment of drafting this deliverable, none of the countries under review have published a draft law implementing Directive (EU) 2019/1024. Yet, because of its relevance for CHIs, the implementation of this Directive will remain on our radar in future research.

5 Conclusion

Our analysis highlights the differences that still exist within the national copyright systems. These differences are not only caused by the lack of harmonization at EU level of particular areas of copyright law such as the moral rights or the adaptation right, but also due to the different transposition of the copyright Directives in the Member States. Among the (partially) harmonized areas of copyright law, these differences are more evident in traditional areas of copyright law such as the exceptions and limitations or the protection of certain subject matter like photographs, than in those areas whose attention has considerably increased due to the development of new technologies (e.g. the regulation of OOCWs or the new exceptions for TDM-related activities).

➡ In particular, with regards to **exceptions and limitations**, we still observe considerable divergences among the Member States, including in those exceptions that are relevant for the activities of CHIs, namely the preservation exception, the exception for advertising exhibitions or sales of works and (to some extent) the exception for research and private study in dedicated terminals.

The implementation of these exceptions varies from one jurisdiction to another, especially in relation to the beneficiaries of the exception. Such divergences may create confusion for CHIs when carrying out their public-interest missions, when providing access to their collections and may hamper the development of sustainable financing models. This has also been recognised by the European legislator: *“The existence of different approaches in the Member States with regard to acts of reproduction for preservation by cultural heritage institutions hampers cross-border cooperation, the sharing of means of preservation and the establishment of cross-border preservation networks in the internal market by such institutions, leading to an inefficient use of resources. That can have a negative impact on the preservation of cultural heritage”*.⁵⁶⁶

Either way, CHIs must remain careful as, in general, the scope of the exceptions in the Member States is rather narrow. For instance, the analysis of the preservation exception in the EU countries at stake confirmed that it is not appropriate for mass-digitization projects, cross border activities or cooperation with other CHIs.. The new mandatory preservation exception provided in the CDSM Directive will provide more legal certainty, but the actions allowed are still insufficient to meet all the concerns and aspirations of CHIs. Also, it needs to be seen how Member States will implement this new exception in their national law.

⁵⁶⁶ Recital (26) CDSM Directive

Also the scope of the exception for advertising exhibitions or sales of works is very narrow, and, because of its optional nature, lead some countries to provide for an even narrower scope of application.

There are interesting future prospects with regard to the possibility of carrying out TDM activities for CHIs. However, among the different challenges CHIs will have to face, they will need to face whether they have sufficient resources and knowledge to make full use of these new possibilities.

➡ There is certainly some improvement regarding the possibilities of using **out-of-commerce works**. Fortunately, a less cumbersome arrangement than that provided for orphan works was chosen. For the latter, there is an almost completely harmonized regulation, but the implementation in practice is too cumbersome for many CHIs. This will normally become simpler for OOCWs, but it remains to be seen how the new rules in the CDSM Directive will be implemented. In this respect, the interesting possibility of the application of the ECL system should be underlined. CHIs will benefit from it when being used by as many Member States as possible, and not just for OOCWs.

We terminate with some conclusions with regard to some concrete topics that we analysed.

➡ **The protection of photographs** remains to be one of the least harmonized areas even after the adoption of the Term Directive. Some countries only protect photographs as long as they are original in the sense of the author's intellectual creation while others also protect non-original photographs through a neighbouring right. This situation leads to different terms and levels of protection for non-original photographs in the Member States, which certainly creates legal uncertainty for cross-border activities.

➡ The protection of **databases**, on the other hand, is an area where most of the countries transposed the Directive quasi identically so the harmonization level is higher than for other types of works. Databases in all the EU countries are subject to a double regime of protection. Still we find differences in the transposition and procedural aspects in the EU Member States.

➡ The issue of **moral rights** remains very problematic, due to the lack of harmonization at EU level. Not only the term of protection of the moral rights vary according to the individual copyright systems, but there are also significant differences as regards the types of moral rights as well as their scope, in particular of the right of integrity (respect). All the countries provide of course for the minimum protection required by the Berne Convention, i.e. the right of attribution and the right of integrity.

The right of adaptation and the creation of derivative works. The right of adaptation is also far from being harmonized at EU level which leaves a confused picture in the EU countries.. The lack

of harmonization entails great modalities of application among the EU countries as some include this right as an independent right while others consider it as part of other economic rights. Yet, it is accepted in all Member States that derivative works are granted copyright protection when they fulfil the originality criterion. In addition, in all countries at stake the author of the pre-existing work will always have the right to authorize or forbid the adaptation of the work. Another area where important differences could be identified, is the **public lending derogation**. A divergent treatment exists with regards to the beneficiaries of the derogation, the types of works to which this rule applies, and the compensation and remuneration systems.

➡ Finally, special attention should be given to the rules regulating rights to **posthumous works, prolongations of the term of copyright** for certain works in France (e.g. the World-War rules), Spain or Poland, the **right of exhibition** that is given to the owner of a physical work in certain countries and the **rights given to public authorities** (States) to control certain uses of works after the author's death for the protection of cultural interests.

6 Annex I – Belgium

6.1 Copyright-related provisions

The Belgian copyright law is encoded in the Code of Economic Law (hereinafter ‘CEL’)⁵⁶⁷. The relevant intellectual property law provisions are stated in Book XI, where the copyright and related neighbouring rights provisions are included in its Title 5 (Articles XI.164 -XI.293). Most of these provisions were codified into the new Code by the Law of 19 April of 2014⁵⁶⁸ and in force since 1 January 2015. Prior to the codification, the Belgian copyright laws were enshrined in the Copyright Act of 30 June 1994, which was also amended several times. It is worth noting the Law of 22 May of 2005⁵⁶⁹ that transposed the Infosoc Directive⁵⁷⁰ into Belgian Law. Other noteworthy provisions are included in Book I CEL as it contains essential definitions for copyright and neighbouring rights. Finally, Book XV and Book XVII CEL contain important provisions on enforcement and special judicial procedures.

6.1.1 Exceptions and limitations

The exceptions and limitations are contained in Title 5, Chapter 2, Section 6 of the Belgian CEL, as modified by two laws in 2016⁵⁷¹. The Belgian legislator introduced a list of the exceptions and limitations allowing certain uses of copyrighted works without having to obtain the rightsholder’s authorization. However, they are subject to some conditions. First, all exceptions and limitations are subject to the prior lawful disclosure of the work. While there were certain debates around the scope of this condition⁵⁷², the CJEU ruled in the judgement of the *Reprobel* case⁵⁷³, that relying on exceptions do not allow uses of copies that are obtained from illegal sources. Second, although the Belgian legislator did not include it explicitly in Belgian law, all the exceptions and limitations are subject to the three-step test⁵⁷⁴(according to the Infosoc Directive and

⁵⁶⁷ Belgian Code of Economic Law.

⁵⁶⁸ Law inserting Book XI ‘Intellectual property’ in the Code of Economic Law, and inserting the provisions specific to Book XI in Books I, XV and XVII of the same Code of 19 April of 2014.

⁵⁶⁹ Law of May 22, 2005, on the Transposition into Belgian Law the European Directive 2001/29/EC of May 22, 2001, on the Harmonization of Certain Aspects of Copyright and Neighboring Rights in the Information Society.

⁵⁷⁰ For a further analysis of the Infosoc Directive see Deliverable 2.1.

⁵⁷¹ Law of June 27, 2016, Amending the Code of Economic Law for the Introduction of Freedom of Panorama; Law of 22 December of 2016 amending certain provisions of Book XI of the Code of Economic Law.

⁵⁷² Janssens (n 19) 201.

⁵⁷³ *ACI Adam and Others (C-435/12) EU:C:2014:254; Hewlett-Packard Belgium SPRL v Reprobel SCRL (C-572/13) EU:C:2015:750.*

⁵⁷⁴ The application of exceptions and limitations must be limited to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

international conventions⁵⁷⁵). Yet, there is a reference to the three-step test in some exceptions, e.g. the preservation exception and most of the Belgian scholars consider that exceptions and limitations should, in principle, be interpreted in the light of the test⁵⁷⁶⁵⁷⁷. Third, all exceptions included in the CEL have a mandatory character, as stated in Article XI.193.

6.1.1.1 *Preservation exception*

An exception for the preservation of cultural heritage, namely, cinematographic works already existed in the Belgian Copyright Act before the adoption of the Infosoc Directive. This exception was thus amended in light of the Directive.

The exception, included in Article XI.190(12°) of the Belgian CEL, allows for making reproductions of works to certain beneficiaries to preserve the cultural and scientific heritage. It states that when the work has been lawfully disclosed, the author cannot forbid 'the limited reproduction of a number of copies determined on the basis of and justified by the aim of preserving the cultural and scientific heritage, carried out by publicly accessible libraries, museums or archives, which do not seek any direct or indirect commercial or economic advantage provided that this does not prejudice the normal exploitation of the work or cause unreasonable prejudice to the legitimate interests of the author'.

Beneficiaries

Publicly accessible libraries, museums and archives can make use of this exception. Libraries and museums can only benefit from the exception when they are accessible by the public in a non-discriminatory way⁵⁷⁸. This condition is not required for archives. Yet, the beneficiary institutions cannot seek any commercial profit, directly or indirectly although it is not excluded that these institutions request the payment of a fee for the entrance⁵⁷⁹. In consequence, libraries or archives that belong to private companies are excluded from the exception even if they are accessible to the public⁵⁸⁰.

While in Belgium educational establishments are excluded from the scope of the exception (unlike the Infosoc Directive), their libraries or archives can invoke such exception. Additionally, the legal

⁵⁷⁵ The Berne Convention art. 9(2); Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 1994 art.13.

⁵⁷⁶ Lindner and Shapiro (n 564) 171.

⁵⁷⁷ See Hendrik Vanhees, *Handboek Intellectuele Rechten* (Antwerpen : Intersentia 2020).

⁵⁷⁸ Janssens (n 19) 238.

⁵⁷⁹ Triaille and others (n 22) 268.

⁵⁸⁰ Janssens (n 19) 239.

provision does not make any reference to the private or public character or ownership of the institution what suggests that private heritage collections are not excluded from the scope of the exception (as long as no commercial advantage is sought)⁵⁸¹.

Purposes of the exception

As stated in Article XI.190 (12°), the beneficiary institutions can make reproductions of works only when aiming at preserving the cultural and scientific heritage. Under Belgian law all works may fall within the scope of the exception as there is no explicit exclusion in the legal provision of any category of works, mediums or forms.

Only acts of reproduction are permitted under this exception. As a result, CHIs cannot make their collections available online relying in this exception. These acts of reproductions must be strictly limited to the preservation of the works and only when their preservation justify such reproductions. Nevertheless, the legal provision does not require the urgent need of preserving a work to allow the institutions to make the reproductions of the work. It is enough that such reproductions can be justified by the preservation purpose. The age of the work seems irrelevant in order to justify such reproductions as even works in good condition could still be reproduced under this exception⁵⁸².

The exception does not permit the digitization of the whole collection of a beneficiary institution since it would go beyond of the 'limited acts of reproduction'. Nevertheless, the exception under Belgian law does not impose any restriction on the number of copies that are permitted as long as they are limited to the ones needed for the purposes of/and justified by the preservation⁵⁸³, nor is there any restriction on the form of reproduction. Therefore, it is agreed that analogue or digital forms of reproductions are allowed. Any migration from any format to another seems to be permitted under the exception as well⁵⁸⁴. This lack of restrictions leaves CHIs a broad margin of manoeuvre in this regard. It must be noted that the law does not define the terms of 'scientific' or 'cultural' heritage.

Additionally, the exception adds two more conditions as the exception shall not 'not prejudice the normal exploitation of the work or cause unjustified prejudice to the legitimate interests of the author' which is an implicit recognition of two of the three steps of the three-step test.

Particularities

⁵⁸¹ Janssens (n 19) 239.

⁵⁸² Janssens (n 19) 240.

⁵⁸³ Triaille and others (n 22) 277.

⁵⁸⁴ Janssens (n 19) 241.

An interesting provision is included in the second paragraph of Article XI.190.(12°) which states that ‘the materials produced in this way remain the property of these institutions, which refrain from any commercial or lucrative use’. Further, the third paragraph of the provision grants the author the possibility to ‘have access to it, with strict respect for the preservation of the work and with fair remuneration for the work carried out by these institutions’.

Thus, the Belgian law differentiates among the ownership of the material produced by the acts of preservation and the exercise of the rights on the work itself. This paragraph originates from the previous version of the exception where some rightholders needed to get access to the copy of the cinematographic work in order to exploit their rights⁵⁸⁵. Now this rule has been extended to include all the beneficiaries of the exception and all the types of works. Yet, the author may not contravene the preservation activities of the institution when accessing the work and must pay a remuneration to the institution for the access⁵⁸⁶.

CDSM Directive

Belgium is one of the few EU Member States that published a publicly available draft of the law implementing the Directive 2019/790, while still under discussion at national level. According to the last available draft dating from 20 of May 2020, this exception would be replaced for the following text in order to transpose the new preservation exception introduced by the CDSM Directive (Article 6)⁵⁸⁷. The preliminary version of the new exception would read as follows:

‘When a work has been lawfully disclosed, the author cannot forbid: (...) the reproduction, by publicly accessible libraries, by publicly accessible museums, by archives or by institutions holding a cinematographic or audio(visual) heritage, of:

- works that are permanently in their collections, in any form or on any medium, for conservation purposes and to the extent that the reproduction is necessary for this conservation;
- other works, limited to a number of copies determined according to and justified by the goal of preserving cultural and scientific heritage.

The materials thus produced remain the property of these institutions which refrain from any commercial or lucrative use. The author will be able to access it, with strict respect for

⁵⁸⁵ Triaille and others (n 22) 278.

⁵⁸⁶ Janssens (n 19) 241.

⁵⁸⁷ See Deliverable 2.1 for a further analysis of the CDSM Directive.

the preservation of the work, and in return for a fair remuneration of the work done by these institutions⁵⁸⁸.

Although the adopted version is still awaited⁵⁸⁹, this draft already signals the intention of the Belgian (and EU) legislator to broaden the preservation exception by adding more beneficiaries that can invoke the exception and by extending the exception to the works that are not permanently in the beneficiaries' collections.

6.1.1.2 Research and private study standing in dedicated terminals

The Law⁵⁹⁰ of 2005 introduced under Belgian law the exception included in Article 5.3(n) of the Infosoc Directive with a very similar drafting.

The exception becomes part of the Belgian copyright system in Article XI.190.(13°), which accordingly, states that the author, once a work has been lawfully disclosed, cannot prohibit 'the communication, including by making available to individuals, for research or private study purposes, of works that are not offered for sale or are subject to a license, and which are part of the collections of publicly accessible libraries, educational and scientific establishments, museums or archives which do not seek any direct or indirect commercial or economic advantage, by means of special terminals accessible in the premises of these establishments'.

This exception seeks to serve the public interest of promoting access to knowledge by stimulating research and private study. Individuals can consult the digital collections of the specific institutions in the same manner as their physical collections.

Beneficiaries

The provision explicitly states the institutions that can benefit from the exception, namely, publicly accessible libraries, educational and scientific establishments, museums and archives. Libraries are required to be publicly accessible. Although not explicitly required, most of the doctrine considers that the accessibility requirements, normally through a registration system, should also apply to educational and scientific establishments⁵⁹¹.

⁵⁸⁸ 'Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d'auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE' (n 119) 165.

⁵⁸⁹ 'Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d'auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE' (n 119).

⁵⁹⁰ Law of May 22, 2005, on the Transposition into Belgian Law the European Directive 2001/29/EC of May 22, 2001, on the Harmonization of Certain Aspects of Copyright and Neighboring Rights in the Information Society.

⁵⁹¹ Janssens (n 19) 242.

The statutory provision adds another requirement for the beneficiary institutions. Only the above-mentioned institutions that do not seek direct or indirect commercial or economic advantage may rely on the exception. As observed, this requirement does not mean that such institutions must be of public ownership. Private institutions may fall within the scope of the exception as long as they do not seek any commercial or economic profit. A payment of an entrance fee is also not excluded, according to the Directive, 'if it does not exceed the costs incurred by the library or archive'⁵⁹².

Purposes of the exception

The exception allows the beneficiary institutions to communicate works to the public, without having the authorization of the author, via specifically dedicated terminals located in these establishments. Although the exception only permits the communication to the public of such works, the CJEU ruled in the *Darmstadt* case⁵⁹³ that these institutions are also allowed to digitize the works in their collections under this exception 'if that is necessary in order to make them available to the public on dedicated terminals'⁵⁹⁴. Yet, the exception does not allow to make copies of the works consulted, neither in the form of printing nor for downloading although certain copies could be made by relying on other exceptions (such as on private copying or reprography)⁵⁹⁵.

Further, the legal provision requires that the consultation of works in the beneficiaries' collections must be carried out in dedicated terminals located in such establishments. Only computers or audio and video terminals that the institutions make available can be used for this purpose, while the use of private devices is excluded. Remote consultation of works is not allowed by this exception. On top of this, this exception only aims to allow consultation of works made by individuals for the purposes of research or private study and not for the communication of works to the general public. As seen, the authorized acts can only be carried out for research and private study purposes. The concept of research and private study also includes, according to Vanhees, research carried out for professional purposes⁵⁹⁶.

Given that the statutory provision does not exclude any category of work from the scope of the exception, it seems clear that all works are eligible. Yet, works must be in the own collections of the beneficiary institutions. Individuals cannot rely on this exception to consult, for instance, works from other institutions, any material supplied through online subscriptions or material that is available on the internet. Works available through interlibrary loans do also not fall under the

⁵⁹² Triaille and others (n 22) 308.

⁵⁹³ Technische Universität Darmstadt v Eugen Ulmer KG (C-117/13) EU:C:2014:2196.

⁵⁹⁴ Technische Universität Darmstadt v Eugen Ulmer KG (C-117/13) EU:C:2014:2196 para 40.

⁵⁹⁵ Technische Universität Darmstadt v Eugen Ulmer KG (C-117/13) EU:C:2014:2196 para 51 et seq.

⁵⁹⁶ Vanhees (n 577) 64.

scope of the exception⁵⁹⁷. Additionally, for these works to be eligible, they cannot be subject to licensing conditions or offered for sale as this could entail that there are different terms or restrictions included in these agreements. According to Janssens, this restriction does not seem compatible with the mandatory character of all Belgian exceptions⁵⁹⁸.

The Belgian exception does not impose a remuneration to the rightholders for the uses of their works under this exception.

6.1.1.3 Advertising public exhibitions or public sales of artistic works

This exception did not exist in Belgian law before the adoption of the Infosoc Directive⁵⁹⁹. The exception allowing acts of reproduction and communication to the public for the purposes of advertising a public exhibition or sales of works envisaged in Article 5.3(j) of the Infosoc Directive, was implemented in a similar manner in Article XI.190.(16°) of the CEL.

According to this provision, the author cannot forbid the ‘reproduction and communication to the public intended to advertise public exhibitions or sales of artistic works, to the extent necessary to promote the event in question, excluding any other commercial use’.

Beneficiaries

The statutory provision does not impose any restriction on the type of beneficiaries that could invoke such exception. Yet, museums and auction houses are the ones that should normally make use of the exception as the exception does not cover any exhibition or sale that have a private character. Exhibitions and sales must be public, in the sense that they have to be publicly accessible⁶⁰⁰.

Purposes of the exception

Acts of reproduction and communication to the public are only allowed for the purposes of advertising a public exhibition or public sale of artistic works. Concerning the nature of works falling within the scope of the exception, only artistic works (that have been lawfully disclosed) can be reproduced and communicated to the public. No further guidelines are provided in this regard.

⁵⁹⁷ Janssens (n 19) 243.

⁵⁹⁸ Janssens (n 19) 244.

⁵⁹⁹ It was introduced by the Law of May 22, 2005, on the Transposition into Belgian Law the European Directive 2001/29/EC of May 22, 2001, on the Harmonization of Certain Aspects of Copyright and Neighboring Rights in the Information Society.

⁶⁰⁰ Janssens (n 19) 248.

The legal provision does not add any restriction on the medium of reproduction and communication to the public, so one may understand that both digital and physical reproductions are permitted under the exception. The same applies to the acts of communication to the public of such reproductions, which allows ‘advertising on television, via web pages and blogs or in newspapers, magazines and brochures’⁶⁰¹.

The exception is further restricted by the addition of the reference ‘to the extent necessary to promote the event’. Only those acts carried out to promote such events are justified under the exception. According to Janssens, some doubts are raised on whether this exception can be used for the promotion of permanent exhibitions as the choice for the term ‘event’ seems to cover only a concrete exhibition or public sale⁶⁰².

The uses must therefore be limited to what is needed for the promotion of the event and any other commercial use is excluded. For instance, other uses such as the promotion of the organization that manages the event, or any permanent promotion on a website is not permitted by relying on the exception. The sales of posters used for the exhibition are also not covered by the exception⁶⁰³.

6.1.1.4 Text and Data Mining

There is no exception for TDM purposes in the current CEL. However, Belgium (as the other EU Member States) will need to implement the two TDM exceptions⁶⁰⁴ that were introduced in the CDSM Directive by June 2021.

The last version of the draft Law⁶⁰⁵ transposing the Directive in Belgium includes, first of all, a definition of the acts that can be understood as ‘text and data mining’ any automated analysis technique aimed at analysing texts and data in a digital form in order to generate information, which includes, but not exhaustively, constants, trends and correlations’ (Article.I.13(10°)). The definition in the draft Law is almost identical to the definition included in the CDSM Directive in its Article 2(2).

Additionally, the draft text also envisages a definition of research organizations, which accordingly states that they should be understood as ‘a university, including its libraries, an institute of

⁶⁰¹ Janssens (n 19) 249.

⁶⁰² Janssens (n 19) 248.

⁶⁰³ Janssens (n 19) 249.

⁶⁰⁴ See Deliverable 2.1 for a further analysis of the TDM exceptions in the CDSM Directive.

⁶⁰⁵ ‘Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d’auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE’ (n 119) 114.

research or any other entity, having for primary objective conducting scientific research, or carrying out educational activities that also include scientific research work: a) on a non-profit basis or in reinvesting all profits in its scientific research; or b) as part of a mission of interest public recognized by a Member State; in such a way that it is not possible for a company with influence decisive on this body of benefit from privileged access to results produced by this scientific research'. However, it seems there are still debates at the national level on the inclusion of such definition as a definition of such organizations already exist in Belgian law⁶⁰⁶.

The first exception included in Article 3 of the Directive, allows reproductions and extractions made by research and cultural organizations to carry out TDM of lawfully accessible works and other subject-matter for the purposes of scientific research⁶⁰⁷.

This exception, which has a special importance for CHIs, is envisaged in the Belgian draft text as a new subsection of Article 191 together with the other exceptions addressing uses for educational and research purposes. These exceptions were initially inserted in Articles XI.189 and XI.190 and were moved to this Article in 2017⁶⁰⁸. The above-mentioned characteristics of the exceptions still apply to these exceptions (see Section 6.1.1).

Therefore the Belgian legislator has preliminarily decided to introduce the TDM exception for scientific purposes carried out by research and cultural organizations within Article XI.191/1 by adding the following text. In this regard, the author cannot forbid, once a work has been lawfully disclosed, the:

‘reproduction, by research organizations, publicly accessible libraries, publicly accessible museums, by archives or by heritage institutions cinematographic or sound, to proceed, for research and scientific purposes, to a search of texts and data on works to which they have lawful access.

These reproductions of works are stored with an appropriate security level and can be kept for scientific research, including for verification of search results.

⁶⁰⁶ See ‘Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d’auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE’ (n 119) 13–14.

⁶⁰⁷ CDSM Directive Art.3.

⁶⁰⁸ Law of 22 December of 2016 amending certain provisions of Book XI of the Code of Economic Law.

The author is authorized to apply measures to ensure the safety and integrity of networks and databases data where the works are hosted, for as far as these measures do not go beyond what is needed to achieve this goal⁶⁰⁹.

The preliminary version of the TDM exception is similar to the exception in the CDSM Directive. With regards to the beneficiaries, the Belgian exception is more explicit than the CDSM Directive as it explicitly states all the organizations, research or cultural organizations that will be able to benefit from the exception. Yet, there are current debates on whether this exception should also apply to software or should they be considered as works of literary arts for the purpose of this exception⁶¹⁰.

Additionally, the CDSM Directive introduces a general exception for TDM purposes that allow reproductions and extractions of lawfully accessible works and other subject matter. This exception however can be restricted by rightholders⁶¹¹.

The Belgian legislator has preliminarily opted to include this general exception within the list of existing exceptions in Article XI.190. According to this draft text, the author will not be able to forbid, once a work has been lawfully disclosed:

‘the reproduction of lawfully accessible works, for the purposes of text and data mining, provided that the use of these works has not been expressly reserved by the author in an appropriate manner, in particular by machine-readable processes for content made available to the public online. These reproductions can be kept as long as necessary for the purposes of text and data mining’⁶¹².

While debates continue at national level on the implementation of the exception⁶¹³, this draft version does not divert from the exception established in the CDSM Directive, whose drafting is very similar.

⁶⁰⁹ ‘Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d’auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE’ (n 119).

⁶¹⁰ ‘Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d’auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE’ (n 119) 14.

⁶¹¹ See Deliverable 2.1 for further analysis of the TDM exceptions under the CDSM Directive.

⁶¹² ‘Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d’auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE’ (n 119) 134.

⁶¹³ ‘Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d’auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE’ (n 119).

6.2 Specific regime in respect to particular types of works

6.2.1 Orphan works

In Belgium, the Orphan Works Directive⁶¹⁴ was transposed into the national jurisdiction through the Law of 20 July of 2015⁶¹⁵ although the transposition period was due in October 2014. The Belgian legislator opted for a similar wording to the EU legal act when implementing the Directive into Belgian law, which on the one hand, facilitates the ‘harmonization’ within the EU Member States, and on the other hand, does not clarify in Belgian law the ‘grey areas’ of the Directive⁶¹⁶.

The first provision on orphan works in the CEL is found in Article XI.192/1. It introduces the exception to reproduce and communicate to the public orphan works by specific institutions. Accordingly, this article states that ‘publicly accessible libraries, educational establishments and museums, as well as archives, institutions holding cinematographic or sound heritage and public service broadcasting organizations, established in the Member States of the European Union and of the European Economic Area, in order to achieve the objectives linked to their missions of public interest, are authorized to use orphan works appearing in their collections in one of the following ways (...): a) making the orphan work available to the public (...) b) reproduction (...) for the purposes of digitization, provision, indexing, cataloguing, preservation or restoration’⁶¹⁷.

Additionally, Chapter 8/1 of the CEL establishes the applicable rules to orphan works.

Types of works

The concept of ‘orphan work’ is defined in Article XI.245/1 which states that an orphan work is a work or phonogram, ‘of which none of the rightholders has been identified, or, even if one or more of them has been identified, none of them could be located although a diligent search of the beneficiaries was carried out and this diligent search has been recorded (...)’.

A work can still be considered an orphan work in cases where there are more than one rightholders involved and not all of them have been identified or located and, the rightholders that have been identified and located authorize the beneficiary institutions to carry out the permitted acts under the exception⁶¹⁸.

⁶¹⁴ See Deliverable 2.1 for a further analysis of the Orphan Works Directive.

⁶¹⁵ Law of 20 of July 2020 transposing Directive 2012/28 / EU of the European Parliament and of the Council of 25 October 2012 on certain authorized uses of orphan works.

⁶¹⁶ Alain Berenboom and others, *Het Belgische Auteursrecht: Artikelsgewijze Commentaar. Huldeboek Jan Corbet; Le Droit d’auteur Belge Commentaire Par Article. Hommage à Jan Corbet* (Fabienne Brison and Hendrik Vanhees eds, 4de herziene druk, Bruxelles : Larcier 2018) 292.

⁶¹⁷ Belgian Code of Economic Law Art.XI.192/1.

⁶¹⁸ Belgian Code of Economic Law Art.XI.245/1, 2.

Nevertheless, not all the works can fall under the exception. Only the following works are eligible:

a) works published in the form of books, journals, newspapers, magazines or other writings which form part of the collections of the beneficiary institutions.

b) cinematographic or audiovisual works and phonograms forming part of the collections of the beneficiary institutions.

c) cinematographic or audiovisual works and phonograms produced by public service broadcasting organizations up to and including 31 of December of 2002 and appearing in their archives, which are protected by copyright or related rights and which are initially published in a member state of the European Union or, in the absence of publication, initially broadcasted in a Member State of the European Union⁶¹⁹.

In the absence of publication or broadcast, works may also be considered orphans when they were made available to the public by any of the beneficiary institutions, prior rightholders' consent and assuming that the rightholders would not oppose to the potential uses of the works⁶²⁰. There is no cut-off date for audiovisual works that have not been published or broadcast⁶²¹.

Finally, works and performances that are embedded, included, or which form an integral part of the above-mentioned works will also be considered as orphan works.

Beneficiaries

Article XI.192/1 establishes which institutions can benefit from the exception in order to make specific uses of the orphan works in their collections. These organizations are the following: libraries, educational establishments and museums, all of them subject to the requirement of being publicly accessible, and secondly, archives, institutions that hold sound or cinematographic heritage, and public broadcasting institutions. The latter group of institutions does not have to be accessible to the public. Nothing is mentioned about the private/public ownership of such institutions.

However, alike the Orphan Works Directive, these institutions must be located in one EU Member States or the EEA. These organizations are required to carry out a public interest mission.

Subject matter

⁶¹⁹ Belgian Code of Economic Law Art.XI.245/2.

⁶²⁰ Belgian Code of Economic Law Art.XI.245/2, 2.

⁶²¹ Bertoni, Guerrieri and Montagnani (n 140) 30.

The exception envisaged in Article XI.192/1 of the CEL allows the above-mentioned beneficiaries to carry out certain acts of reproduction and communication to the public in relation to the orphan works in their collections. Yet, these acts need to be performed only for the purposes of ‘digitization, provision, indexing, cataloguing, preservation or restoration’. This is further confirmed by Article XI.245/5 by stating that the beneficiary institutions can only make use of orphan works in order to fulfil their ‘their public-interest missions, in particular the preservation and restoration of works or phonograms present in their collection and the provision of cultural and educational access to them’. Some legal scholars indicate that it is not clear whether this latter reference should be taken as an exhaustive list of activities as it differs from the list of Article XI.192/1. Yet, it seems that it should not be considered as exhaustive since these institutions should be able to carry out all the acts needed to comply with their public-interest mission⁶²².

It must be noted that, alike the Directive, the CEL allows the beneficiaries to perceive certain revenues from the uses of the orphan works but only those revenues that cover the costs for the digitization and the communication to the public of such works. Otherwise, the exception for the use of the orphan works would be economically prejudicial for the beneficiaries⁶²³.

Importantly, this exception only allows the reproduction and communication to the public of the orphan works, though it does not allow any re-use made by the general public⁶²⁴.

Finally, the institutions need to mention all the rightholders that have been identified when making use of a work⁶²⁵.

Diligent search

According to Article XI.245/1, a work (or phonogram) can be considered orphan only after the beneficiary institutions have carried out a diligent search and after the results of such search were recorded in the EUIPO database. Only after fulfilling these requirements can the work acquire the ‘orphan status’.

The diligent search must be carried out in good faith by consulting the appropriate sources for each category of works before the institution starts using the work⁶²⁶.

⁶²² Maxime Lambrecht, ‘Chapter VIII/I Legal Provisions for Orphan Works’ in Fabienne Brison and Hendrik Vanhees (eds), *Het Belgische auteursrecht: artikelsgewijze commentaar. Huldeboek Jan Corbet; Le droit d’auteur belge commentaire par article. Hommage À Jan Corbet* (Bruxelles : Larcier 2018) 580.

⁶²³ Lambrecht (n 622) 581.

⁶²⁴ Berenboom and others (n 616) 295.

⁶²⁵ Belgian Code of Economic Law Art.XI.245/5,2.

⁶²⁶ Belgian Code of Economic Law Art.XI.245/3.

D2.2 Public

The specific sources to be consulted by the beneficiary institutions have been listed in a Royal Decree of 2016⁶²⁷ classified according to the category of works, e.g. books, newspapers, audiovisual works or works of art, among others. This list also includes specific databases such as ARROW and other Belgian sources. The consultation of the sources mentioned in the Decree is compulsory, yet it is not limited to these sources⁶²⁸. However, CHIs may encounter certain difficulties when accessing these sources as not all the sources mentioned in the Decree may be accessible to the public. For instance, databases from authors' societies or CMOs may not be publicly accessible.

Further, the second paragraph of Article.XI.245/4 states that the diligent search must be carried out in the Member State (EU or EEA) 'where the first publication of the work or phonogram took place or, in the absence of publication, in the Member State where the first broadcast took place'. For cinematographic works, the diligent search needs to be made in the Member State where the producer has his permanent residence. For those works that have not been published or broadcasted but made available to the public with the author's authorization, the diligent search must be performed in the place where the organization that made the work available is located. So as a general rule, unless there is evidence suggesting that some information may be available in other countries, the place to be carried out the diligent search is the place of first publication or broadcast.

According to the Directive, and implemented in the CEL, once a work is declared orphan in one Member State, it is considered orphan in the other Member States⁶²⁹. This mutual recognition mechanism creates a certain 'EU status of orphan works'⁶³⁰.

Furthermore, the third paragraph of article XI.245/4 obliges the beneficiary institutions to i) keep the results of the diligent search, namely, the name of the identified rightholders, the potential uses of the work and the identification and contact details of the organization concerned, and ii) to register all this information in the EUIPO database.

The National Library of Belgium was nominated as the competent authority for all the matters concerning orphan works, serving as the contact point between the EU institutions and the organizations.

End of orphan-works-status

⁶²⁷ Royal Decree of 17 October of 2016 defining the appropriate sources for carrying out the diligent search of right holders in order to determine whether a work or a phonogram is orphan works or not.

⁶²⁸ Lambrecht (n 622) 576.

⁶²⁹ Belgian Code of Economic Law Art.XI.245/3,2.

⁶³⁰ Lambrecht (n 622) 573.

As required by the Directive, the Belgian legislator provides the possibility for rightholders to put an end to the orphan status of their works⁶³¹. This information should be communicated to the EUIPO in order to be registered in the database.

Compensation

In case the rightholder appears, he or she has the right to obtain a remuneration for the uses of his works that the cultural organizations have been carried out during his absence. This remuneration is charged to the institutions that made use of the works⁶³². A Royal Decree implements further practical specifications on the sharing of the revenues to the authors or on the calculations of said remuneration.

It must be noted that the Belgian legislator opted for the use of the term ‘remuneration’ which has been habitually used in Belgian law to refer to the European law concept of ‘fair compensation’⁶³³.

6.2.2 Out-of-commerce works

The CDSM Directive puts in place, in Articles 8 to 11, a legal framework addressing the legal and practical problems that CHIs face with OOCWs. For this reason, this part of the Directive is entirely addressed to CHIs⁶³⁴. The Directive creates a bifold mechanism for the use of OOCWs by CHIs, which consists of a licensing mechanism in the first place and a mandatory exception in the second place, in case that CHIs cannot find CMOs, namely that do not fulfil the legal requirements, to issue these licenses.

In the preliminary draft of the law, the Belgian legislator has opted for implementing these provisions in the Belgian CEL in different sections. First, it introduces a sub-section in Section 6 dealing with exceptions on OOCWs in Article XI.192/2 and a different section concerning the licensing system for OOCWs in Chapter 8/1/1.

With regards to the beneficiaries of the new OOCWs’ provisions, the Belgian legislator explains in its draft law that, while there are certain similarities with other exceptions that address CHIs as well, the beneficiaries of the provisions related to OOWCs are not the same as the ones benefiting from the orphan works regime or the preservation exception. For the OOCWs’ uses, only libraries or museums that are accessible to the public, archives or institutions that custody cinematographic or sound heritage can make use of the OOWCs under the new provisions.

⁶³¹ Belgian Code of Economic Law Art.XI.245/6.

⁶³² Belgian Code of Economic Law Art.XI.245/7.

⁶³³ Lambrecht (n 622) 584.

⁶³⁴ See Deliverable 2.1 for a further analysis of the provision of out-of-commerce works in the CDSM Directive.

Educational establishments and public service broadcasting organizations are excluded for both the use of the licensing system or the exception⁶³⁵. This exclusion originates from the CDSM Directive⁶³⁶.

Regarding the types of works that could fall within the scope of the OOWCs' provisions, the Belgian legislator has suggested to place it in Book I, and more precisely in Article I.13 of the CEL, which includes the definitions applicable to Book XI⁶³⁷. Accordingly, the draft paragraph 12 defines "works, performances, press publications, computer programs and/or databases that are not or no longer commercially available" as follows:

'a work, a service, a press publication, a computer program and/or a database of which can be assumed in good faith that the work, service, press publication, the program computer and/or database is not available in its entirety for the public, through the usual commercial channels, after reasonable efforts have been undertaken to verify if it is available to the public. The limited availability of a work, service, press publication, computer program and/or database, in second-hand stores, or the theoretical possibility of obtaining a license, should not be considered as availability to the public through usual commercial channels (...)'.

In addition, in order to determine which OOWCs can fall under the new regime, the draft (not yet available) Article XI.245/7(4) will most likely follow the provisions of the Directive quasi identically as explained in the draft law⁶³⁸.

Licensing regime

As seen, CHIs could enter, in the first place, into a licensing agreement with a CMO in order to use the OOCWs that are permanently in their collections. The relevant legal provisions, namely Article.XI.247/1 and 247/2 (not yet available), will establish the conditions of the licensing

⁶³⁵ 'Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d'auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE' (n 119) 261.

⁶³⁶ CDSM Directive Art.2(3).

⁶³⁷ 'Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d'auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE' (n 119) 29.

⁶³⁸ 'The provisions relating to works not commercially available do not apply not to works and / or services that have been published or broadcast for the first time in a third country outside the European Union or of the European Economic Area, to works cinematographic or audiovisual whose producer has its registered office or habitual residence in a third country and works and / or services of third country nationals when the location of the first edition or distribution or, in the case of cinematographic or audiovisual works, the seat or habitual residence of the producer. If the management company appointed by the King is however sufficiently representative for this third country, for example by an agreement of reciprocity, it may however conclude the license'.

system⁶³⁹. However, the Belgian legislator has explained that the licensing agreements will need to clearly state the permitted uses of the OOWCs under the license and the territorial application of such license. Given that the Directive allows the application of cross-border licenses by the creation of a legal fiction⁶⁴⁰, these licenses may cover one or more Member States or even the whole EU territory. The territorial application needs to be clearly specified in the agreement. In addition, this provision will also make clear that the CMO entering into the license is obliged to respect the equal treatment principle for all rightholders, including those ones that are not represented by the CMO⁶⁴¹.

In practical terms, it will be difficult for CHIs to actually ascertain whether a specific CMO exists for the rights and works concerned. As a result, the Belgian legislator has opted for the creation of a system that will be managed by a CM. This system will represent all the CMOs that exist in Belgium in order to identify the works and rights concerned that will be subject to licencing with the CHIs⁶⁴². This system will be established by a Royal Decree at a later stage and aims at providing legal certainty for those parts concerned, namely for CHIs. It will facilitate the task of CHIs to know whether there are CMOs available for a particular type of works and whether they fulfil the requirements for entering into these licenses. At the same time, the system plans to reduce the administrative burden by creating a one-single contact mechanism⁶⁴³.

Exception

In case there are no licenses available due to the absence of a CMO that is sufficiently representative for the category of works and the rights concerned, CHIs can still make use of the OOCWs that are permanently in their collections by relying on the exception.

Accordingly, a draft new Article XI.192/2 establishes the exception according to which the author cannot forbid reproductions or communications to the public when carried out by the beneficiaries mentioned above for non-commercial purposes of a work that is not commercially available and that is permanently found in their collections as long as 'i) the CMO is not designated

⁶³⁹ 'Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d'auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE' (n 119) 310.

⁶⁴⁰ CDSM Directive Art.9.

⁶⁴¹ 'Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d'auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE' (n 119) 312.

⁶⁴² 'Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d'auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE' (n 119) 259.

⁶⁴³ 'Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d'auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE' (n 119) 313.

for the rights concerned; ii) the works are made available on non-commercial websites; and iii) the source and the name of the author or any other identifiable rightholder are indicated, unless this turns out impossible’.

Additionally, the second paragraph of the draft provision gives the possibility for rightholders to opt-out from the exception, including when the beneficiary institutions have already started to make use of the OOCWs. This provision also includes another registration obligation for the beneficiary institutions, namely the obligation to register certain information, such as the identification of the OOCWs, in the EUIPO database.

As required by the Directive, the system must provide for an opt-out system in order to give rightholders the possibility to withdraw. In this context, Article XI.245/7(2), which is still not available, will determine the manners according to which the rightholders can opt-out of the system. If this is the case, the CMO will need to stop issuing the licenses concerning his works and will inform the CHI. In this case, the author will be able to ask for remuneration for his works' use to the CMO⁶⁴⁴.

The Draft Article XI.245/7/5, still not available, will provide for the publicity measures as required by Article 10 of the CDSM Directive. Such information will be registered in the new database for OOCWs of the EUIPO and will be publicly available.

6.2.3 Works of visual arts in the public domain

Article 14 of the CDSM Directive states that the digital reproductions of works of visual art in the public domain should not be subject to copyright or related rights unless this reproduction is original in the sense that it could qualify for copyright protection on its own⁶⁴⁵.

However, the Belgian legislator has decided (so far) not to explicitly transpose this provision into national law⁶⁴⁶ given that the principle reflected in the Directive is already implicitly stated in the Belgian copyright system. The Belgian copyright laws already foresee the principle according to which the copyright or related rights protected works will fall in the public domain once the period of protection expires. Therefore reproductions made after that period are not subject to the rightholders' prior authorization. Further, as explained in the draft law, Article XI.165 states that

⁶⁴⁴ ‘Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d’auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE’ (n 119) 315.

⁶⁴⁵ See Deliverable 2.1 for a further analysis of article 14 of the CDSM Directive.

⁶⁴⁶ ‘Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d’auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE’ (n 119) 41, 222–223.

original creations of literary and artistic works are protected by copyright. As a result, any material originated through the reproduction of a work of visual art in the public domain and that is original by itself, can give rise to a different work and consequently be protected by copyright. On the contrary, any material originated from a reproduction of these works will not be protected unless it is original.

In consequence, the Belgian legislator has decided that including such explicit provision would only generate confusion and would jeopardise legal certainty given that all these principles apply to all categories of works and not only are they applied to works of visual arts⁶⁴⁷.

6.2.4 Non-original photographs

The Term Directive⁶⁴⁸ not only harmonizes the copyright terms of protection within the EU Member States but also the material scope of an 'artistic work' with regards to photographs. In this regard, the Term Directive harmonizes its position at least for those original photographs that satisfy the criterion of originality.

Besides, the Directive offers the possibility to the Member States to provide 'for the protection of other photographs'⁶⁴⁹. The Directive refers to those photographs that are not original within the meaning of the Directive. Therefore, the protection of non-original photographs has wholly been left to the Member States' discretion whom may introduce a neighbouring or related right to protect these photographs. The Directive also remains silent on the duration of this potential protection. Thus, this matter remains unharmonized.

Under Belgian law, photographs can only be protected by copyright as long as they are original because they constitute the author's intellectual creation. This is established in Article XI.166.5 of the Belgian CEL, which states that 'the term of protection for photographs which are original, in the sense that they are an intellectual creation specific to their author, is determined in accordance with the preceding paragraphs'.

On the other hand, the Belgian legislator decided not to make use of the possibility provided by the Term Directive and has not introduced any neighbouring right for the protection of photographs that do not achieve enough original character to be granted copyright protection.

⁶⁴⁷ 'Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d'auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE' (n 119) 222–223.

⁶⁴⁸ See Deliverable 2.1 for a further analysis of the Term Directive.

⁶⁴⁹ 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 2011 Art.6.

6.2.5 Databases

As seen, the Database Directive aimed at harmonizing the rules of protection for databases at the EU level and at clarifying the protection for databases⁶⁵⁰. At the EU level, databases can be protected by copyright protection and by a so-called *sui-generis* right.

In Belgium, the Database Directive was transposed into Belgian law through a separate 1998 Law⁶⁵¹ while the provisions concerning the copyright protection of databases were introduced into the copyright law. With the codification into the Code of Economic Law, all provisions are now in this text.

A definition of a database is provided in Article.I.13.6 of the CEL, according to which a database is ‘a collection of works, data or other independent elements that are systematically or methodically ordered and are separately accessible by electronic means or in another form’. This definition imposes three cumulative conditions for a database to be considered as such: i) it must constitute a collection of works, data or other independent elements; ii) it must be systematically ordered and iii) it must be separately accessible by electronic means or any other form. Databases can be in a digital or tangible form. A website, a blog or the extensive datasets created by the big data can be considered databases⁶⁵². The source of the data of the database is not relevant to ascertain whether a database should be considered as a database.

Copyright protection

Article. XI.186 of the CEL introduced a provision related to the copyright protection of databases and set out its conditions of protection. As such it establishes that ‘databases which, by the choice or by the arrangement of material, constitute an intellectual creation of the author are protected as such by copyright’. Thus, databases that are original in the sense of the author’s intellectual creation qualify for copyright protection. No other criteria should be taken into account.

In addition, alike the Directive, the second paragraph of such provision states that the copyright provision does not extend to the content, data or any other element included in the database and it exists without prejudice of any other exclusive rights lying in the content of the database. Hence the copyright protection on the database does not add or remove any protection to the content of the database⁶⁵³.

⁶⁵⁰ See Deliverable 2.1 for further analysis of the Database Directive.

⁶⁵¹ Law of 31 August of 1998 transposing into Belgian law the European directive of 11 March 1996 on the legal protection of databases.

⁶⁵² Depreeuw (n 285) 985.

⁶⁵³ Jean-Paul Triaille, ‘Specific Provisions on Databases’ in Fabienne Brison and Hendrik Vanhees (eds), *Het Belgische auteursrecht: artikelsgewijze commentaar. Huldeboek Jan Corbet; Le droit d’auteur belge commentaire par article. Hommage À Jan Corbet* (Bruxelles : Larcier 2018) 183.

In practice, the requirement of originality has often led to deny copyright protection to databases. According to Triaille, this is due to the concept of the 'choice of material'. In other words, if the producer tends to arrange them in the most exhaustive manner possible, no selection is made. Secondly, with regards to the 'arrangement of material', the database should be structured in the most logical way facilitating people to find it, so making it 'less original'. In this regard, the Belgian courts have frequently denied copyright protection to databases such as 'telephone directories, lexicons, wine cards, lists of suppliers, collections of legal texts, etc.'⁶⁵⁴.

The author of the database that qualifies for copyright protection is the person the creator of the database. Yet, there is a derogation from the general rule in Article.XI.187 of the CEL that states that 'unless there is a contractual or statutory provision to the contrary, only the employer is presumed assignee of the economic rights relating to the databases created, in the non-cultural industry, by one or more employees or agents in the exercise of their functions or according to the instructions from their employer'⁶⁵⁵.

Sui generis protection

Apart from the copyright protection, the Database Directive granted those databases that are not original enough to qualify for a *sui-generis* right⁶⁵⁶. This exclusive right is envisaged in the CEL in its Title 7 that relates to databases.

Similar e to the Directive draft, the Belgian Code grants the right to the database producers which 'apply to databases regardless of their form, where the obtention, the verification or the presentation of the content attests a qualitative or quantitative substantial investment'⁶⁵⁷.

This right applies independently of any other protection of the database under copyright or other exclusive right. It exists without prejudice of any existing right, e.g. copyright or related right, trade secret or personal data⁶⁵⁸, in the content, data or element of the database.

Beneficiaries

Under Belgian law, this *sui-generis* right is granted to the producers of the database⁶⁵⁹. The producer of the database enjoys an exclusive right that mainly protects the investment made in the database.

⁶⁵⁴ Triaille (n 653) 184.

⁶⁵⁵ Belgian Code of Economic Law Art.XI.187.

⁶⁵⁶ Database Directive Chapter III.

⁶⁵⁷ Belgian Code of Economic Law Art.XI.306.

⁶⁵⁸ Depreeuw (n 285) 985.

⁶⁵⁹ Belgian Code of Economic Law Art.XI.307.

Scope of protection

The *sui generis* right is granted to a database when it is the result of substantial, qualitative or quantitative investments that aim at the obtention, control or presentation of the content. No formalities are required to obtain the *sui-generis* protection. This protection is aimed at the protection of investment in the creation of databases. Similar to the Directive, the Belgian law refers to the ‘substantial investment’ which is measured in relation to the human, financial or technical investment. The investment can be assessed quantitatively if possible, but also qualitatively, e.g. an intellectual effort⁶⁶⁰. This investment must be aimed at the obtention, verification and presentation of the data.

According to Article XI.307 of the CEL, the producer has the right to ‘prohibit the extraction and/or reuse of all or part, qualitatively or quantitatively substantial, of the content of his database’.

The concepts of extraction and re-use are defined in the third and fourth paragraph of Article I.17, in similar terms as the Database Directive:

‘Extraction: a permanent or temporary transfer of all or a substantial part of the content of a database to another medium by any means or in any form whatsoever; public lending is not an act of extraction’.

‘Reuse: any form of making available to the public all or a substantial part of the content of the database by distribution of copies, by rental, by online transmission or in other forms; public lending is not an act of reuse’.

A mere consultation of the database is not restricted under the rights of extraction and re-use granted to the database producer unless for the said consultation making a copy of the database would be required⁶⁶¹. The producer of the database can only prohibit the extraction or re-use of the database when it concerns ‘all or a substantial part’ of the database. This means that ‘unsubstantial parts’ – e.g. individual items of the database can always be extracted and/or re-used by lawful users for any purpose.

However, the exception to this rule is stated in the second paragraph of Article XI.307 CEL. The use of non-substantial parts of the database cannot cause any prejudice to the legitimate interests of the producer of the database. In addition, if the user repetitively extracts or re-use the non-substantial parts of the database, the producer can also exercise his rights⁶⁶² as stated in the Belgian code: ‘repeated and systematic extractions and/or re-uses of non-substantial parts of the

⁶⁶⁰ Depreeuw (n 285) 987–988.

⁶⁶¹ Depreeuw (n 285) 995.

⁶⁶² Depreeuw (n 285) 997.

content of the database are not permitted when they are contrary to the regular operation of the database or cause undue prejudice to the legitimate interests of the producer of the database’.

Term of protection

Alike the Directive, the duration of the right of the database’s producer lasts 15 years after the 1st January of the year immediately following the completion of the database⁶⁶³. However, in cases where a database is made available to the public before the expiration of the 15 years, the protection will expire 15 years after the database was first made available to the public.

In addition, the Belgian Code (alike the Database Directive) provides that when any modification is made to the database, a new period of protection to the new database can be assigned as long as such modification is ‘qualitatively or quantitatively substantial’⁶⁶⁴. Yet, no new term of protection is granted to the older version of the database⁶⁶⁵. Finally, it is stated in the fourth paragraph of such provision that the producer of the database bears the burden of proof regarding the date of the completion of the database.

6.3 Other copyright matters in a nutshell

6.3.1 The public lending derogation

In Belgium, the lending (and rental) right is provided to the author through a broad conception of the Article.XI.165 that refers to the reproduction right of the author. According to the statutory provision, ‘the right also includes the exclusive right to authorize rental or loan’. Therefore in principle the author’s consent is needed for any loan of his works.

Article 6(1) of the Rental and Lending Directive establishes a derogation of the authors’ exclusive lending right in order to allow libraries to lend books without the copyright owners’ consent as long as the authors and other rightholders obtain a remuneration for such lending⁶⁶⁶.

Belgium did not transpose all the requirements for the public lending derogation in time which led the European Commission to bring a case to the CJEU⁶⁶⁷. As a result, the Belgian legislator opted to introduce a compulsory license with the right to compensation for rightholders⁶⁶⁸.

⁶⁶³ Belgian Code of Economic Law Art.XI.309.

⁶⁶⁴ Belgian Code of Economic Law Art.XI.309.3.

⁶⁶⁵ Depreeuw (n 285) 1003.

⁶⁶⁶ See Deliverable 2.1 for further analysis of the Rental and Lending Directive.

⁶⁶⁷ *Commission of the European Communities v Kingdom of Belgium (C-433/02) EU:C:2003:567.*

⁶⁶⁸ Janssens (n 19) 283.

Consequently, the exception to the exclusive lending right of the author is included in Article.XI.192 according to which ‘the author may not prohibit the loan of literary works, databases, photographic works, scores of musical works, sound works and audiovisual works when this loan is organized for educational and cultural purposes by institutions recognized or officially organized for this purpose by the public authorities’.

Accordingly, the author cannot oppose to the lending of his works made by certain institutions when two conditions are met. First, the loan must be organized for educational or cultural purposes and, second, the loan must be carried out by an institution that is officially recognized for such purposes by the government.

Beneficiaries

To our knowledge, there is not currently a list of beneficiaries of the public lending derogation⁶⁶⁹.

Types of works

Literary works, databases, photographic works, scores of musical works, sound works and audiovisual works can be subject to a loan. On the contrary, authors of works of visual arts retain the exclusive right of prohibiting the loan of their works⁶⁷⁰, as established in the Directive⁶⁷¹. Computer programs are also excluded from the public lending derogation⁶⁷².

For e-books, the situation is still not clear although the CJEU ruled in the VOB case⁶⁷³ that the concept of ‘lending’ within the meaning of the Directive also applied to lending of copies of digital books under the model ‘one copy, one user’⁶⁷⁴⁶⁷⁵. According to the Court, these operations should be regarded as having the same characteristics as lending printed books⁶⁷⁶. Therefore, libraries could, under the public lending derogation, provide e-lending as long as authors are remunerated for the use of their works.

⁶⁶⁹ Article 2.3 of the Royal Decree of 13 December 2012 relating to remuneration for public lending and withdrawing the Royal Decree of April 25, 2004 relating to remuneration rights for public lending of authors, performers, producers of phonograms and producers of refers to the Law of 1994 which has been abolished by the Law of 19 April of 2014 .

⁶⁷⁰ Dirk Voorhoof, ‘Loans of Works’ in Fabienne Brison and Hendrik Vanhees (eds), *Het Belgische auteursrecht: artikelsgewijze commentaar. Huldeboek Jan Corbet;Le droit d’auteur belge commentaire par article. Hommage À Jan Corbet* (Bruxelles : Larcier 2018) 283.

⁶⁷¹ Rental and Lending Directive Art.3(2).

⁶⁷² Belgian Code of Economic Law Art.XI.298.

⁶⁷³ *Vereniging Openbare Bibliotheken v Stichting Leenrecht* (C-174/15) EU:C:2016:856. (n 339).

⁶⁷⁴ *Vereniging Openbare Bibliotheken v Stichting Leenrecht* (C-174/15) EU:C:2016:856. (n 339) para 52.

⁶⁷⁵ See Deliverable 2.1 for further analysis of e-lending.

⁶⁷⁶ *Vereniging Openbare Bibliotheken v Stichting Leenrecht* (C-174/15) EU:C:2016:856. (n 339) para 53.

With regards to audio or audiovisual works, the Belgian legislator opted for the introduction of a ‘grace period’ according to which the loan can only be carried out two months after the distribution of the work to the public⁶⁷⁷. In doing so, the Belgian legislator wanted to avoid that providers of LPs, DVDs or CDs could suffer a higher economic damage from the public lending. In order to find a correct balance between the users, the rightholders and the beneficiary institutions, the Belgian legislator introduced the possibility of shortening or enlarging this period by a Royal Decree for phonograms or cinematographic works⁶⁷⁸.

Additionally, the third paragraph of Article XI.192 establishes an exception for the exclusive distribution right of authors. While this right is normally only exhausted within the EU, this provision allows the beneficiary institutions to import copies of literary works, databases, photographic works and sound or audiovisual works as well as sheets of musical works’ which have been distributed outside the EU but not yet in the EU territory. This importation of works can be carried out provided that it is only carried out for purposes of public lending for educational or cultural purposes and as long as it does not relate to more than five copies or scores of the work’. The Belgian legislator wanted to allow these institutions to import certain copies of works that may not have a high direct public interest, for public lending⁶⁷⁹.

Compensation

The public lending derogation gives rise to a right of compensation for the authors of whom works have been loaned⁶⁸⁰. The delay of the transposition of the compensation requirement in Belgian law led to an infringement case that the European Commission brought to the CJEU⁶⁸¹.

The calculation of the remuneration system has been subject to certain debates in Belgium. At the beginning, a Royal Decree of 2004⁶⁸² stated that the actual calculation was exclusively based on the ‘number of borrowers annually registered to the lending institutions’. Moreover, if a person was registered to more than one institutions, the amount of the remuneration had to be paid only once⁶⁸³.

This situation led to make that *Vewa*, the Belgian CMO, requested the annulment of such Decree to the Belgian Council of State as it considered that the Royal Decree contravened the Rental and

⁶⁷⁷ Belgian Code of Economic Law Art.XI.192.2.

⁶⁷⁸ Voorhoof (n 670) 285.

⁶⁷⁹ Voorhoof (n 670) 286.

⁶⁸⁰ Belgian Code of Economic Law Art.XI.243.

⁶⁸¹ *Commission of the European Communities v Kingdom of Belgium (C-433/02) EU:C:2003:567* (n 667).

⁶⁸² Royal Decree of 25 April 2004 on the remuneration rights for public lending of authors, performers, producers of phonograms and producers of first fixations of films.

⁶⁸³ Enrico Bonadio and Marco Bellezza, ‘Exceptions to Public Lending Rights and Authors’ Remuneration: The ECJ in *Vewa v Belgium*’ (2011) 6 *Journal of Intellectual Property Law & Practice* 768, 768.

Lending Directive. The CJEU ruled that the obligation to pay the remuneration to the authors originates from the making available of works by the public establishments and not by the actual number of loans made by the persons registered in such institutions. In addition, it stated that the establishments in charge of the loans should pay the remuneration⁶⁸⁴. With regards to the criteria for the quantification of the remuneration, the CJEU ruled that the number of borrowers registered in an institution is relevant but it is not the only criterion to take into account and that the Belgian Royal Decree did not take into account the 'the number of works made available to the public'⁶⁸⁵. This judgement determined therefore that the Belgian Royal Decree was incompatible with the EU copyright law and therefore the Belgian system had to be modified accordingly⁶⁸⁶.

The (new) current Article XI.244 establishes that the calculation of the remuneration will be established by a Royal Decree according to which the remuneration system can be calculated based on i) the volume of the lending institution's collection; and or ii) the number of loans per institution. The remuneration system is managed by the Belgian CMOs.

Nevertheless, the CEL does establish certain rules on the distribution of the remuneration among rightholders. Accordingly, Article XI.245 states that 70% of the remuneration perceived should be distributed to the authors while 30% of the remuneration will be provided to the publishers.

Importantly, due to the fact that the Belgian public lending right also includes sound and audiovisual works, the author, the performer and the producer of such works are also entitled to remuneration⁶⁸⁷.

Exemption to compensation

Article XI.244 also established the possibility to exempt certain institutions from the payment of the remuneration (as provided in the Directive). In this regard, Article 5 of the Royal Decree of 2012⁶⁸⁸ exempts the following institutions from the obligation to remunerate rightholders from their public lending:

⁶⁸⁴ *Vereniging van Educatieve en Wetenschappelijke Auteurs (VEWA) v Belgische Staat (C-271/10) EU:C:2011:442* (n 355) para 23.

⁶⁸⁵ *Vereniging van Educatieve en Wetenschappelijke Auteurs (VEWA) v Belgische Staat (C-271/10) EU:C:2011:442* (n 355) paras 39–40.

⁶⁸⁶ Bonadio and Bellezza (n 683) 769.

⁶⁸⁷ Belgian Code of Economic Law Art.XI.243(2).

⁶⁸⁸ Royal Decree of 13 December 2012 relating to remuneration for public lending and withdrawing the Royal Decree of April 25, 2004 relating to remuneration rights for public lending of authors, performers, producers of phonograms and producers of Art.5.

- ‘1. Educational establishments officially recognized or organized for this purpose by the public authorities;
2. Scientific research institutions recognized or officially organized for this purpose by the public authorities;
3. Health care institutions recognized or officially organized for this purpose by the public authorities;
4. Officially recognized institutions created for the benefit of the blind, visually impaired, deaf and hard of hearing’.

6.3.2 Moral rights

As explained above, while moral rights are not harmonized at EU level⁶⁸⁹, they are enshrined (at least two of them – the right of attribution and the right of integrity-) in Article 6bis of the Berne Convention⁶⁹⁰. Besides these two rights, other moral rights may be introduced in national jurisdictions.

In Belgium, moral rights are envisaged for authors in Section 2 of Article XI.165. The statutory provision confirms, first, the inalienable character of the moral rights which are closely linked to the author’s personality. In general terms, these rights cannot be waived or relinquished as explicitly stated by the second paragraph of this provision ‘the overall waiver of the future exercise of this right is void’. Yet, this statement is more complicated than it seems at first sight. It does not mean that certain agreements in this area would not be allowed since this provision could be read *a contrario*, in the sense that a well-defined consent for the exercise of a moral right could be valid⁶⁹¹. Nevertheless, it is commonly agreed that the rule stated in this provision does not allow the author to renounce the moral rights in a definitive, global, imprecise and/or ex ante manner⁶⁹².

Types of moral right

The right of disclosure or divulgation

The first right that is mentioned in Article XI.165.2 is the right of disclosure which mainly grants the author the right to decide on the disclosure of his work to the public. This right is fundamental

⁶⁸⁹ See Deliverable 2.1 for a further analysis of moral rights at international level.

⁶⁹⁰ The Berne Convention Art.6bis.

⁶⁹¹ Gotzen (n 416) 67.

⁶⁹² Marie-Christine Janssens and JF Puyraimond, ‘Moral Rights’, *20 ans de nouveau droit d’auteur 20 jaar nieuw auteursrecht* (ANTHEMIS 2015) 139.

and irrevocable. The decision to disclose the work to the public belongs solely to the author and can only be exercised once for the same work as it is exhausted in the first use. Yet, this right can be exercised at the same time that an exploitation right, e.g. with the publication of a book. This right can nevertheless also be exercised in a future moment. For instance, in cases of future works, the disclosure of the work will only be exercised once the work is completed and at the time the author considers it is ready to be delivered or disclosed⁶⁹³.

The attribution right

The attribution (or paternity) right is introduced in Article XI.165.2 of the CEL which reads as follows ‘ the author has the right to claim or refuse the authorship of the work’. This provision confers upon the author the right to be connected with his work as its creator. This right also prevents third parties from false attribution of the work. In addition, according to the CEL, the right of attribution is inalienable which therefore does not allow the author to waive the right of attribution of his work. He always will be considered the author of his work. Certain rules however apply with regards to third parties for works that are anonymous or are known under a pseudonymous.

The right of respect (the right of integrity)

The right of integrity is recognized in Belgian law in the last two paragraphs of Article.XI.165.2: ‘the author has the right for his work to be respected allowing him to oppose any modification thereof’.

As seen, the right of integrity confers upon the author the right to oppose any modification of the work which would alter the integrity of the work. The modification can be material of nature, which can be of any type, e.g. making any additions to the work, shortening the work or any modification that can affect the integrity of the work. The author does not need to demonstrate any damage to be able to oppose a modification of his work. As stated by the Court of Cassation, the right of respect also gives the right to the author to oppose non-material modifications of the work that may affect the ‘spirit of the work’⁶⁹⁴.

This right, as the other moral rights in Belgian law, is inalienable. However, the exercise of this right cannot prevent the author from making specific agreements with a third party in order to make certain agreed changes on the work⁶⁹⁵.

⁶⁹³ Gotzen (n 416) 68.

⁶⁹⁴ *Belgian court of Cassation 8 of May 2008, AM 2009* (n 446).

⁶⁹⁵ Gotzen (n 416) 70.

The second part of the right of integrity provides an exception to the rule, according to which ‘notwithstanding any waiver, the author retains the right to oppose any deformation, mutilation or other modification of this work or any other attack on the same work, which is prejudicial to his honour or his reputation’⁶⁹⁶. Hence in cases when the author has agreed to a particular waiver, he will always keep the right to oppose any deformation, mutilation or any other modification of the work that may cause him a prejudice to his honour or reputation. It will therefore never be possible to introduce a clause in any agreement that accepts a modification of the work that violates his honour or reputation⁶⁹⁷.

An excessive resistance from the author when exercising this right could lead to be considered as an abuse of law. As Janssens explains, one of the main evolutions within the last years in relation to moral rights is the introduction of concepts such as the ‘abuse of law’ or the ‘proportionality of the legitimate interests’. This means that the author does not have absolute disposal of moral rights. Additionally, it should be considered whether the author pursues other objectives, e.g. economical advantage⁶⁹⁸.

Term of protection

The moral rights in Belgium have the same duration as the economic rights as stated in Article. XI.166 establishing that ‘copyright continues for seventy years after the author's death for the benefit of the person he has designated for this purpose or, failing that, his heirs in accordance with Article XI.171’. While the CEL is not crystal clear to the duration of moral rights, it seems that the intention of the Belgian legislator was to adjust the moral rights’ duration with the duration of the economic rights, namely, 70 years after authors’ death. This conclusion is inferred from the reference to ‘copyright’ that was introduced in the law which involves both the economic and the moral rights⁶⁹⁹. Also the doctrine in Belgium agrees that the duration of moral rights in Belgium is the same as the economic rights⁷⁰⁰.

Importantly, Article XI.171 of the Belgian CEL makes a division between economic rights and moral rights for the exploitation of the exclusive rights after the authors’ death. Accordingly, the second paragraph of this provision states that ‘after the author's death, the rights determined in Article XI.165,2, are exercised by his heirs or legatees, unless he has designated a person for this purpose’. These persons will exercise the moral rights in the name of the author and will need to act in accordance with the will and views of the author and in his interest⁷⁰¹.

⁶⁹⁶ Belgian Code of Economic Law Art.XI.165.2.

⁶⁹⁷ Gotzen (n 416) 70.

⁶⁹⁸ Janssens and Puyraimond (n 692) 141.

⁶⁹⁹ Gotzen (n 416) 72–73.

⁷⁰⁰ Janssens and Puyraimond (n 692) 138.

⁷⁰¹ Berenboom and others (n 616) 101–102.

6.3.3 Adaptation right

The adaptation right is an exclusive economic right that provides the authors the right to control the transformation of his work, generally into another type or presentation of the work. As seen, neither the right of adaptation nor the right of translation have been harmonized at EU level⁷⁰². However, they remain applicable in the Member States as a consequence of the application of the Berne Convention⁷⁰³.

In Belgium, the right of adaptation is included in the exclusive right of reproduction as stated in Article.XI.165.1 of the CEL which explicitly states that ‘this right includes in particular the exclusive right to authorize its adaptation or translation’. The adaptation of a work could be defined as the reproduction of a work into ‘another form, another genre or another language’⁷⁰⁴. Therefore, any modification of the work and of the reproduction of the work must be authorized by the author of the original work. When the changes made to the (reproduction of the) work lead to the creation of an independent original work, the author of the new work will also enjoy copyright protection. The author of the new work will need, however, the consent of the author of the original work.

The translation right works in a similar manner. Only the author of a written work can authorize its translation. When a translator has the permission of the author of the work, the translator can also obtain a copyright protection as long as it meets the criterion of originality⁷⁰⁵.

Term of protection

As the adaptation right is considered part of the reproduction right in Belgian law, it enjoys the same term of protection, namely, 70 years author’s post mortem⁷⁰⁶.

Particularities

For its importance for transformative re-uses of works and for the inDICEs project, it is worthy of mentioning the ‘right of destination’. This right exists in the Belgian copyright system (and in French law), although it is a doctrinal and jurisprudential conception and not a legal notion. The right of destination also forms part of a broad conception of the reproduction right recognized by the Court of Cassation⁷⁰⁷.

⁷⁰² See Deliverable 2.1 for a further analysis of the adaptation right at EU and international level.

⁷⁰³ The Berne Convention Art.12.

⁷⁰⁴ Julien Cabay and Maxime Lambrecht, ‘Remix Prohibited: How Rigid EU Copyright Laws Inhibit Creativity’ (2015) 10 Journal of Intellectual Property Law & Practice 359, 363.

⁷⁰⁵ Gotzen (n 416) 54.

⁷⁰⁶ Belgian Code of Economic Law Art.XI.166.

⁷⁰⁷ *Belgian Court of Cassation 19 January 1956, Pas 1956, I, 484.*

The right of destination is defined as the right of the author to prohibit certain uses of reproductions of his work. This right is entrusted in the principle that if an author owns the reproduction right, he must also have the possibility to determine how the reproductions will reach the public⁷⁰⁸. Therefore, once the reproduction is made, the author can oppose any making available of the work to the public that does not respect his initial will. For instance, a photograph intended for the press cannot be used for advertising in a shopping window⁷⁰⁹. Yet, for this right to be infringed by a third party, the infringement needs to be done under reasonable circumstances according to which the author had to communicate the specific destination of the reproductions of his works.

Although criticized by certain scholars⁷¹⁰, the Cassation Court of Belgium considered that the integration of a sculpture into another conceptual artwork by ‘surrounding the statue with a ribbon bearing the word ‘Kijkverbod’ (‘Viewing prohibited’)⁷¹¹ infringed the destination right of the author of the sculpture as the work was determined to be displayed in the public space and not to be part of the other work.

6.4 Other rules on matters relevant for CHIs

6.4.1 Protection of public domain/cultural heritage

Posthumous works

Often the authors do not get to publish their works before their death. When the publication of a work is made after the author’s death, they are referred to as posthumous works and are usually granted a different duration of protection due to their unique characteristics.

In Belgian law, if a work is communicated to the public before the expiration of the duration of copyright protection, namely during the 70 years after the authors’ death, the assignees will continue the normal exploitation for the rest of the copyright protection.

However, the Belgian law grants a different protection once a work has been communicated to the public after the expiration of the copyright protection. This is stated in Article.166.6, according to which, ‘anyone who, after the expiration of the protection by copyright lawfully publishes or communicates lawfully to the public for the first time a work not previously published, enjoys

⁷⁰⁸ B Michaux and P Campolini, ‘Le Droit de Destination : Un Appendice Davantage Qu’un Droit Spécifique’ (2010) no:2010 Auteurs & Media 494.

⁷⁰⁹ Gotzen (n 416) 54.

⁷¹⁰ Michaux and Campolini (n 708) 494.

⁷¹¹ Cabay and Lambrecht (n 704) 364.

protection equivalent to that of the economic rights of the author'. This protection is granted to anyone who publishes or communicates the work to the public lawfully. While this is not exactly a copyright but a neighbouring right, the person that makes the investment and effort to communicate the work to the public will enjoy a similar kind of protection. This right is not granted to the rightholders that by law have the right to enjoy the copyright protection after the authors' death but to anyone that publishes or communicates the work to the public. This kind of provision is normally provided to benefit the investment of a person that makes the effort in order to 'stimulate the editions of old works'⁷¹².

The term of protection of this right is 25 years from the moment that the work was lawfully published or lawfully communicated to the public for the first time⁷¹³.

6.4.2 Open Data Directive

At the time of drafting these lines, there is no any draft law available implementing the Open Data Directive in Belgium.

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⁷¹² Gotzen (n 416) 75.

⁷¹³ Belgian Code of Economic Law Art.XI.166.6.

7 Annex II – France

7.1 Copyright-related provisions

7.1.1 Exceptions and limitations

The formal implementation in France of the Infosoc Directive⁷¹⁴ was accomplished by the Law of 1 August 2006 on Copyright and Related rights in the Information Society⁷¹⁵ which introduced or revised certain exceptions and limitations, implemented the new rules on TPMs and DRMs and reinforced penalties for criminal infringement⁷¹⁶. These provisions amended the French Intellectual Property Code of 1992 followed by other copyright-related amendments made by subsequent laws. The IP Code has been last modified by the Decree 2020-946⁷¹⁷ modifying the IP national authority.

Exceptions and limitations of the French *droit d'auteur* system are stated in Articles L-122-5 for author's rights and 211-3 related to neighbouring rights.

7.1.1.1 Preservation exception

The preservation exception had not been introduced by the French legislator before the implementation of the Infosoc Directive, which establishes the following: 'the reproduction of a work and its representation carried out **for conservation purposes** or intended to preserve the conditions of its consultation for purposes of research or private study by individuals, on the premises of the establishment and on dedicated terminals by libraries accessible to the public, by museums or by archives, provided that these do not seek any economic or commercial advantage'⁷¹⁸.

Beneficiaries

Article L-122-5,8° introduces the exception for conservation purposes made by museums, archives or libraries that are accessible to the public. The reference to 'publicly accessible libraries' does not mean that the library must publicly owned but it only refers to the actual possibility of

⁷¹⁴ See Deliverable 2.1 for further analysis of the Infosoc Directive.

⁷¹⁵ LOI n° 2006-961 du 1er août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information.

⁷¹⁶ Lindner and Shapiro (n 564) 350.

⁷¹⁷ Décret n° 2020-946 du 30 juillet 2020 relatif à la désignation de l'Institut national de la propriété industrielle en tant qu'organisme unique mentionné à l'article 1er de la loi n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises.

⁷¹⁸ French IP Code art. L-122-5, 8.

the public to get access to the library. Libraries of a private nature could also benefit from the exception as long as the library is publicly accessible regardless its private or public ownership. However these kind of institutions could be limited in the use of the exception as they cannot pursue any commercial profit⁷¹⁹.

In addition, the beneficiaries being able to benefit from the exception is extended by a particular provision of the French Heritage Code⁷²⁰ regulating the cultural institutions to those institutions in charge of the legal deposit. These institutions are allowed to make reproductions of works for the collections and for the conservation of specific works⁷²¹.

Despite the introduction of educational establishments in the Infosoc Directive, the French legislator did not opt for the inclusion of these institutions in the national implementation of the exception, being then excluded from the exception.

Purposes of the exception

The exception allows for reproduction and ‘performance of works’ for preservation purposes. Unlike the Infosoc Directive, the French exception also allows for the ‘performance of works’ which clearly goes beyond the scope of the exception in the Directive, which only affects the reproductions right. Yet, the ‘performance of works’ is limited by the fact of the purpose of the exception, as it can only be authorized when aiming at the preservation of works⁷²².

With regards to the conservation purposes, it is generally accepted that the creation of copies of works in order to avoid the loss or deterioration of the original works are allowed under the exception. Making copies of the works in order to preserve them correctly due to the different evolution of technology is also contemplated under the exception⁷²³. For instance, if a written work is fixed in a tangible format, the exception allows the beneficiaries to make copies through

⁷¹⁹ Alleaume (n 17) 28.

⁷²⁰ French Heritage Code (last modified in January 2020) L-131-1.

⁷²¹ French Heritage Code (last modified in January 2020) L-131-2 ‘Printed, graphic, photographic, sound, audiovisual, multimedia documents, whatever their type technical process of production, edition or distribution, are subject to a compulsory deposit, called a deposit legal, as long as they are made available to the public. However, documents intended for a first exploitation in cinematographic theatres are subject to the obligation of legal deposit when they have obtained the cinematographic exploitation visa provided for in Article L. 211-1 of the Cinema and the animated image Code. Software and databases are subject to the obligation of legal deposit when they are updated, available to a public by the distribution of a material medium, whatever the nature of this medium. Signs, signals, writings, images, sounds or messages of any kind are also subject to legal deposit as communicated to the public by electronic means’.

⁷²² Triaille and others (n 22) 273.

⁷²³ Alleaume (n 17) 27.

photocopying, scanning or photographs, among others, in order to 'safeguard the access' to the work⁷²⁴.

The beneficiary institutions are also allowed to make copies of the works in both physical and digital format⁷²⁵. For the latter, works in a digital format, e.g. a DVD, the law allows making reproductions in other similar formats e.g. copying it in a USB or another digital format. However, these institutions cannot rely on the exception with the objective of increasing their catalogue, e.g. making copies of works obtained through interlibrary loans or as a record of TV works. The only objective of the exception is the conservation of the work.

Contrary to the provision of the Infosoc Directive, the French one does not impose that the works whose reproductions are allowed under the exception must be in the permanent collections of the beneficiary institutions. Hence, the French law 's scope of the exception is certainly broader than the Infosoc Directive. Yet, this 'risk' is mitigated by the obligation of the institutions to make reproductions for preservation purposes only. For instance, in case that a museum does not have that work in the collection but it is 'lent' to another institution, the obligation of preserving the work still relies in the institution that loans the work⁷²⁶.

The reproductions of works cannot lead to any commercial profit or advantage, in the same degree as the Infosoc Directive. According to the doctrine, this exception must be carried out in a manner that reproductions of the works do not replace the sales of such works and the digital reproductions of the works are not used for the online sharing of the content⁷²⁷.

Importantly, the French legislator does not impose any compensation to the rightholders for the use of this exception. This option has been criticized by the doctrine due to economic reasons. Before the exception, publishers could obtain further revenues from institutions that used to buy new copies of the same work given that some institutions would need to replace the work that could be damaged e.g. by use. However, with this exception in place in the French system, the beneficiary institutions can make reproductions of the work without having to pay the price for another work or without having to compensate rightholders. Furthermore, the exception does not allow for mass-digitization projects of large amount of works and neither for their making available to the public apart from the specific cases contemplated in the provision⁷²⁸.

⁷²⁴ Alleaume (n 17) 27.

⁷²⁵ Gautier (n 37) 400.

⁷²⁶ Alleaume (n 17) 29.

⁷²⁷ Alleaume (n 17) 27.

⁷²⁸ Pouchard (n 31) 9.

7.1.1.2 *Research and private study standing in dedicated terminals*

The same article of the French IP Code, L-122-5,8° allows particular beneficiaries to make a ‘reproduction of a work and its representation carried out for conservation purposes or intended to preserve the conditions of **its consultation for purposes of research or private study by individuals, on the premises of the establishment and on dedicated terminals** by libraries accessible to the public, by museums or by archives, provided that these do not seek any economic or commercial advantage’.

Beneficiaries

As explained in the previous section, the beneficiaries of this exception are those libraries that are accessible to the public, museums and archives (see previous section for further explanation) independently of their public or private ownership. Besides, the French Heritage Code includes organizations that are in charge of the legal deposit to also benefit from the exception (see previous section for further details).

Purposes of the exception.

The French exception follows the same approach of the Infosoc Directive as it allows for reproductions of works for consultation with research or private study purposes by individuals. Even though there is no any limit on the number or the category of individuals that may be allowed to consult the work, the French Heritage Code establishes a limitation for the institutions in charge of the legal deposit: only accredited researchers are allowed to consult these works⁷²⁹.

From this provision, it is inferred that only the act of ‘consultation’ is allowed under this exception and any other acts such as downloading a copy or saving a copy in the researcher’s device is not allowed⁷³⁰. Such consultation of works must be carried out in dedicated terminals of the above-mentioned institutions. Importantly, this exception does not permit the remote consultation of works but only those reproductions for on-site consultation are allowed. For the onsite consultation, it must be noted that the French exception does not impose any number of copies of the works that can be consulted by individuals in dedicated terminals of such institutions simultaneously⁷³¹.

⁷²⁹ French Heritage Code (last modified in January 2020) L-132-4 establishes that ‘the consultation of the work on site by researchers duly accredited by each depositary body on individual consultation stations, the use of which is exclusively reserved for these researchers’.

⁷³⁰ Alleaume (n 17) 31.

⁷³¹ Serrano Fernández and others (n 40) 74.

Part of the doctrine has considered this exception rather ‘vague and risky for rightholders’⁷³² and consider that this exception requires a strict interpretation in order to avoid that reproductions of works replace the actual sales of works⁷³³. Furthermore, the exception does not allow for mass-digitization projects of large amount of works and neither for their making available to the public apart from the specific cases contemplated in the provision⁷³⁴.

To end, as mentioned above, the doctrine criticizes the fact that the French legislator did not opt for introducing a system to compensate rightholders for those uses made while relying on the exception⁷³⁵.

7.1.1.3 Advertising the public exhibition or sale of artistic works

Before the adoption of the Infosoc Directive, a law of 1997⁷³⁶ introduced in the French IP Code an exception for the advertisement of the public exhibition or sale of works. Initially, this exception only allowed the lack of authorisation of the author for the reproductions of works in a catalogue for public auctions. Nevertheless this provision was later modified⁷³⁷ and adjusted the current version by only permitting catalogues’ reproductions for ‘judicial sales’. Therefore Article L-122-5,3°,d) of the French IP Code establishes that ‘when the work has been disclosed, the author may not prohibit, provided that clearly indicated the name of the author and the source, reproduction of all or part of graphic or plastic art for including in the catalogue of a judicial sale made in France for copies made available to the public prior to the sale for the sole purpose of describing the works of art offered for sale’⁷³⁸.

Beneficiaries

As seen, the 2000 law⁷³⁹ reduced the scope of application of the exception only allowing reproductions for catalogues for ‘judicial sales’⁷⁴⁰. This is the result of an earlier case where the Court of Appeal of Paris had ruled that, in the case of public auctions of works of arts, the auction houses (*‘societes de ventes volontaires’*) could not benefit from the exception since the Court considered that the auction houses are involved in commercial and for profit activities. More specifically, the Court believes that often the auction houses’ catalogues are sold for a price

⁷³² Gautier (n 37) 400.

⁷³³ Pouchard (n 31) 9.

⁷³⁴ Pouchard (n 31) 9.

⁷³⁵ Alleaume (n 17) 31.

⁷³⁶ Law n ° 97-283 of March 27, 1997 transposing into the intellectual property code the directives of the Council of the European Communities n ° 93/83 of September 27, 1993 and 93/98 of October 29, 1993.

⁷³⁷ Law n ° 2000-642 of July 10, 2000 regulating voluntary sales of furniture by public auction.

⁷³⁸ French IP Code L-122-5,3,d].

⁷³⁹ Law n ° 2000-642 of July 10, 2000 regulating voluntary sales of furniture by public auction art.42.

⁷⁴⁰ Durrande and others (n 101) 178.

generating a certain profit⁷⁴¹. As a consequence, the mentioned law changed not only the scope of the exception but also the beneficiaries of the exception. Nowadays the auctioneers in charge of these judicial sales (*les commissaires-priseurs judiciaires*) are the exclusive beneficiaries of the exception.

Purpose of the exception

The French exception aims at permitting reproductions of graphic or plastic arts for including them in a catalogue of a judicial sale made in France. The exception is rather narrow as it limits its scope to reproductions of graphic or plastic works of art excluding reproductions of other kind of works although such reproduction may consist of the whole or of a part of the work. The work of art whose reproductions are aimed at being included in the catalogues must have been already disclosed in order fall under the scope of the exception. Besides, such reproductions are only permitted for the purpose of describing the works that are being sold in the judicial sale. This provision must be interpreted restrictively in order to protect the authors' rights⁷⁴² and this is further confirmed by the law when adding the reference to 'the sole purpose': the description of the works in sale is the only permitted act under the exception.

Furthermore, Article L-122-5,3^o,d) needs to be read conjointly with Article R-122-1 of the French IP Code which provides for a definition of a 'catalogue of a sale of graphic or plastic works'⁷⁴³. In accordance with the definition, catalogues that have already been distributed are out of the scope of this exception.

Finally, in order to benefit from the exception, the provision imposes the obligation of mentioning the author and the source in the catalogue (the moral right of attribution).

7.1.1.4 Text and Data Mining

The EU legislator did not introduce any exception for TDM among the (closed) list of optional exceptions in the Infosoc Directive. Due to the importance of text and data mining in the digital era and the big data economy, the new CDSM Directive, currently under implementation in the Member States, introduces two TDM exceptions. One of these exceptions is specifically addressed to cultural institutions as beneficiaries⁷⁴⁴.

⁷⁴¹ *Cour de Cassation, Chambre civile 1, du 22 janvier 1991, 89-15617.*

⁷⁴² Durrande and others (n 101) 162.

⁷⁴³ French IP Code R-122-1: 'a catalogue means copies of a list, illustrated or not, distributed before a public auction, describing, with a view to informing potential buyers, the works that will be dispersed during the sale, as well as the conditions thereof, and made free or at cost price available to any person who requests it from the public or ministerial officer carrying out the sale'.

⁷⁴⁴ See Deliverable 2.1 for further analysis of the TDM exception in the CDSM Directive.

Nevertheless, before the adoption of the new copyright Directive, the French legislator had already introduced an exception allowing for TDM related acts by the Law of the Digital Republic⁷⁴⁵, approved in 2016 which modified accordingly the French IP Code.

The 2016 Law introduced a new provision in Article L-122-5,10° according to which, once a work has been disclosed, the author cannot prohibit ‘digital copies or reproductions made from a lawful source, with a view to the exploration of texts and data included or associated with scientific writings for the needs of public research, excluding any commercial purpose.’⁷⁴⁶.

A similar exception was also included in Article L-342-3,5° for databases. It follows from the provision that the rightholder of a database cannot forbid ‘copies and digital reproductions of a database by a lawful user, made for the purposes of mining text and data included in or associated with scientific publications, for research purposes, excluding all commercial purposes. Archiving and communication of technical copies made during the process, after the completion of the research project for which they were made, is guaranteed by an organisation designated by Decree. Other copies and reproductions are deleted’.

Beneficiaries

The French rule does not clearly specify who is the beneficiary of the exception. Yet, it can be inferred from the text that only researchers carrying out TDM for research purposes can benefit from the exception.

Purposes of the exception

The law therefore permits the ‘exploration of texts and data’ that are included or associated with scientific writings for the purposes of public research. Yet, the broad drafting of the provision does not confer enough clarity. For instance, the law does not provide any definition of ‘text and data mining’ neither of ‘scientific writings’ thus it is not clear which kind of texts, e.g. thesis, articles, would fall under the scope of the exception⁷⁴⁷.

To this end, the author of a scientific work that has been previously disclosed could not prohibit the reproductions of his works – without any limitation on the format of the reproduction nor of the number of reproductions made⁷⁴⁸- obtained from a lawful source. The extraction of text and data must be done for public research purposes excluding any commercial advantage.

⁷⁴⁵ LOI n° 2016-1321 du 7 octobre 2016 pour une République numérique.

⁷⁴⁶ French IP Code L-122-5,10.

⁷⁴⁷ Battisti and Schöpfel (n 114) 26.

⁷⁴⁸ Durrande and others (n 101) 166.

Further, the exception does not provide for any compensation to the rightholders of the uses of the works made under the exception.

The conditions to benefit from the exception are rather strict, which increase the risk of reducing the potential impact of such exception⁷⁴⁹. In addition, a particular applicable regime will be established by a Decree that ‘sets the conditions under which the exploration of texts and data is carried out, as well as the methods of conservation and communication of the files produced at the end of the research activities for which they were produced; these files constitute research data’⁷⁵⁰. However, due to the legislative process of the CDSM Directive, the legislative procedure for approving the application rules of the French TDM exception was (and still is) on hold.

Given that the French legislator has decided to implement the CDSM Directive in separate laws, starting by the most controversial provisions of the Directive -Articles 17 and 15, there is no draft law on the implementation of other provisions at the moment of writing these lines.

7.2 Specific regime in respect to particular types of works

7.2.1 Orphan works

The French IP Code regulates the status of the orphan works in ‘Chapter V on Special provisions relating to certain uses of orphan works’ which adds the rules of the law 2015-195⁷⁵¹ transposing the Orphan Works Directive⁷⁵² into the already pre-existing provisions on orphan works that already existed in France.

Types of works

To clarify the types of works falling under the scope of the rules for orphan works, one needs to first read the definition provided by Article L-113-10 of ‘*oeuvres orphelines*’, according to which, ‘orphan work is a protected and disclosed work, whose rightsholder cannot be identified or found, despite diligent, proven and serious searches. When a work has more than one rightsholder and one of them has been identified and found, it is not considered orphan’⁷⁵³. Besides, in accordance with the Orphans Works Directive, works that are considered ‘orphan’ in another Member State also fall under the scope of these provisions.

⁷⁴⁹ Latreille (n 115) 8.

⁷⁵⁰ French IP Code L-122-5,10.

⁷⁵¹ Law No. 2015-195 of February 20, 2015 on various provisions for adaptation to European Union law in the fields of literary and artistic property and cultural heritage.

⁷⁵² See Deliverable 2.1 for further analysis of the Orphan Works Directive.

⁷⁵³ French IP Code L-113-10.

Still, only certain types of works, which were initially published or broadcasted in an EU Member State, can fall under the scope. These works are as follows:

‘a) Works published in the form of books, journals, newspapers, magazines or other writings forming part of the collections of libraries accessible to the public, museums, archives, institutions depositing cinematographic or sound heritage or educational establishments, with the exception of photographs and still images which exist as independent works;

b) Audiovisual or sound works forming part of these collections or which were produced by public service broadcasting organizations before 1 January 2003 and which form part of their archives’⁷⁵⁴.

Beneficiaries

Libraries that are open to the public, museums, archives, depositories of the cinematographic and sound heritage or educational establishments and public service broadcasting organizations are the only beneficiaries of the exception for the orphan works’ uses. Interestingly, while museums or archives are not requested by the French legislator to be accessible and open to the public, libraries need to be publicly accessible in order to benefit from the exception⁷⁵⁵.

Subject matter

The orphan works existing in the collections of the beneficiary organizations can only be used ‘within the framework of their cultural, educational and research missions’ and cannot pursue any profit-making objective for a maximum period of seven years. Besides, the law expressly states how the orphan works can be used, namely the orphan works’ reproductions can only be carried out for the following purposes: their digitization, provision, indexing, cataloging, preservation or restoration and their making available to the public. In this context, the orphan work is considered as being made available to the public when ‘everyone can have access to it on their own initiative’.

Despite the prohibition of the commercial advantage when relying on the exception, the beneficiary organizations could still receive certain revenues that could cover the costs directly arising from the digitization and from the making the orphan work available to the public⁷⁵⁶.

Cultural organizations have also certain obligations if they want to benefit from such exception. In particular, they are also requested to mention the name of the rightholders of the works and

⁷⁵⁴ French IP Code L-135-1,1.

⁷⁵⁵ Bertoni, Guerrieri and Montagnani (n 140) 60.

⁷⁵⁶ French IP Code L-135-2.

to respect the moral rights that may exist in the works. Moreover, they are also obliged to communicate the information of the work to the Ministry of Culture that will transmit it to the EUIPO (as required by the Orphan Works Directive).

Diligent search

Before being able to make use of the orphan works, the organizations must carry out a ‘diligent, proven and serious search’. This search needs to be performed in the EU Member State where the first publication or first broadcast of the work took place⁷⁵⁷. In the absence of publication or broadcasting but when the work was actually made available to the public, the search needs to be carried out in the Member State where the organization made the work accessible is established. For audiovisual works, the producer’s place of residence is the place where the search needs to be carried out.

The diligent search must be performed taking into account the particular sources for the different categories of works. Further details on the sources that needs to be consulted when carrying out the diligent search are included in Chapter V of the applicable rules to orphan works of the French IP Code (Articles R-135-1 and seq.)⁷⁵⁸. For instance, for books, the legal deposit or the catalogues of publicly accessible libraries, among others, need to be consulted. While the sources introduced by the legislative Decree are mainly the same as the ones provided in the Orphan Works Directive, there are still certain additions, namely, the information available on the work or the reference to ‘unpublished written works’⁷⁵⁹.

The results of the diligent search need to be communicated to the competent authority (in France it is normally the Ministry of Culture) that will refer these results to the EUIPO. This is rather useful as when one organization wants to make use of a work that is already declared as ‘orphan’ and registered in the EUIPO database, the organization does not need to proceed to another search⁷⁶⁰. Yet, there is no mention of any database of the search results that beneficiary institutions need to keep in their files, unlike the request established in the Orphan Works Directive⁷⁶¹.

End of orphan-works status

Once the rightholder is found or located, the work stops being considered ‘orphan’. In case a work has more than one rightholder and only some of them have been located, the uses of the works

⁷⁵⁷ French IP Code L-135-3.

⁷⁵⁸ Introduced by the Decree No. 2015-506 of May 6, 2015 issued for the application of Articles L. 135-7, L. 212-3-1 and L. 212-3-3 of the Intellectual Property Code.

⁷⁵⁹ Bertoni, Guerrieri and Montagnani (n 140) 62.

⁷⁶⁰ French IP Code L-135-4.

⁷⁶¹ Bertoni, Guerrieri and Montagnani (n 140) 62.

made by the organizations need to be authorized by the rightholders that have been identified and located⁷⁶².

If the rightholder or rightholders are all located and they have proved their exclusive rights on the work, the beneficiary organization must stop using such work and can only make use of it with the rightholder's authorization⁷⁶³. It must be noted that the rightholder can appear at any moment⁷⁶⁴. The end of the orphan works status must be also communicated to the Ministry of Culture and to the EUIPO.

Compensation

When/if the rightholder reappears, they have the right to obtain compensation from the uses of their works that have been made by the beneficiaries and can hence put these uses to an end.

In this regard, it follows from Article L-135-6 that the organization that used the work must pay a fair compensation for the prejudice the author suffered as a result of the uses of his work. As set up in the law, such compensation needs to be made in agreement between the organization and the rightholder(s) taking into account any tariff or agreement in place for the professional sector concerned.

7.2.2 Out-of-commerce works

The French IP Code regulates particular uses of a certain type of out-of-commerce works in its Chapter IV on 'digital exploitation of 'unavailable books'. These rules were introduced by the Law 2012-287⁷⁶⁵ that modified the IP Code accordingly. This regime responds to the objective of making non-commercially available books, available to the public in digital or tangible form⁷⁶⁶.

The speedy process of the adoption of this law relied in the need of providing a solution to the problem that libraries (and other institutions) are facing nowadays. In France, libraries, and specially the National Library of France, were involved in digitization projects of the works in their collections not only in order to better preserve them but also to make them available to the public. However, only works in the public domain could be made available through the internet as they do not require authorization from the rightholder. Given that libraries have in their collection a vast amount of works that are still protected by copyright but that they are no longer in commerce (normally due to the lack of interest of the publisher to continue exploiting them

⁷⁶² French IP Code L-135-5.

⁷⁶³ French IP Code L-135-6.

⁷⁶⁴ French IP Code L-135-6.

⁷⁶⁵ LOI n° 2012-287 du 1er mars 2012 relative à l'exploitation numérique des livres indisponibles du XXe siècle 20.

⁷⁶⁶ Gautier (n 37) 644.

commercially)and hence it rendered impossible to communicate these works to the public without the author's authorization, the French legislator decided to put in place a collective management system (similar to the Goggle Books Project) where authors and publishers are fairly remunerated and their rights are respected.⁷⁶⁷.

The Chapter starts by providing a definition of 'unavailable books' (*'les livres indisponibles'*) according to which an unavailable book should be understood as 'a book published in France before 1 January 2001 which is no longer the subject of commercial distribution by a publisher and which is not currently the subject of a publication under a printed or digital form'⁷⁶⁸. It must be noted that the concept of unavailability of works responds only to the lack of commercial distribution by a publisher, leaving aside other works that may be published by other channels than a publisher, e.g. university publications⁷⁶⁹. On top of this, there will be a number of these works that are orphan works so the system may clash with the system created for the orphan works.

The French law requires the creation of a free and accessible database of such unavailable books managed by the National Library of France. According to Article L-134-2 every person can request the inscription of an unavailable book in this database. After six months of the inscription of a unavailable work in the database, the collective management organization can exercise the rights of authorising the reproduction and the representation into a digital format for a period of five years that can be renewed against payment⁷⁷⁰. These licenses are therefore handled by a specific collective management organization created according to certain criteria⁷⁷¹, which handles the revenues of the exploitation of the works.

The French law introduces an opt-out system in order to provide certain guarantees for the authors and rightholders of the works. In this context, the authors and publishers of the works concerned can oppose to the collective management of their works during a period of six months from the inscription of the database. In case a publisher opposes, he needs to justify the uses made or planned to be make of the works. After this period the author can still oppose to the reproduction or representation of his work if such uses entail a prejudice to his honour or reputation⁷⁷².

⁷⁶⁷ Franck Macrez, 'L'exploitation numérique des livres indisponibles : que reste-t-il du droit d'auteur ?' (2012) 12 Recueil Dalloz 749, 3.

⁷⁶⁸ French IP Code L-134-1.

⁷⁶⁹ Macrez (n 767) 5.

⁷⁷⁰ French IP Code L-134-3.

⁷⁷¹ French IP Code L-134-3.

⁷⁷² French IP Code L-134-4.

This system has been criticized by the doctrine due to the little guarantees that are given to the authors of the works⁷⁷³. However, the system provides certain benefits to the publishers since the collective management organization, in the case of absence of opposition, will provide a preferential authorization to exploit the work digitally to the publisher that got the rights of exploitation of the printed book for a period of ten years. The publisher can accept or decline the offer.

Nevertheless, the CJEU judged in the *Soulier* case⁷⁷⁴ that the Infosoc Directive was not compatible with granting a collecting society the right to allow the publication of out-of-print works while allowing the authors to oppose to such practice. The CJEU confirmed the right of the author of providing prior's consent, unless the uses of the works fall under any exception or limitation contemplated in the Infosoc Directive, or, in the case of compulsory licensing management, when the authors are duly informed in an individualised manner.

After this judgement the Decree establishing the application of rules for the unavailable books⁷⁷⁵ was annulled in France by the State Council⁷⁷⁶ and it seems the practical influence of this provision is limited.

Given that there is not any draft available of the implementation of the CDSM Directive in France yet (except from certain provisions), we cannot analyse how the new rules on out-of-commerce works introduced by the Directive will be transposed into national legislation.

7.2.3 Works of visual arts in the public domain

At the time of writing these lines, there is no draft available in France on the implementation of Article 14 of the CDSM Directive in France⁷⁷⁷.

7.2.4 Non-original photographs

In France, photographs are protected by authors' rights according to Article L-112-2 of the French IP Code. In this context, 'photographic works and those produced using techniques similar to photography' are considered intellectual creations. It must be highlighted that there is no any neighbouring right protecting non-original photographs in France.

⁷⁷³ Macrez (n 767).

⁷⁷⁴ *Marc Soulier and Sara Doke v Premier Ministre and Ministre de la Culture et de la Communication* (C-301/15) EU:C:2016:878 (n 209).

⁷⁷⁵ Décret n° 2013-182 du 27 février 2013 portant application des articles L. 134-1 à L. 134-9 du code de la propriété intellectuelle et relatif à l'exploitation numérique des livres indisponibles du xxe siècle.

⁷⁷⁶ Conseil d'État, 10ème - 9ème chambres réunies, 07/06/2017, 368208, Inédit au recueil Lebon.

⁷⁷⁷ See Deliverable 2.1 for further analysis of the CDSM Directive.

Before 1985⁷⁷⁸, the French *droit d'auteur* system protected photographs that were distinguished with an artistic or documentary character. This distinction between 'artistic or documentary' did not entail any difference in the regulatory treatment of photographs but a pure classification of the works⁷⁷⁹. The photographer in the artistic photographs would pursue an artistic effect close to that one originated in painting while documentary photographs was used to refer to photographs where the photographer aim at fixing and event that could attract public interest regardless of its aesthetic aspect. The confusion that this classification provoked lead the French legislator to remove such references⁷⁸⁰.

Therefore, in the French system a photograph can be protected by copyright or not protected when not deserving copyright protection. To ascertain whether a photograph deserves copyright protection, the only criteria that remains is the assessment of the originality of the work. Since the photograph needs to be original and bear the stamp of the photographer's personality, it is mandatory for Courts in France to assess the level of creativity in a case-by-case analysis⁷⁸¹. Such evaluation needs to be done taking into account the choices the photographer made, in particular, the framing, the angles, the moment of the shots, the positioning of the objects, or the choices in the use of the shadows and light⁷⁸². Yet, it seems that French Courts impose a higher level of originality and creativity in photographs that in other countries⁷⁸³. However sometimes French Courts have granted copyright protection to photographs of works of arts, namely of paintings, that reproduces them as accurately as possible⁷⁸⁴.

7.2.5 Databases

Copyright protection

When the Database Directive⁷⁸⁵ was transposed into the French IP Code, Article L-112-3 that grants copyright protection to authors of their intellectual creations was modified. Accordingly, the *droit d'auteur* protection is extended to authors of 'anthologies or collections of works or

⁷⁷⁸ Law No. 85-660, of July 3, 1985, on Author's Rights and on the Rights of Performers, Producers of Phonograms and Videograms and Audiovisual Communication Enterprises .

⁷⁷⁹ Gautier (n 37) 128.

⁷⁸⁰ Law No. 85-660, of July 3, 1985, on Author's Rights and on the Rights of Performers, Producers of Phonograms and Videograms and Audiovisual Communication Enterprises.

⁷⁸¹ Thomas Margoni, 'Digitising the Public Domain: Non Original Photographs in Comparative EU Copyright Law' in John Gilchrist and Brian Fitzgerald (eds), *Copyright, Property and the Social Contract: The Reconceptualisation of Copyright* (Springer International Publishing 2018) <https://doi.org/10.1007/978-3-319-95690-9_8>.

⁷⁸² Margoni (n 781).

⁷⁸³ See Deliverable 2.1 for a further analysis of the originality in non-original photographs.

⁷⁸⁴ S van Gompel and E Lavik, 'Quality, Merit, Aesthetics and Purpose: An Inquiry into EU Copyright Law's Eschewal of Other Criteria than Originality' (2013) 236 *Revue internationale du droit d'auteur* 100, 201.

⁷⁸⁵ See Deliverable 2.1 for a further analysis of the Database Directive.

various data, such as databases, which, by the choice or arrangement of materials, constitute intellectual creations’.

Besides, this provision also defines the concept of a database and it reads as follows: ‘a collection of works, data or other independent elements, arranged in a systematic or methodical manner, and individually accessible by electronic means or by any other means’. Such definition may include not only electronic databases but also databases in tangible form, e.g. texts in paper format⁷⁸⁶ or catalogues of an exhibition in paper format⁷⁸⁷.

Sui-generis right protection

The law transposing the Database Directive introduced the sui-generis right of for the protection of non-original databases in Articles L-341 and seq. While the sui-generis right is considered in French (and EU) law a neighbouring right, the French legislator does not apply the term ‘sui-generis’ right in the legal text. Yet, the rationale of this right is the granting of certain protection against ‘parasitism’ to those substantial economic (but not only) investments in the arrangement of the database⁷⁸⁸ in contrast with the protection of author’s rights.

In consequence, the requirements and threshold to benefit from the sui-generis protection are lower than those envisaged for granting copyright protection.

Beneficiaries

In the same context as the Database Directive, the French IP Code grants a neighbouring right to ‘the producer of a database, understood as the person who takes the initiative and the risk of the corresponding investments’. The producer must have the interest and the means to engage in the production of the database⁷⁸⁹. This person hence benefits from the protection of the database ‘when the constitution of the database, the verification of the content of the database or the presentation of database and its elements attest to ‘a substantial financial, material or human investment’⁷⁹⁰. While the economic investment needs to be certainly taken into account, it should not be the only criterion to assess the ‘substantial investment’ made by the producer of the database. Further, the investment made when creating the database should be of a different nature than the kind of investment that constitutes the main activity of the enterprise⁷⁹¹.

⁷⁸⁶ Gautier (n 37) 195.

⁷⁸⁷ Durrande and others (n 101) 478.

⁷⁸⁸ Durrande and others (n 101) 478.

⁷⁸⁹ Durrande and others (n 101) 479.

⁷⁹⁰ French IP Code L-341-1.

⁷⁹¹ Durrande and others (n 101) 478.

The producer of a database is often an enterprise, but it is not a requirement as stated in Article L-341-2. Furthermore, the producer of databases can be nationals (or have their permanent residence) of a EU Member State or companies having their social residence in an EU Member State, among others. Therefore the protection provided is normally only granted to companies or nationals of/in the EU territory. In conformity with the French law, the the burden of proof of the substantial investment is vested on the producer who will need to clarify the moment and stage of the investment if requested to do so.

Alike the Database Directive, the sui-generis right is independent from the copyright protection and thus the protection granted is independent to any other protection in the elements constituting the database.

Scope of protection

According to the French law, in the same terms as the Database Directive, the sui generis right gives the database producer the possibility to prohibit:

‘1 ° The extraction, by permanent or temporary transfer of all or a qualitatively or quantitatively substantial part of the content of a database on another medium, by any means and in any form whatsoever;

2 ° Reuse, by making available to the public all or a qualitatively or quantitatively substantial part of the content of the database, whatever its form⁷⁹².

The producer of the database can also prohibit the extraction of the elements of the database that are not substantial in quantitatively terms but that are considered substantial for the database in qualitatively terms⁷⁹³. On top of this, the French law does not only require that the extraction of a part of the database is substantial but it gives the possibility to the producer to also prohibit those extractions that are not substantial but that are repetitive and systematic⁷⁹⁴. Except from a repetitive extraction, the non-substantial extraction of the database does not need to be authorized by the producer of the database⁷⁹⁵. Importantly, the French law explicitly excludes ‘public lending’ as it does not consider it as an ‘act of extraction or reuse’.

Term of protection

⁷⁹² French IP Code L-342-1.

⁷⁹³ Durrande and others (n 101) 481.

⁷⁹⁴ French IP Code L-342-2.

⁷⁹⁵ Gautier (n 37) 199.

The duration of the protection of the neighboring right lasts 15 years ‘after January 1 of the calendar year following that of their completion’⁷⁹⁶, following the obligation of the Database Directive. Yet, any substantial new investment in the database can lead to a new term of protection. This continuous possibility of renewing the protection could lead to a perpetual protection of the database⁷⁹⁷.

Particular provisions

There are a couple of exceptions and limitations in the French law that are worth mentioning here. First, the new Article L-342-3,5° includes the exception for TDM⁷⁹⁸. Hence the new provision permits making digital copies of the database by a person who has lawful access to it for the purposes of text and data mining (see Section 7.1.1.4 for further explanation of this exception). Second, France deviates from the exceptions provided in the Database Directive by also allowing the exception for people with disabilities⁷⁹⁹. In addition, there are a number of provisions regulating the procedures and sanctions for the database infringements with the objective of establishing a faster procedure that can better address the specific situations of database infringements.

7.3 Other copyright matters in a nutshell

7.3.1 The public lending derogation

At the moment of the transposition of the Rental and Lending Directive⁸⁰⁰, the lending right was not transposed into the national system. The French legislator considered the lending right was already included in a broad concept of the right of reproduction⁸⁰¹ (*‘le droit de destination’* or the right to control the use to which copies are put⁸⁰²). Neither exceptions related to the lending right were therefore introduced in the French IP Code. However the Law 2003-517⁸⁰³ deviates from the exclusive rights of authors to authorize (or not) the lending of their works in libraries and establishes a statutory licensing system. The incorporation of this system into the French IP Code has been implicitly recognised the ‘right to lend’ for libraries introducing, at the same time, a

⁷⁹⁶ French IP Code L-342-5.

⁷⁹⁷ Gautier (n 37) 199.

⁷⁹⁸ Introduced by the LOI n° 2016-1321 du 7 octobre 2016 pour une République numérique.

⁷⁹⁹ Bently and others (n 257) 10.

⁸⁰⁰ See Deliverable 2.1 for a further analysis of the Rental and Lending Directive.

⁸⁰¹ Serrano Fernández and others (n 40) 68.

⁸⁰² According to Reneaud (n 322) 74 this right is not explicitly stated in the French IP Code but in the case-law of the Court of Cassation.

⁸⁰³ Loi n° 2003-517 du 18 juin 2003 relative à la rémunération au titre du prêt en bibliothèque et renforçant la protection sociale des auteurs.

remuneration system for the authors⁸⁰⁴. Though this system the French legislator reconciles the fair remuneration of authors from their exploitation of their works and the right to access to culture⁸⁰⁵.

In this regard, Article L-133-1 introduces the only exception to the exclusive right of lending in the French law stating that 'when a work has been the subject of a publishing contract with a view to its publication and distribution in the form of a book, the author cannot object to the lending of copies of this edition by a library accessible to the public'. It follows from this rule that an author cannot oppose to the lending of his works made by libraries that are open to the public. It must also be noted that the French IP Code does not provide any definition of 'lending', contrary to the Directive.

Beneficiaries

It follows from the foreground that only libraries are contemplated as beneficiaries of the exception to the exclusive right of lending. This is deduced from, on the one hand, the provision that states it expressly, and on other hand, it is inferred from the narrow scope of the types of works that fall under the scope that only institutions that loan 'books' can fall under the scope⁸⁰⁶. The fact that only libraries are the beneficiaries of the provision must be interpreted strictly.

The restrictive character of the provision is further emphasized by the obligation for libraries to be open to the public in order to fall under its scope. In particular, libraries accessible to the public are those State and other public libraries: i) State libraries are the National Library of France, university libraries and some specialized libraries; ii) public libraries are regional lending libraries and municipal libraries, among others. However, it must be noted that the requirement of a library open to the public is not incompatible with the private character of some private libraries⁸⁰⁷.

Types of works

Whereas the Rental and Lending Directive envisages a broader scope of the exception, the French legislator opted for a much narrower provision. Contrary to the Directive, the French law only refers to works that have been the subject of a publishing contract in the form of books. Such restrictive character of the provision that leaves aside any other wirings is explained by the fact that le legislator preferred to exclude press publications from the scope of the provision⁸⁰⁸.

⁸⁰⁴ Reneaud (n 322) 68.

⁸⁰⁵ Reneaud (n 322) 72.

⁸⁰⁶ Serrano Fernández and others (n 40) 69.

⁸⁰⁷ Reneaud (n 322) 76.

⁸⁰⁸ Reneaud (n 322) 72.

Compensation system

As a result of the impossibility of the author of authorizing or prohibiting the lending of his works by libraries open to the public, the law provides that lending gives rise to ‘the right to remuneration for the benefit of the author according to the terms provided for in article’⁸⁰⁹. Therefore authors will be remunerated for the lending of their works by the beneficiaries. On top of this, publishers will be also able to benefit from the remuneration from the lending⁸¹⁰ since publishers are considered to take the financial risks when publishing books and thus they may also suffer an economic damage from the lending of the books⁸¹¹.

The compensation mechanism system for authors and publishers provided in the law will be financed from the French State. The system, managed by collective management organizations⁸¹², is established in two parts. The first part, which is financed completely by the State, takes the form of a lump-sum fixed by a Decree and is calculated based on the number of users registered in the open libraries⁸¹³. All libraries are therefore required to provide accurate data in order to calculate the exact amount of registered users. The first part is supplemented by a system calculated based on the purchases of the books (without taxes) that will be paid by specific legal persons, namely, ‘regional and local authorities, teaching, training and research establishments, representative unions, works councils and associations’⁸¹⁴. These legal persons will therefore pay for the books purchased for their libraries.

The remuneration perceived by the collective management organizations is also organized in two stages: the first part perceived, according to the number of copies purchased by libraries, must be shared equally between authors and publishers. The legal obligation of equal remuneration responds to the need of maintaining the balance between authors and publishers by limiting the remuneration that publishers can claim and by leaving potential contractual negotiations aside⁸¹⁵. On top of this, the legislator opted for calculating the remuneration according to the number of books purchased, and not of the books actually lent. This allows to balance the effects of the success of the most publicized books⁸¹⁶.

The second part of the remuneration, which cannot exceed the 50% of the total amount, is aimed at a supplementary pension scheme for writers and translators, which forms part of a cultural

⁸⁰⁹ French IP Code L-133-4.

⁸¹⁰ French IP Code L-133-4.

⁸¹¹ Reneaud (n 322) 80.

⁸¹² French IP Code L-133-2.

⁸¹³ French IP Code L-133-3.

⁸¹⁴ Reneaud (n 322) 92.

⁸¹⁵ Reneaud (n 322) 82.

⁸¹⁶ Florence Bellivier, ‘Rémunération Des Prêts En Bibliothèque’ [2003] *Revue trimestrielle de droit civil* (Paris, France : 1980) 558.

policy objective where the legislator believes that writers need to have a proper pension scheme⁸¹⁷.

Exemption to compensate rightholders

Article L-133-3 of the French IP Code only excludes school libraries from the obligation to remunerate rightholders for the lending of their books. According to this law, a Decree fixes the exact calculation for such contributions. However, the same provision opens the door to the legislator to apply different contribution regimes from university libraries.

7.3.2 Moral rights

Being France one of the countries (if not the most) known for the strong protection of authors, and in particular, its moral rights' system⁸¹⁸, the French IP Code corroborates this approach in the general attribution of authors' rights by confirming that the author's rights is comprised by both the economic rights and the moral and intellectual attributes⁸¹⁹. This provision reflects the 'dualist approach' of the French *droit d'auteur* system, 'according to which the author's right is composed of two separate set of rights, the moral right and the economic rights'⁸²⁰. All authors in France are entitled to moral rights. The French law also provides moral rights to performers.

Moral rights are envisaged in Chapter I of Title II in relation to author's rights, placing them before the economic rights in the text.

Types of moral rights

The right of respect (right of attribution and right of integrity) is stated in Article L-121-1, according to which 'the author enjoys the right to respect for his name, his quality and his work'. The so-called 'right of respect' actually integrates two of the moral rights from the Berne Convention –the right of attribution and the right of integrity – for the right to attributes the work to the author and the right to respect for the authors' work, respectively. In a third meaning, the right of respect for his qualification is understood as the right to indicate the author's professional status⁸²¹. Importantly, nothing is mentioned in the provision with regards to the obligation of having a certain damage to the honour or reputation of the author in order to be able to enforce such rights⁸²², as it happens in other systems.

⁸¹⁷ Reneaud (n 322) 82.

⁸¹⁸ Durrande and others (n 101) 100.

⁸¹⁹ French IP Code L-111-1.

⁸²⁰ Sterling (n 230) 399.

⁸²¹ Sterling (n 230) 399.

⁸²² Durrande and others (n 101) 102.

Furthermore, the law explicitly states that ‘this right is attached to his person and it is perpetual, inalienable and imprescriptible’⁸²³. This provision confers the moral right to be perpetual in time. After the authors’ death, the right is transferred to the heirs of the author but ‘its exercise could be conferred to a third party by virtue of testamentary provisions’. In addition, the right is strongly attached to the author and cannot be assigned to any third party neither can it be waived or renounced by contractual agreement, although the Courts have softened this restriction in certain particular circumstances. Finally, the right cannot be subject of any prescription affected by the lack of use⁸²⁴.

With regards to the ‘right of paternity’, the doctrine believes that the author has always the right to be acknowledged for his work(s) and to oppose to the recognition of a third party as the author of his work⁸²⁵. This right remains applicable even in the event that the work was commissioned or when the author received instructions within an agreement⁸²⁶. Besides, the ‘negative paternity right’ or the right of the author to not be connected as an author of a work that is not his, has received an increased acceptance by the Courts⁸²⁷.

The right of integrity, or respect to his work, is considered to be the most important of all the moral rights⁸²⁸, and it revolves around two sides. First, the respect to the physical integrity of his work (the right to oppose to modifications, mutilations, retouches...etc.) and second, the respect to the intellectual integrity of the work⁸²⁹. According to this, the work cannot be devaluated or deteriorated⁸³⁰.

The right of divulgation (disclosure)

Article L-121-2 of the French IP Code provide for the right of divulgation of the author, which is mainly the right of putting the work in contact with public⁸³¹. It follows for this provision that it the author alone, has the right to divulge his work by determining the procedure and conditions (subject to certain conditions for publications of a work stated in the law). For instance, the author has the right to determine exhibition or sale of a work in gallery, the publishing and distributing a written work or de ‘la premiere’ of a concert, among others⁸³².

⁸²³ French IP Code L-121-1.

⁸²⁴ Gautier (n 37) 218.

⁸²⁵ Durrande and others (n 101) 102.

⁸²⁶ Gautier (n 37) 238.

⁸²⁷ Gautier (n 37) 245.

⁸²⁸ Gautier (n 37) 216.

⁸²⁹ *The Court of Appeal of Versailles (20 December 2001, D. Pontoreau v. Front National)* (n 447).

⁸³⁰ See Deliverable 2.1 for a general analysis of the right of integrity.

⁸³¹ Gautier (n 37) 211.

⁸³² Gautier (n 37) 211.

It corresponds then to the author to determine the moment of the disclosure of the work, not even of extracts or summaries of the work⁸³³, without being possible to disclose such work without his authorization. The authorization to disclose the work can be done in advance through the signature of a contract but also such authorization can be presumed through other acts such as the donation of a work to a museum or of manuscripts to a library⁸³⁴.

This right lasts after the death of the author. Its exploitation can therefore be exercised by the heirs designated by the author in the testamentary provisions. In their absence, the law provides for a list of persons that could exercise such right.

The French IP Code provides for an important provision concerning abuses of the right of divulgation made by the descendants or representatives of the author, after his death. Therefore, in case of abuse in the use or abuse of the non-use of such right, the Court could impose any appropriate measure⁸³⁵. For instance, when it is considered that the heirs of the author are unreasonably opposing to the divulgation of the works, the court could force the necessary permission⁸³⁶. Further, the Ministry of culture is explicitly stated in the law as the claimant to the Court.

The right of withdrawal

Article L-121-4 provides the right of the author, when the exploitation rights have been assigned, and even after the publication of the work, of withdrawal vis-a-vis the person to whom the rights were ceded. In order to grant a certain level of protection to the assignee, this right is subject to a compensation to the assignee for the damage that the authors' withdrawal may cause him. In any case, the justification of the withdrawal is controlled by the Court in order to prevent frauds⁸³⁷. Further, if the author decides to exploit the work again after the withdrawal, the first assignee obtains a preference for the exploitation of the work under the same conditions that were originally offered.

Term of protection

The moral rights provided in Articles L-121-1 and L-121-2 are perpetual and therefore last after the death of the author. They can be exercised by his heirs or representatives (see above) in contrast to the economic rights that have a duration of 70 years after the death of the author. Public domain works are therefore still protected by moral rights in France.

⁸³³ TGI Paris (17 February 1999, 'Les visiteurs II').

⁸³⁴ Gautier (n 37) 212.

⁸³⁵ French IP Code L-121-3.

⁸³⁶ Sterling (n 230) 401.

⁸³⁷ Gautier (n 37) 234.

Other particularities

There are certain particular provisions in the French IP Code within the moral rights' chapter which are mainly determined by the types of works affected by the protection.

Concerning cinematographic works, the law prohibits the destruction of a definitive version of an audiovisual work. A definitive version of the work is understood as the version of the work that has been agreed between the author(s) and the producer⁸³⁸. Further, any 'addition, deletion or change of any element' of this version needs to be authorized by the co-authors and the producer. The same provision also states that any transformation of the work into any other medium aiming at providing another form of exploitation must be preceded by a consultation with the director. On top of this, Article L-121-6 establishes that when one of the authors refuses to complete its contribution to the audiovisual work, or cannot contribute to it due to *force majeure*, he cannot oppose to the use of the part he had already contributed.

With regards to computer programs, the law establishes that the author of a software cannot oppose to the adaptation of the program by the assignee 'when it is not prejudicial for his honour and reputation'⁸³⁹ and cannot exercise the right of withdrawal.

The law also provides a specific right for works of journalists. Namely, the author has the 'right to collect his articles and speeches in a collection and to publish them or authorize their publication in this form'⁸⁴⁰. This right applies to all collective works and to all authors, being employees or not⁸⁴¹ as well as to written and oral press. This right was envisaged by the French legislator in an attempt to limit the right of the promoters of collective works. Further, a law of 2009⁸⁴² introduces that authors of press works also retain, unless otherwise agreed, the right to reproduce and exploit their works except from those rights assigned. Yet, all these rights cannot be used to compete with the press title. This right only applies to written press and to journalists employees⁸⁴³.

7.3.3 Adaptation right

The French IP Code does not include a right of adaptation *per se* within the economic rights since it is considered as a deviation from the other economic rights⁸⁴⁴, namely the right of reproduction

⁸³⁸ French IP Code L-121-5.

⁸³⁹ French IP Code L-121-7.

⁸⁴⁰ French IP Code L-121-8.

⁸⁴¹ Durrande and others (n 101) 134.

⁸⁴² LOI n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet (1) art.20.

⁸⁴³ Durrande and others (n 101) 134.

⁸⁴⁴ Gautier (n 37) 649.

and the right of communication to the public. Not to forget that the right of adaptation has not been harmonized at EU level and therefore its application in the different Member States varies considerably⁸⁴⁵.

As a result, there is no particular regime for the adaptation right. The lack of recognition and the absence of a specific regime creates certain difficulties in its application, especially with regards to the author and the application of exceptions⁸⁴⁶. The right of adaptation in France can be however assessed through the right of reproduction, the right of communication to the public or through the creation of the derivative works⁸⁴⁷. This Study focuses only on the latter.

A derivative works or '*oeuvre composite*' is, according to Article L-113-2 'a new work in which a pre-existing work is incorporated without the collaboration of the author of the latter'. It must be noted that there are works that do not constitute the creation of a new work but just a juxtaposition of two works and therefore do not fall within the definition of derivative works under French law.

Derivative works

Derivative works are characterized by the absence of the author of the first work's collaboration meaning that the author of the derivative work adapts on his own the original work. The derivative work can also give rise to copyright protection as stated in Article 112-3 of the French IP Code: 'authors of translations, adaptations, transformations or arrangements of intellectual works enjoy the protection instituted by this code without prejudice to the rights of the author of the original work (...)'.

The obligation to respect the rights of the author of the original work has been made clear by the French legislator in the above-mentioned provision and it is further confirmed by Article L-113-4 which establishes that 'the *composite* work is the property of the author who produced it, subject to the rights of the author of the pre-existing work'. The law does not require any specific form of the authors' authorization, presuming that the authorization given by the author is made before engaging in the exploitation of the work. Thus there is no a different mechanism to apply for the transformation of the work than for the exploitation for the original work⁸⁴⁸. The authors' authorization can be given in return of remuneration but it can be also issued for free, according to the rules set up in Article L-122-7,1°. The author is equally entitled to oppose to the transformation of the work.

⁸⁴⁵ See Deliverable 2.1 for further analysis of the right of adaptation.

⁸⁴⁶ Benabou (n 511) 34.

⁸⁴⁷ See Benabou (n 511) 34–35.

⁸⁴⁸ Benabou (n 511) 38.

Adapting the original work without the authors' authorization, when the work is still protected by exclusive rights, will entail infringement of such exclusive rights as explicitly stated in Article L-122-4. This provision makes a specific reference to the translation, adaptation or transformation of the work: 'any full or partial representation or reproduction made without the consent of the author or his successors in title or successors in title is illegal. The same is true for translation, adaptation or transformation, arrangement or reproduction by any art or process'. In the absence of an explicit recognition of the adaptation right in France, this provision is considered as an implicit consideration of this right: an exclusive authors' right to object to the modifications of his work. Yet, this implicit acknowledgment does not establish a particular regime for this right (except from the audiovisual works, see below)⁸⁴⁹.

Another difficulty in the creation of derivative works under the French law is the application of both the economic and moral rights on the adaptation of the work. The creator of the derivative work must respect both the economic rights of the pre-existing work but also the moral rights lying in the pre-existing work (divulgarion, respect, attribution)⁸⁵⁰. The strongest difficulty relates to the adaptation of the work and the moral right of respect the integrity of the work. As previously mentioned, not only the right of respect affects to the material integrity of the work but any adaptation of the work must be also made in conformity with the 'spirit of the work'⁸⁵¹. This is a broader and subjective concept, which means that the person that transforms the work needs to do so in accordance with the 'mind of the author' of the original work. As seen⁸⁵², any infringement to the right of integrity can occur even when there is no physical transformation of the work, e.g. the author can oppose to a decontextualization of the work if he considers that the work is distorted. Even the assembly of a work of an author with authors that do not share the same philosophy could entail the infringement of the moral right, as ruled by the Court of Cassation in the case 'Jean Ferrat'⁸⁵³.

However, the French Courts have recognized that a certain infringement of the moral rights of the author of the pre-existing work could be permitted by the author of a derivative work⁸⁵⁴. The French Courts have softened the application of the authors' moral right by acknowledging that the author of the derivative work should enjoy a certain level of artistic freedom in order to

⁸⁴⁹ Benabou (n 511) 33.

⁸⁵⁰ Durrande and others (n 101) 83.

⁸⁵¹ Jane Ginsbourg, 'Droit d'auteur et Propriété de l'exemplaire d'une Œuvre d'art: Étude de Droit Comparé' (1994) 46 *Revue internationale de droit comparé* 811, 815.

⁸⁵² See Deliverable 2.1 for further analysis of the moral rights and the adaptation right.

⁸⁵³ *Cour de Cassation, Chambre sociale, du 8 février 2006, 04-45203 (Jean Ferrat)*.

⁸⁵⁴ Léger (n 519) 84.

provide a new expression of the substance of the work⁸⁵⁵. In most of the cases, as Benabou explains, the French Courts require that the author proves that the work has been distorted in order to not exercise a pure discretionary prerogative⁸⁵⁶ (see Section 7.3.2). This concept is exemplified by a judgement related to Victor-Hugo's seminal work, 'Les Misérables'. In the adaptation of his work that had already fallen in the public domain, the Court ruled that there was no harm to the moral right of integrity⁸⁵⁷. As Dusollier explains, 'the difficulty of providing such evidence shows that the perpetual moral right will actually only be capable of preventing an adaptation where the latter is a clear abuse of the freedom to use public domain works'⁸⁵⁸.

The perpetuity of moral rights in countries like France can be often a matter of public policy related to the safeguarding of the national heritage instead of the protection of individual rights where public authorities act as 'watchdogs' of the cultural heritage and defenders of the collective interests (see Section 7.3.2 on the possibility of the Ministry of Culture to interfere with the heirs of the authors in cases of abuse). Yet, this State protection should only occur when there is a public interest at stake and should definitely not entail a 'veto' for the adaptation of a work⁸⁵⁹.

It must also be noted that moral rights are not transferred to the collective management organizations and they are still exercised by the author. For this reason, the adapting author of the new work must take into account that operating licenses which may apply to the pre-existing work do not involve the moral rights of the author. This situation increases the legal uncertainty of the author of the derivative work⁸⁶⁰.

Assignment

The French IP Code regulates the adaptation right through the adaptation of works, on the one hand, and on the other hand, through the moral right of respect (see Section 7.3.2) which remains after the economic rights have expired⁸⁶¹. However, often, rules related to contract laws apply which will not be subject of this Study, except from the rare provisions governing the following provision of the right of adaptation⁸⁶².

⁸⁵⁵ *Arrêt n° 788 du 22 juin 2017 (15-28.467 et 16-11.759) - Cour de cassation - Première chambre civile ('Dialogue des Arrêt n° 788 du 22 juin 2017 (15-28.467 et 16-11.759) - Cour de cassation - Première chambre civile ('Dialogue des carmelites')* (n 520).

⁸⁵⁶ Benabou (n 511) 45.

⁸⁵⁷ *Cour de cassation, civile, Chambre civile 1, 30 janvier 2007, 04-15543 ('les Misérables')*.

⁸⁵⁸ Dusollier (n 539) 39.

⁸⁵⁹ Dusollier (n 539) 38.

⁸⁶⁰ Benabou (n 511) 46.

⁸⁶¹ Marc Simon Altaba, 'El Derecho de transformación en la Ley de Propiedad Intelectual española' (PhD Thesis, Universitat Pompeu Fabra 2017) 19.

⁸⁶² Benabou (n 511) 37.

The only provision establishing a particular regime for the ‘right of adaptation’ found in the French IP Code is related to the audiovisual adaptations of written works⁸⁶³. Article L-131-3 states that the assignment of such rights must be done in a different contract than the original publishing contract of the written work given that the publisher is normally the one engaging in a contract with the producer. This provision exemplifies the commitment of the French legislator to give the prominence to the author of the original work in order to avoid general presumptions made in earlier publishing contracts⁸⁶⁴.

7.4 Other rules on matters relevant for CHIs

7.4.1 Protection of public domain/cultural heritage

Despite the protectionist French *droit d’auteur* system, the term ‘public domain’ was first used by the French in the XIX Century to refer to those works where the copyright was expired⁸⁶⁵. France was hence one of the first systems to use such term emphasizing the idea of the ‘public’s property as the backdrop to private rights’⁸⁶⁶ and Victor Hugo was one of his most famous advocates⁸⁶⁷. However, while France had applied a limited *domaine public payant* regime for literary works that was then abolished in 1976, there is no such system in the French jurisdiction.

Moral right of divulgation and the prevention of abuse provision

The moral rights are still present in the works in the public domain as in France they are perpetual. However, the French case law has built on the theory that the freedom of creation makes impossible to prohibit the subsequent creations unless these creations are proved to be prejudicial for the work in its integrity⁸⁶⁸ (see Section 7.3.2).

In the field of the moral rights, the French IP Code provides for a rule that aims at preventing abuses originated from the moral right of divulgation made by the descendants or representatives of the author, after his death. This provision also applies for works that have already fallen in the public domain⁸⁶⁹. In case of abuse in the use or abuse of the non-use of such right, the Court,

⁸⁶³ Benabou (n 511) 33.

⁸⁶⁴ Gautier (n 37) 657.

⁸⁶⁵ Jane C Ginsburg, “‘UNE CHOSE PUBLIQUE’? THE AUTHOR’S DOMAIN AND THE PUBLIC DOMAIN IN EARLY BRITISH, FRENCH AND US COPYRIGHT LAW’ (2006) 65 Cambridge law journal 637, 638.

⁸⁶⁶ Jane C Ginsburg (n 865) 654.

⁸⁶⁷ Maximiliano Marzetti, ‘Paying for Works in the Public Domain? The “Domaine Public Payant” in the 21st Century’ (2019) 4 Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil.

⁸⁶⁸ Durrande and others (n 101) 103.

⁸⁶⁹ Dusollier (n 539) 38.

upon request of the Ministry of Culture, could impose any appropriate measure⁸⁷⁰. For instance, when it is considered that the heirs of the author are unreasonably opposing to the divulgation of the works, and there is a public interest at stake, the Court could force the necessary permission⁸⁷¹ to e.g. disclose the work. As Dusollier explains 'rather than a substitution of the State in the exercise of a perpetual moral right, this competence ensures a balance between safeguarding cultural heritage and the public interest in the access to culture'⁸⁷². Yet, this possibility has been rarely exercised.

Posthumous works

The French legislator grants a neighbouring right in order to compensate the beneficiary who runs the risk to make certain investment for the publication of the work⁸⁷³ after the authors' death. Hence, the French IP Code establishes a specific regime for posthumous works. Posthumous works are those works that are disclosed after the author's death. For a work to benefit from this protection, the work must be undisclosed at the moment of the author's death. If the author had signed a contract before his death, and the works are disclosed afterwards they are not considered posthumous as the author had expressed his interest in disclosing it. Works are also not considered posthumous when the author disclosed a part of the work, even if it consisted in just extracts of the works⁸⁷⁴.

As a result, for works that are disclosed after the expiration of the authors' exploitation rights (70 years after authors' death), the French IP Code provides that the duration of the exclusive right is 25 years from 1 January of the calendar year following the disclosure⁸⁷⁵.

As this right arises after the author's death, the law establishes the following regime in relation to the ownership of the right. If the work is disclosed during the 70 years after authors' death, this right to exploit the posthumous works belongs, according to the law, to the author's beneficiaries/rightholders, even if the work was discovered by a third party⁸⁷⁶. However, if the disclosure occurs after the expiration of the 70 years after authors' death, this right belongs to 'the owners, by inheritance or other titles, of the work, who make or will make the disclosure'⁸⁷⁷.

According to the law, the general rule is that 'posthumous works must be the subject of a separate publication'. Yet, when the undisclosed work is only a fragment of a previously published work,

⁸⁷⁰ French IP Code L-121-3.

⁸⁷¹ Sterling (n 230) 401.

⁸⁷² Dusollier (n 539) 38.

⁸⁷³ Gautier (n 37) 435.

⁸⁷⁴ Gautier (n 37) 433.

⁸⁷⁵ French IP Code L-123-4.

⁸⁷⁶ Gautier (n 37) 434.

⁸⁷⁷ French IP Code L-123-4.

the work could still join the previously published work only if the beneficiaries 'still have the right to use them', namely if the previously published work is still protected by exclusive rights. According to Gautier, there is specific case-law where the Courts ruled that if the posthumous part is more important than the disclosed work that has already fallen in the public domain, the complete work will be protected⁸⁷⁸.

Importantly, the person entitled to the right and thus to the disclosure of the work will need to get authorization of the heirs of the author who still own the moral rights of the author and therefore the right of divulgation⁸⁷⁹.

Longer term of protection: War-Related Term Extensions

The Term Directive, harmonizing the term of protection of copyright in the EU⁸⁸⁰, allows Member States to keep a longer term of protection when it was already running in a Member State on 1 July 1995. In this context, the Directive permits the existence of those provisions introduced by the French legislator to compensate for the lack of exploitation in certain moments of the history, such as during the worldwide wars.

In the French IP Code, there are three provisions extending the term of protection of works. Two of this provisions, corresponding to Articles L-123-8 and L-123-9, extended the term of protection of works created between the first world war (WWI) and the second world war (WWII), respectively. According to Angelopoulos:

(a) The rights of authors, composers and artists of works published before the signing of the Treaty of Versailles and which had not fallen into the public domain on 3 February 1919 were extended by 6 years and 152 days;

(b) The rights of authors, composers and artists of works published before 1 January 1948 and which had not fallen into the public domain on 13 August 1941 were extended by 8 years and 120 days⁸⁸¹.

A third provision enlarges the protection of those works of authors who died for France during the WWI and WWII, e.g. Apollinaire, Saint-Exupery, by 30 years⁸⁸².

⁸⁷⁸ Gautier (n 37) 436.

⁸⁷⁹ Gautier (n 37) 435.

⁸⁸⁰ See Deliverable 2.1 for further analysis of the Term Directive.

⁸⁸¹ Angelopoulos (n 550) 9.

⁸⁸² French IP Code L-123-10.

7.4.2 Open Data Directive

At the moment of writing these lines, there is no draft available of the draft law implementing the Directive 2019/1094 in France.

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8 Annex III – Lithuania

8.1 Copyright-related provisions

The copyright system in Lithuania is regulated by the Law on Copyright and Related Rights of the Republic of Lithuania⁸⁸³ of 1999 which has been last amended in July 2019.

Given that Lithuania joined the EU as a Member State in May 2004, most of the EU legal copyright Acts were implemented almost literally, especially those acts that were adopted before the accession⁸⁸⁴. The Infosoc Directive was implemented in Lithuania by the Law amending the Law

⁸⁸³ The Lithuanian Copyright Law.

⁸⁸⁴ Lindner and Shapiro (n 564) 563.

on Copyright and Related Rights of 5 March 2003⁸⁸⁵, except from some provisions on the reproduction of works for personal use and the remuneration system of the reprographic exception⁸⁸⁶.

8.1.1 Exceptions and limitations

Exceptions and limitations are envisaged in Section 4 of the Lithuanian Copyright Law. With regards to the interpretation of exceptions and limitations, the Copyright Law introduced the obligation to interpret them according to the rule of the three-step test of the Infosoc Directive (and international Conventions)⁸⁸⁷ in Article 19. Accordingly, exceptions and limitations ‘must not conflict with a normal exploitation of a work and must not prejudice the legitimate interests of author or other owner of copyright’.

Yet, the same article introduces a particular rule related to the interpretation of exceptions and limitations that are only applicable for non-commercial uses. This provision does not provide any clarity whatsoever⁸⁸⁸ as it states that ‘when determining whether or not a work, an object of related rights or sui generis rights has been used for non-commercial purposes account must be taken of the purpose of the use. The legal form, organisational structure and method of financing of the user of a work, an object of related rights or sui generis rights shall not be decisive factors in this case’⁸⁸⁹.

8.1.1.1 Preservation exception

The preservation exception of Article 5.2(c) of the Infosoc Directive⁸⁹⁰ has been introduced in Article 23 of the Lithuanian Copyright Law. This provision grants an exception for the ‘use of works to preserve fonds and collections of libraries, educational institutions, museums or archives. To this account, this provision allows the reproductions of works made by the aforementioned beneficiaries for non-commercial purposes without having the authorization of the copyright owner and without compensation.

Beneficiaries

⁸⁸⁵ Law amending the Law on Copyright and Related Rights of the Republic of Lithuania of 5 March 2003, 5 No. IX-1355.

⁸⁸⁶ See Mizaras (n 317) 850.

⁸⁸⁷ See Deliverable 2.1 for further analysis of the Infosoc Directive and the three-step test.

⁸⁸⁸ Lindner and Shapiro (n 564) 574.

⁸⁸⁹ The Lithuanian Copyright Law art.19.2.

⁸⁹⁰ See Deliverable 2.1 for further analysis of this exception at EU level.

The only beneficiaries of the Lithuanian exception are libraries, educational institutions, museums and archives. It must be noted that although the Directive includes educational establishments as beneficiaries of the exception, Lithuania is one of the few countries that includes them.

Purposes of the exception

Alike the Directive, the authorized acts under the Lithuanian exception are the reproductions of works. These reproductions must be made by the aforementioned beneficiaries as long as they are not made for commercial purposes. In addition, these reproductions must be carried out ‘so that a lost, destroyed or rendered-unusable copy of the work of the fonds and collections of the establishments specified in this article would be preserved or reproduced or when it is necessary to restore a lost, destroyed or rendered-unusable copy from the permanent collection of any other similar library, educational institution, museum or archives, if it is impossible to obtain such a copy by other acceptable means’.

The Lithuanian exception does not impose any restriction on the type of works that may fall under the exception except from those works ‘communicated to the public via computer networks (on the Internet)’⁸⁹¹. Therefore, a priori all works are eligible for the exception.

Reproductions can be made by any means as the law does not restrict any type of technology used for the reproductions⁸⁹². In addition, the Lithuanian exception permits repeated acts of reproductions provided they are carried out on ‘unrelated occasions’. Although it is not crystal clear that this exception permits the format shifting of works in order to make use of such works, it does not seem that it generates further problems for CHIs in practice. As a result, it is an accepted practice in Lithuania that CHIs digitize works under this exception when they risk being lost or their format renders unsuitable⁸⁹³.

Remuneration to authors for the uses made under this exception is explicitly excluded in the Copyright Law. Yet, the source and author’s name should be mentioned, ‘where possible’.

With regards to the new CDSM Directive, Lithuania has not provided yet any draft law implementing the provisions of the Directive. In any case, it does not seem that the new exception will lead to significant changes. Yet, the exception will need to be reworded to explicitly allow the format shifting⁸⁹⁴.

⁸⁹¹ The Lithuanian Copyright Law art.23.

⁸⁹² Matulionyte (n 36) 270.

⁸⁹³ Matulionyte (n 36) 270.

⁸⁹⁴ Matulionyte (n 36) 270.

8.1.1.2 Research and private study standing in dedicated terminals

The exception for research and private study via dedicated terminals in specific establishments that is included in Article 5.3(n) of the Infosoc Directive⁸⁹⁵, was introduced by the Lithuanian legislator in Article 22(3) of the Copyright Law. Accordingly, this exception allows, without having to obtain the rightsholder's consent, the use of works held by libraries, educational and research institutions' libraries, museums or archives, by communicating them to the public, for the non-commercial purposes of research or private study via computer networks at the terminals designated for that purpose in those establishments'.

Beneficiaries

The only beneficiaries of this exception are libraries, libraries of educational and research institutions, museums and archives. It must be noted that the law does not impose any requirement on the public accessibility of these establishments.

Purposes of the exception

The acts allowed by this exception are those acts of communication to the public of the works held in the aforementioned establishments via computer networks. Yet, as seen above, the CJEU ruled in the *Darmstadt* case⁸⁹⁶ that these institutions are also allowed to digitize the works in their collections under this exception 'if that is necessary in order to make them available to the public on dedicated terminals'⁸⁹⁷. In this regard, the Lithuanian exception explicitly states that reproductions of works made by the above-mentioned institutions may be carried out but only for the purpose of communicating these works to the public via computer networks.

Alike the Directive, the communication to the public of works must be only exercised for research and private study purposes and only via computer networks at dedicated terminals in the aforementioned institutions. The statutory provision also establishes that these institutions must ensure the use of effective technical protection measures in order to prevent i) the reproduction of works and that ii) the content of works is not transferred outside these dedicated terminals to any external network.

With regards to the type of works that fall under the scope of the exception, the Lithuanian legislator does not impose any restriction on the category of works. However, it is explicitly stated that these works must not be 'publicly traded' and their uses must not be forbidden by the copyright owners. There is also no specific limitation on the number of copies that can be made

⁸⁹⁵ See Deliverable 2.1 for further analysis of this exception at EU level.

⁸⁹⁶ Technische Universität Darmstadt v Eugen Ulmer KG (C-117/13) EU:C:2014:2196.

⁸⁹⁷ Technische Universität Darmstadt v Eugen Ulmer KG (C-117/13) EU:C:2014:2196 para 40.

available. Nevertheless, the legal provision states that not more copies of a work should be made accessible via computer networks 'than held by these institutions'.

Remuneration to authors for the uses made under this exception is explicitly excluded in the Copyright Law. Yet, the source and author's name should be mentioned, 'where possible'.

8.1.1.3 Advertising the public exhibition or sale of artistic works

The 2003 Law introduces the exception for advertising public exhibitions or sales of works in Article 24(4) which relates to the uses of a work for information purposes. No remuneration is provided for such uses, but the attribution of the work must be mentioned 'where possible'. It must be noted that the Lithuanian exception follows the wording of Article 5(3)(j) of the Infosoc Directive⁸⁹⁸ almost literally.

Beneficiaries

The Lithuanian exception does not make any reference to the beneficiaries of the exception. Yet, this exception should normally be applied by museums or cultural institutions and public auction houses.

Purposes of the exception

The acts authorized under the Lithuanian exception are, alike the Directive, the reproduction, publication or communication to the public of works. However, these uses are only authorized for the purposes of advertising a public exhibition or sale of works. In the same manner as the Directive, these uses are only permitted to the 'extent necessary' for the promotion of the event and should therefore not be applied beyond the promotion of the event. Any other commercial uses are excluded from the scope of the exception.

With regards to the types of works covered by the exception, only artistic works fall under the scope of the exception, in the same terms as required by the Infosoc Directive. Yet, there is no such particular limitation with regards to the public exhibition of works.

8.1.1.4 Text and Data Mining

There is no TDM exception under the current Lithuanian Copyright Law and it seems clear that the research exception⁸⁹⁹ does not cover TDM activities⁹⁰⁰.

⁸⁹⁸ See Deliverable 2.1 for further analysis of this exception at EU level.

⁸⁹⁹ The Lithuanian Copyright Law art.22.

⁹⁰⁰ Matulionyte (n 36) 268.

Nevertheless, the new CDSM Directive⁹⁰¹ introduces two exceptions for TDM acts that will need to be implemented at national level. At this moment, there is no draft law implementing such exceptions available in Lithuania and therefore it is not clear yet how these exceptions will be transposed.

8.2 Specific regime in respect to particular types of works

8.2.1 Orphan works

The Orphan Works Directive⁹⁰² was transposed into the Lithuanian copyright system by a 2014 Law⁹⁰³ and two implementing Ministerial Orders⁹⁰⁴. The latter were adopted by the Ministry of Culture and concern the list of sources for the diligent search and the compensation system for rightholders in case the author reappears⁹⁰⁵.

The Lithuanian Copyright Law was modified accordingly introducing the orphan works related provisions in Articles 89 et seq. The concept of orphan works is defined within Article 2(35) of the said law according to which an orphan work is a 'work or a phonogram with none of the rightholders in that work or phonogram identified or, even if one or more of them is identified, with none located despite a diligent search for the rightholders having been carried out and recorded in accordance with the procedure laid down by this Law'.

Types of works

An orphan work can only be considered as such after a diligent search of rightholders has been carried out. Works can still be considered orphans and therefore may be still used under the exception in Lithuania when there is more than one rightholder involved, and not all of them have been identified or located, or even if one or more of them have identified or located. However, in the latter situation, before making use of the orphan works, the authorization of the identified or located rightholders (for the rights they hold) must be previously obtained⁹⁰⁶.

⁹⁰¹ See Deliverable 2.1 for a further analysis of the TDM exceptions under the CDSM Directive.

⁹⁰² See Deliverable 2.1 for a further analysis of the Orphan Works Directive.

⁹⁰³ Law of 16 December 2014 No XII-1460 regarding the amendment of the Law of Authors Rights and Related Rights No VIII-1185.

⁹⁰⁴ Order of the Minister of Culture of the Republic of Lithuania of 28 January 2015 No JV- 46 concerning the sample list of sources for the diligent search of right holders of orphan works; Order of the Minister of Culture of the Republic of Lithuania of 17 July 2015 No JV-480 concerning the compensation conditions for the former orphan works.

⁹⁰⁵ See Bertoni, Guerrieri and Montagnani (n 140) 89.

⁹⁰⁶ The Lithuanian Copyright Law art.90.2.

In addition, the Lithuanian Copyright Law introduced an interesting provision on the presumption of the orphan status of a work. Correspondingly, the orphan status of a work may not be presumed due to i) the lack of mention of the author's name in a publication or broadcast or where it has been published under a pseudonym and neither due to ii) the lack of mention of the producer of the phonogram and/or performer in a publication or broadcast⁹⁰⁷.

According to the Lithuanian Copyright Law which follows the approach of the Directive, not all types of works can be considered orphans. Only i) works published in the form of books, journals, newspapers, magazines or other writings contained in the collections of certain institutions; ii) audiovisual works and phonograms contained in the collections of particular institutions; iii) audiovisual works and phonograms produced by public-service broadcasting organisations up to and including 31 December 2002 and contained in the archive of the public institution, national public broadcaster 'Lithuanian National Radio and Television'⁹⁰⁸.

The statutory provision also includes those works or phonograms that have never been published or broadcasted but that have been made available by the cultural, educational and scientific institutions or public broadcasting organisations of Lithuania or other Member States with the authorization of the rightholder(s) or, at least, when it was reasonable to presume that the rightholders would not oppose to such uses.

Embedded works that are incorporated or that constitute an integral part of the orphan works also fall under the scope of the exception. The Lithuanian legislator opted for introducing a non-exhaustive list of works that could be embedded in the orphan works such as illustrations, photographs, designs, sketches or maps⁹⁰⁹.

Beneficiaries

The beneficiaries of the exception according to which such orphan works may be used (under certain conditions explained below) are the following: libraries, museums, archives, film or audio heritage institutions, educational establishments and research institutes. These institutions must be publicly accessible.

It must be noted that the Lithuanian Law also adds the 'research institutes' to the list of beneficiaries, which are not included in the Directive⁹¹⁰.

Subject matter

⁹⁰⁷ The Lithuanian Copyright Law art.90.4.

⁹⁰⁸ The Lithuanian Copyright Law art.89.

⁹⁰⁹ The Lithuanian Copyright Law art.89.2.

⁹¹⁰ Bertoni, Guerrieri and Montagnani (n 140) 89.

D2.2 Public

In the same terms as the Directive, Article 91 of the Lithuanian Copyright Law grants the possibility to the aforementioned institutions to 'use orphan works for non-commercial purposes in the ordinary management of their activities aimed at their public-interest missions in the fields of the promotion of culture, heritage protection, education, science and public information, provided that the orphan works which are being used are contained in their collection'⁹¹¹.

The uses made by the cultural and scientific institutions can only be carried out for non-commercial purposes. Yet, institutions may engage in agreements with third-parties but only in the 'pursuit of their public-interest missions'. These third parties cannot, in any case, make use of the orphan work or control its use⁹¹². Nevertheless, the beneficiary institutions are allowed to generate certain revenues in order to cover exclusively the costs of the reproductions and the making available of the works⁹¹³, as provided in the Directive.

Permitted uses. Following the Directive's requirements, the only permitted uses of the orphan works by the beneficiaries are stated in Article 94 of the Lithuanian Copyright law. Accordingly, the beneficiary institutions can only i) reproduce the orphan works for the purposes of 'digitisation, making available, indexing, cataloguing, preservation or restoration'; ii) make the orphan works available to the public. The statutory provision gives a further explanation on how the orphan works should be made available to the public, namely 'by wire or wireless means' (for instance, via computer networks and/or the Internet) which allows the public to access orphan works from a place of their choice and at a time of their choice.

Diligent search

According to Article 90(1) of the Lithuanian Copyright Law, a work or a phonogram can only be considered as orphan after a diligent search has been carried out. Further conditions on the diligent search are established in Article 92 of the Copyright Law.

In this regard, the diligent search must be carried out for each particular work by verifying the information from the sources of each category of works. A list of sources has been included in a separate Ministerial Order⁹¹⁴. This list includes: '(i) sources for diligent search of authors and related right holders, (ii) sources for the diligent search of right holders of newspapers, journals and other periodicals; (iii) sources for the diligent search of right holders of visual art (photographs, illustrations, design, architectural works and others) published in newspapers,

⁹¹¹ The Lithuanian Copyright Law art.91.1.

⁹¹² The Lithuanian Copyright Law art.91.2 and 91.3.

⁹¹³ The Lithuanian Copyright Law art.94.2.

⁹¹⁴ Order of the Minister of Culture of the Republic of Lithuania of 28 January 2015 No JV- 46 concerning the sample list of sources for the diligent search of right holders of orphan works.

journals and other periodicals, and (iv) sources for diligent search of rightholders of audio-visual works and phonograms⁹¹⁵.

Article 92(2) provides, in the same terms as the Directive, the places where the diligent search should be performed. In this regard, first, the search must be carried out in the Member State where a work was published or broadcast for the first time, or in the absence of publication, the first broadcast. Second, for audiovisual works, the search must be performed in the Member State where the producer has the permanent residence or headquarters. Third, the place where the beneficiary institution that made the work available to the public is established. Where there is evidence to presume that relevant information of a rightholder can be found not only in the Member States, or when it appears that the producer of the audiovisual work does not have the permanent residence or headquarters in any of the Member States, sources of other countries must also be consulted.

Importantly, the beneficiaries are required to keep all the records of the diligent search until the expiration of the exclusive rights for those works⁹¹⁶.

Once the diligent search has been performed and if it is concluded that the work or the phonogram is an orphan work, the beneficiary institutions must inform the results of the search to the competent authority, the *Martynas Mažvydas* National Library of Lithuania. The competent authority will transfer this information to the EUIPO's database. Once the information of the work is recorded, the work gets its 'orphan status'⁹¹⁷.

End of the orphan works-status

As explicitly required by the Directive, the Lithuanian Copyright Law grants the rightholders the right to put the orphan status of a work to an end at any time. Article 95 of the Copyright Law establishes the manner how the rightholders could request the beneficiary institution to end the orphan status of his work(s). Such request must be accompanied by any supporting document acknowledging the entitlement of the exclusive rights to the specific work, e.g. publishing agreements, certificates of the right of inheritance of copyright or related rights, etc. In case the beneficiary institutions conclude that the orphan work status has to end, they shall communicate this information to the competent national authority and shall keep all the records until the expiration of the exclusive rights for those works.

Compensation

⁹¹⁵ Bertoni, Guerrieri and Montagnani (n 140) 91–92.

⁹¹⁶ The Lithuanian Copyright Law art.92.1.

⁹¹⁷ The Lithuanian Copyright Law art.93.

Besides, the rightholder has the right to obtain compensation for the uses made of his work(s) during his absence, as required by the Directive. The right to compensation is explicitly stated in Article 96 of the Lithuanian Copyright Law. In order to obtain such compensation, the rightholder must submit an application to the institution authorized by the Government which will take a decision on the compensation. The compensation will be paid by the State and will be calculated by evaluating the uses made of the works, the importance of the public-interest missions of the institutions, among others. This decision will be taken by a panel of experts created for this matter. Further compensation and distribution arrangements are established through a Ministerial Order⁹¹⁸.

8.2.2 Out-of-commerce works

There is not any statutory provision within the Lithuanian Copyright Law addressing the uses of OOCWs even if the situation of CHIs to clear rights for this kind of works has also been proven complex in Lithuania. Yet, there are some initiatives from the Government within the National Digitization Strategy that aim at facilitating and simplifying the engagement of CHIs in licenses with CMOs⁹¹⁹.

Therefore, it seems that the new OOCWs' provisions in the CDSM Directive⁹²⁰ will be welcomed in Lithuania although not without challenges⁹²¹. In any case, Lithuania must implement these provisions into their national copyright law. At the time of writing these lines, there is no draft available of the law implementing such provisions.

8.2.3 Works of visual arts in the public domain

Given that there is no draft law available for the implementation of the CDSM Directive in Lithuania yet, we cannot assess how the provision in Article 14 of the CDSM Directive⁹²² will be transposed into national law.

8.2.4 Non-original photographs

At EU level, photographs can be granted copyright protection as literary and artistic works provided they are original. Non-original photographs can also be granted protection through

⁹¹⁸ Order of the Minister of Culture of the Republic of Lithuania of 17 July 2015 No JV-480 concerning the compensation conditions for the former orphan works.

⁹¹⁹ See Matulionyte (n 36) 271–272.

⁹²⁰ See Deliverable 2.1 for a further analysis of the OOCWs provisions in the CDSM Directive.

⁹²¹ Matulionyte (n 36) 272–273.

⁹²² See Deliverable 2.1 for a further analysis of the Article 14 of the CDSM Directive.

another neighbouring right as allowed by the Term Directive. The said Directive provides the Member States the possibility to introduce other related right protection for photographs that are not original enough to qualify for copyright protection⁹²³.

In Lithuania, original photographs can be protected by copyright as stated in Article 4 of the Lithuanian Copyright Law. Accordingly, this provision establishes that the subject matter of copyright includes literary, scientific and artistic works ‘which are the result of creative activities of an author’ and therefore it comprises ‘photographic works and other works created by a process analogous to photography’.

This provision clearly grants protection to photographs that are original regardless the technology used. This is further confirmed by Article 2 of the Copyright Law which provides a definition of a ‘photographic work’. Accordingly, a photographic work is ‘an image produced on surfaces sensitive to light by means of light or any other radiation the composition, selection or way of capturing the chosen objects of which show originality, irrespective of the technology (chemical, electronic, etc.) of such fixation’⁹²⁴.

In contrast, the Lithuanian legislator did not choose to introduce any other related right for the protection of non-original photographs in the Lithuanian copyright system. Given the absence of further rules for the protection of photographs in Lithuania, photographs are protected by copyright when they constitute the author's own intellectual creation. This is the only criterion to determine the originality of the photographs⁹²⁵.

8.2.5 Databases

According to the Database Directive⁹²⁶, the protection of databases in the EU can be granted through i) copyright protection for databases that are original and ii) a *sui-generis* right protection for those databases that do not qualify for copyright protection. The Database Directive was transposed in Lithuania with an almost identical wording⁹²⁷.

A definition of database is provided in the Copyright Law in Article 2(7) which defines a database as ‘a compilation of works, data or any other material arranged in a systematic or methodical way and individually accessible by electronic or other means’. The only addition that was not included in the definition provided by the Directive is that the Lithuanian legislator explicitly excluded ‘computer programmes used in the making or operation of such databases’.

⁹²³ See Deliverable 2.1 for a further analysis of the Term Directive.

⁹²⁴ The Lithuanian Copyright Law art.2.10.

⁹²⁵ Mizaras (n 317) 839.

⁹²⁶ See Deliverable 2.1 for a further analysis of the Database Directive.

⁹²⁷ Mizaras (n 317) 840.

However, the Lithuanian provision does not explicitly state the ‘independence’ of the works or data that are included in the collection or compilation as established in the Directive⁹²⁸. Yet, this is further inferred from the subsequent provisions (see below).

Copyright protection

The protection of databases that are original and therefore subject to copyright protection is explicitly stated in Article 4(3) of the Lithuanian Copyright Law.

Alike the Directive, copyright protection is granted to collections or compilations of data or databases that by reason ‘of the selection or arrangements of their contents’ constitutes the author’s intellectual creations’. The statutory provision adds that these compilations of data or databases must be ‘expressed in machine readable form by technical means or in another form’⁹²⁹. Such specification is not included in the Directive.

Following the approach of the Directive, the copyright protection does not extend to the data or material contained in the database. In addition, the copyright protection on the database applies without prejudice of the of copyright or related rights on the works contained in the database or compilation of data⁹³⁰.

As an author of the copyright subject matter, an author of an original database enjoys the same level of protection and term of protection, namely 70 years *post mortem*. Yet, there is an interesting provision in Lithuanian copyright law according to which moral rights of an author of databases ‘may not be used in a manner which unreasonably prejudices the rights of a holder of the author’s economic rights in these databases’. These rights include the right to adapt, alter and distribute these works at his discretion, with the exception of the cases when such actions would be prejudicial to the author’s honour or reputation’⁹³¹.

The rights of the lawful user of databases are indicated in Article 32 of the Copyright Law in a close manner to the drafting of the Directive.

Sui-generis right protection

The *sui-generis* right protection is included in the Lithuanian Law in Chapter IV related to the ‘Rights of makers of databases’.

Beneficiaries

⁹²⁸ Fisher and others (n 266) 8.

⁹²⁹ The Lithuanian Copyright Law art.4.3(2).

⁹³⁰ The Lithuanian Copyright Law art.4.4.

⁹³¹ The Lithuanian Copyright Law art.14.3.

In Lithuania, the owner of the *sui-generis* right is the ‘maker of a database’ which is defined in Article 2(40) of the Copyright Law as the person ‘who has made when selecting, arranging, verifying and presenting the contents of the database, has made substantial qualitative and (or) quantitative (intellectual, financial, organizational) investment, as well as a natural or legal person to whom the *sui generis* rights of the maker of the database has been transferred’⁹³².

Scope of protection

Article 61 of the Copyright Law states, in a similar manner than the Directive that a ‘maker of a database who shows that he has made a substantial qualitative and/or quantitative (intellectual, financial, organisational) investment in obtaining, arrangement, verification and presentation of the contents of that database’ will have the right to i) transfer permanent or temporarily all or a substantial part of the contents of a database to another medium by any means or in any form and to ii) make available to the public in any form ‘all or a substantial part of the contents of a database’, as well as to distribute copies, by renting or selling them, including an invitation to buy them or targeted advertising which incentivizes users to buy them⁹³³. The Lithuanian law does not define the concept of ‘substantial investment’ either.

It must be noted that the Lithuanian law does not follow the Directive with regards to the rights of the database owner. The Directive refers to the right of the database maker as the right to prevent the ‘extraction’ and ‘re-utilization’ of the contents of the database. However, the Lithuanian legislator refers to these concepts, without defining them, in Article 63 on the exceptions and limitations that apply to the *sui-generis* right.

Yet, repeated and systematic extractions and reutilization of small parts of the contents of a database shall be prohibited also under Lithuanian Law ‘where such acts conflict with a normal exploitation of that database or unreasonably prejudice the legitimate interests of the maker thereof’⁹³⁴. This provision follows almost word by word the drafting of the Article 7.5 of the Directive.

Term of protection

As required by the Database Directive, Article 64 of the Copyright Law establishes a term of protection for the *sui-generis* right of 15 years from the date of completion of the database. When a database has been made available to the public within this period, the 15 years of protection will count from the date the database was made available to the public⁹³⁵. It must be noted that

⁹³² The Lithuanian Copyright Law art.2.40.

⁹³³ The Lithuanian Copyright Law art.61.1.

⁹³⁴ The Lithuanian Copyright Law art.63.2.

⁹³⁵ The Lithuanian Copyright Law art.64.1.

this provision does not state the year in which the protection should start to be counted (unlike the Directive)⁹³⁶.

Additionally, when a database has been subject of a substantial modification, including any ‘changes resulting from the accumulation of successive additions, deletions or alterations’ that constitute a substantial new investment, a new term of protection may be granted⁹³⁷.

8.3 Other copyright matters in a nutshell

8.3.1 The public lending derogation

In Lithuania the exclusive lending right of the author is included in Article 15(1)(5)⁹³⁸ which states that the author has the exclusive right of authorizing or prohibiting the lending of the original or copies of a work. The exclusive author’s right of lending may be derogated for the benefit of libraries and other institutions as established by Article 5 of the Rental and Lending Directive⁹³⁹. In this regard, Lithuania has introduced a public lending derogation in Article 2(38) of the Copyright Law, which also provides a definition of ‘lending’. According to Article 2(38), lending is understood as the ‘transfer of the original or copies of a work or subject matter protected by exclusive rights by sui generis rights for use for a certain period of time without remuneration in libraries or other publicly accessible institutions’⁹⁴⁰.

This provision must be read in combination with the legal provision stated in Article 16(3) of the Lithuanian Copyright Law which establishes the obligation of compensation to rightholders.

Beneficiaries

The beneficiaries of the public lending derogation are the institutions that are allowed to lend original or copies of works without the authorization of the rightholder are, in principle, libraries (although Article 2(38) does not exclude other publicly accessible institutions). The libraries that fall under the public lending derogation, according to Mizaras, are the following: ‘the Lithuanian

⁹³⁶ Jean-Paul Triaille and others, *Annex 1. Legal Analysis. Study on the Application of Directive 2001/29 /EC on Copyright and Related Rights in the Information Society (the “InfoSoc Directive”)* (European Union 2013) 99.

⁹³⁷ The Lithuanian Copyright Law art.64.2.

⁹³⁸ ‘distributing the original or copies of the work through sale, including a public offer to buy them or targeted advertising of the original or copies of the work, encouraging consumers to purchase them, as well as renting, lending or otherwise transferring the original or copies of the property or managing, importing or exporting’.

⁹³⁹ See Deliverable 2.1 for a further analysis of the Rental and Lending Directive.

⁹⁴⁰ The Lithuanian Copyright Law art.2.26.

National Library, the public, county and municipal libraries⁹⁴¹. The Copyright Law opens the door to the legislator to introduce other institutions that are publicly available.

Types of works

Article 16.3 of the Lithuanian Copyright Act only includes books and visual arts publications in the scope of the public lending derogation. With regards to what should be considered as visual art publications, the statutory provision further refers to ‘art and photo albums’⁹⁴².

In the same terms as the Rental and Lending Directive, the law explicitly excludes buildings and works of applied art from the lending right⁹⁴³. In addition, according to Mizaras, the public lending derogation does not cover the lending of ‘books and other publications released in a digital manner, in various electronic media, and phonograms and audiovisual works released in various audio and visual media’⁹⁴⁴. It must be noted that after the CJEU judgment⁹⁴⁵ in the *VOB* case⁹⁴⁶, the situation may have changed in Lithuania with regards to the lending of e-books.

Compensation

The introduction of a compensation to rightholders for the loans made of their works is an obligation explicitly stated in the Directive. Therefore, the Lithuanian legislator introduced such obligation in Article 16(3) of the Copyright Law. According to this provision, authors and their successors have the right to obtain a remuneration for the loans of their works that have been made.

The amount of the remuneration is decided by the Government following the recommendations of the Copyright and related rights’ Commission and is based on the calculation of the loans made⁹⁴⁷. The collection and distribution of the compensation is compulsory managed by a CMO⁹⁴⁸ and is paid from the national budget funds⁹⁴⁹.

Exemption of compensation

With regards to the possibility given by the Directive to exempt certain institutions from the payment of the compensation to rightholders for the loans of their works, the Lithuanian

⁹⁴¹ Mizaras (n 317) 848.

⁹⁴² The Lithuanian Copyright Law art.16.3.

⁹⁴³ The Lithuanian Copyright Law art.15.7.

⁹⁴⁴ Mizaras (n 317) 848.

⁹⁴⁵ See Deliverable 2.1 for a further analysis of the case-law.

⁹⁴⁶ *Vereniging Openbare Bibliotheken v Stichting Leenrecht* (C-174/15) EU:C:2016:856. (n 339).

⁹⁴⁷ Ana-Maria Marinescu (n 372) 918.

⁹⁴⁸ The Lithuanian Copyright Law art.65.2(4).

⁹⁴⁹ Mizaras (n 317) 848.

legislator decided to exempt libraries of educational and scientific institutions⁹⁵⁰ as established in Article 16.3 of the Copyright Law.

8.3.2 Moral rights

Moral rights are envisaged in Article 14 of the Lithuanian Copyright Law. Article 14(1) evidences the independent character of moral rights from the economic rights. Moral rights remain ‘property’ of the author even when economic rights have been transferred to a third-party⁹⁵¹.

Further, moral rights cannot be transferred, inherited or waived⁹⁵². After the author’s death, his moral rights can be exercised in accordance with the procedure stated in Article 49(2)⁹⁵³. According to this provision, the author can designate the person that will exercise the protection of his moral rights. In the absence of instructions from the author, the moral rights will be exercised by his heirs. In case there are no heirs and in case the term of the economic rights expires, the moral rights will be exercised by ‘an institution authorised by the Government’⁹⁵⁴.

Despite this, moral rights should not be considered as ‘absolute’. Following Mizaras, there are certain provisions in the Copyright Law that aims at balancing the interests of rightholders and the users when exercising the moral rights⁹⁵⁵, such as the provision of Article 14(3) that relates to the moral rights of authors of computer programs and databases which accordingly, may not be used ‘in a manner which unreasonably prejudices the rights of a holder of the author’s economic rights in these computer programs and databases’.

Types of moral rights

The Lithuanian Copyright Law only provides the ‘minimum’ moral rights envisaged in the Berne Convention⁹⁵⁶, namely the attribution and integrity right, given the lack of harmonization at EU level⁹⁵⁷. Yet, the Lithuanian legislator introduced the attribution right in a particular manner as it is provided in two separate rights.

The first right included in Article 14 is the **right of attribution**. This provision grants the author ‘the right to claim authorship of the work, by indicating the author’s name in a prominent way on all the copies of a published work, and in connection with any other public use of the work’.

⁹⁵⁰ Mizaras (n 317) 848.

⁹⁵¹ The Lithuanian Copyright Law art.14.

⁹⁵² Mizaras (n 317) 843.

⁹⁵³ Mizaras (n 317) art.14.2.

⁹⁵⁴ The Lithuanian Copyright Law art.49.2.

⁹⁵⁵ Mizaras (n 317) 844.

⁹⁵⁶ The Berne Convention art.6bis.

⁹⁵⁷ See Deliverable 2.1 for a further analysis of moral rights at EU and international level.

Secondly, 14(2) provides the author **the right to the author's name**: 'the right to claim or prevent the mention of the author's name in connection with any use of the work, or the right to claim that the work be disclosed to the public under a pseudonym.'

The second right included in Lithuanian's law, 'the right to the author's name' is normally included in other jurisdictions as part of a broad concept of the attribution right.

The third moral right that is granted to authors under Lithuanian copyright law is the right of integrity or, according to this provision, '**the right to the inviolability of a work**'. Such right confers the author 'the right to object to any distortion or other modification of a work or the title thereof, as well as to any derogatory action in relation thereto which may be prejudicial to the author's honor or reputation'.

In Lithuania there has not been so far too many judgments in relation to the infringement of moral rights and most of them concern the right of attribution⁹⁵⁸. Few cases relate to the right of the inviolability of a work and in this respect, it seems that the Lithuanian Courts have not adopted a position yet on whether the assessment of infringement of such right should be accompanied by a damage to the author's honor or reputation. Yet, the trend in the Lithuanian case-law seems to follow the presumption according to which the respect of the works should be associated with the respect of the author. In a Court Case⁹⁵⁹, the Supreme Court considered that any alterations or distortions caused to a work, even if they are considered minor, could be painful for the author and considered by him as disrespectful⁹⁶⁰.

Term of protection

In Lithuania moral rights are perpetual in the sense that they are protected for an unlimited period of time, e.g. 'for life'⁹⁶¹. This is explicitly stated in Article 34.2: 'the protection of the author's moral rights shall be of unlimited duration'.

8.3.3 Adaptation right

Although the adaptation right (nor the translation right) has been harmonized at EU level⁹⁶², they remain applicable in all Member states through the Berne Convention.

⁹⁵⁸ Mizaras (n 317) 845.

⁹⁵⁹ *Decision of the Supreme Court of Lithuania of 19 February 2003, civil case, J. Jakitas v. UAB Mis0 gaires, No. 3k-3-273/2003, category 78.* (n 450).

⁹⁶⁰ Mizaras (n 317) 845.

⁹⁶¹ Mizaras (n 317) 844.

⁹⁶² See Deliverable 2.1 for a further analysis of the adaptation right at EU and international level.

In Lithuania, the adaptation right is an independent economic right established in Article 15 of the Copyright Law, which accordingly grants the author the possibility to authorize or prohibit the ‘adaptation, arrangement, dramatization or other transformation of a work’. There are no further specifications with regards to the adaptation right of the author, except from some provisions related to specific type of works, such as adaptations of audiovisual works and computer programs.⁹⁶³ As an economic right of the author, this right has the same characteristics than the other economic rights and the same duration of protection, namely 70 years *post mortem*.

Nevertheless, due to the intrinsic relation of the adaptation right with the regime for derivative works, we will briefly refer to this kind of works under the Lithuanian Copyright Law.

Derivative works, which ‘are created on the basis of other literary, scientific or artistic works (translations, dramatizations, adaptations, annotations, reviews, essays, musical arrangements, static and interactive Internet homepages, and other derivative works)’⁹⁶⁴ can also be subject of copyright protection as long as they are ‘the result of creative activities of an author’. Interestingly, the Lithuanian legislator opted to introduce a non-exhaustive list of what should be considered as ‘derivative works’ and has explicitly included ‘internet pages’ in such list. According to Mizaras, mentioning internet pages as derivative works generates confusion as it would entail that homepages are created based on pre-existing works or that the homepage would extent to the contents that appear in the display of the homepage⁹⁶⁵.

The copyright protection granted to derivative works applies regardless of the copyright or related rights protection of the pre-existing work in which the derivative work is based on⁹⁶⁶.

8.4 Other rules on matters relevant for CHIs

8.4.1 Protection of public domain/cultural heritage

Display of works of fine arts

The Lithuanian Copyright Law has introduced a particular and debated⁹⁶⁷ provision with regards to the display of a work of fine arts. Due to the potential relevance for CHIs and the inDICES project, it is briefly presented below.

⁹⁶³ See The Lithuanian Copyright Law art.11.1 and 11.2 for audiovisual works and art.30 for computer programs.

⁹⁶⁴ The Lithuanian Copyright Law art.4.3.

⁹⁶⁵ Mizaras (n 317) 841.

⁹⁶⁶ The Lithuanian Copyright Law art.4.4.

⁹⁶⁷ See Lindner and Shapiro (n 564) 589.

This exception permits, without having the author's consent (or other rightsholder's), the public display of an original or a copy of work of art for non-commercial purposes 'if the work has been sold or its ownership has been otherwise transferred to another natural or legal person'. The public display of works of art is only permitted when the author or his successor is aware of the public display or has 'reasonable grounds' to believe that such public display or exhibition of works constitutes an integral part of the regular activities of the natural or legal person that acquired the work⁹⁶⁸. While displaying the work or its copy the author's name shall be provided, if possible. No remuneration is envisaged for the rightholders for this kind of uses.

Right of making available of work of fine art

Although the Lithuanian law only grants the attribution right and integrity right as moral rights to authors (and performers), there are two specific provisions that could qualify as a *quasi* moral right in Article 18 and that are worth of mentioning in the study.

Article 18(1) states that the owner of an original work of art must permit the author of the work to reproduce or display the said work in his exhibition provided that neither the reproduction right nor the right to public display have been transferred to the owner of the work of art. Safety of the work and the legitimate interests of the owner of the work must not be prejudiced⁹⁶⁹.

In addition, Article 18(2) states that 'the owner of an original work of fine art may not destroy the work before offering it back to the author'. Nevertheless, when the return of the original work is no longer possible, the conditions for the author to create a copy of the work must be provided.

Posthumous works

The Lithuanian legislator opted for the introduction of an exclusive right for those persons, legal or natural, that after the expiry of the copyright protection, lawfully publishes for the first time or lawfully communicates to the public a previously unpublished work⁹⁷⁰. The protection granted is similar to the protection for the other exclusive economic rights of the author. The duration of protection is 25 years from the date of the first lawful publication of the work or the first lawful communication to the public⁹⁷¹.

⁹⁶⁸ The Lithuanian Copyright Law art.33.

⁹⁶⁹ The Lithuanian Copyright Law art.18.1.

⁹⁷⁰ The Lithuanian Copyright Law art.36.1.

⁹⁷¹ The Lithuanian Copyright Law art.36.2.

8.4.2 Open Data Directive

At the moment of writing these lines, the Lithuanian legislator has not made available any draft law implementing the Directive 2019/1024.

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9 Annex IV – Poland

9.1 Copyright-related provisions

9.1.1 Exceptions and limitations

9.1.1.1 Preservation exception and Research and private study standing in dedicated terminals

Scope of the exceptions

The Polish Act on Copyrights and Related Rights (*Ustawa z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych*)⁹⁷² provides, in Article 28, specific exceptions and limitations to cultural organizations. This includes a preservation exception, as well as an exception for research and private study via dedicated terminals. The whole provision sets out special rules for the use of protected works without the consent of the rightholder and includes the following three types of exceptions for educational establishments, libraries, museums and archives: the exception to the lending right, to the reproduction right and the distribution right.

The relevant article states that:

1. Educational institutions, universities, research institutes pursuing the activity referred to in Article 2.3 of the Act of 30 April 2010 on Research Institutes (Journal of Laws 2018, item 736), research institutes of the Polish Academy of Sciences pursuing the activity referred to in Article 50.4 of the Act of 30 April 2010 on the Polish Academy of Sciences (Journal of Laws 2017, items 1869 and 2201), libraries, museums, and archives may:

- 1) lend, as part of their statutory tasks, copies of disseminated works,
- 2) reproduce works being part of their own collections for the purposes of supplementing, preserving, or protecting their own collections,
- 3) make their collections available for research or cognitive purposes via the end points (terminals) of information technology systems located on their premises

—if these activities are not performed for direct or indirect financial gain.

⁹⁷² Ustawa z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych (Dz.U. 1994 nr 24 poz. 83, z późn. zm).

The public lending right, which concerns the lending of works by establishments open to the public (regulated at EU level in the Directive 2006/115/EC), will be described later in this paper. Below we characterize the two other exceptions guaranteed in Article 28, which fairly faithfully reflect Articles 5(2)(c) and 5(3)(n) of the Infosoc Directive (2001/29/EC).

Beneficiaries

In the current state of law, those entitled to benefit from the above provision are: "educational institutions, higher education institutions and research institutes carrying out the activities referred to in Article 2, section 3 of the Act of 30 April 2010 on Research Institutes (Journal of Laws 2018, items 736 and 1669, and of 2019, item 534), scientific institutes of the Polish Academy of Sciences conducting the activity referred to in Article 50, section 4 of the Act of 30 April 2010 on the Polish Academy of Sciences (Journal of Laws 2018, items 1475 and 1669 and Journal of Laws 2019, item 534), libraries, museums and archives".

According to the above closed list - which defines the beneficiaries of the regulation - libraries, museums, archives and educational institutions, indicated directly in the regulation, i.e. educational institutions, universities, research institutes and scientific institutes of the Polish Academy of Sciences, may benefit from these exceptions. However, research and scientific institutes have been strictly defined through a precise definition of the activities that they conduct and through a reference to specific legislation, pursuant to which such institutes are covered by the provision only if they offer doctoral programmes, postgraduate programmes or other forms of education.

The current wording of the provision has been amended relatively recently, following the amendment of the Act on Copyrights and Related Rights, introduced by the Act of 11 September 2015 amending the Act on Copyrights and Related Rights and the Gambling Act. This is important because, according to the earlier wording of the provision, museums were not covered by this exception, and the notion of "educational institutions" was limited only to schools. It was therefore defined much more narrowly than in the Infosoc Directive, which establishes the possibility of including publicly accessible libraries, educational institutions, museums and archives in the exception. It was only in 2015 that museums were included among the beneficiaries of this exception, and the narrow concept of 'school' was replaced by the broader concept of 'educational institutions'.

According to the Infosoc Directive, the beneficiaries of the exceptions set out in Article 5(2)(c) and 5(3)(n) may be publicly accessible. This therefore includes libraries, educational establishments or museums, as well as archives - to which the requirement of public availability does not apply.

Under Polish legislation, the accessibility required by the Directive for designated institutions (excluding archives) results from specific provisions regulating their functioning⁹⁷³.

Purpose of the exceptions

Article 28(1), point 2 establishes the exception for specific acts of reproduction. The institutions referred to in the provision may reproduce works contained in their own collections, provided that they do so for one of the specific purposes. They may therefore digitize works, irrespective of their copyright status (including those subject to copyright protection) without the consent of the rightholder, where they do so in order to supplement, preserve or protect the collections.

Thanks to this exception, the digitization itself is not conditioned by the copyright status of an object belonging to the collection of the authorized institution. It does, however, determine the possibility of making the results of the digitization available - when an institution wants to make its digitized collections available and re-use possible, it must already know whether it has rights to do so and must have those rights at its disposal.

However, the work does not need to be published beforehand (before the aforementioned amendment to the Act on Copyrights and Related Rights of 2015, the exception to the reproduction right applied only to works that were previously published). Therefore, the institutions have the possibility to digitize works which were not previously made available to the public in any way, with the author's consent (this may apply, for example, to manuscripts which were found only after the author's death).

Additionally, in the previous wording of the provision, institutions had the possibility of making (or commissioning the making) of copies, and after the amendment, the expression "making copies" was replaced with the term "reproduction".

It should be noted that this exception corresponds in its scope with the exception provided in Article 6 of the CDSM Directive, which concerns the preservation of cultural heritage and requires the introduction of copyright exception for cultural heritage institutions, allowing the making of copies of all protected works that are permanently in their collections, in any format or medium, for purposes of preservation of such works or other subject matter and to the extent necessary for such preservation. The abovementioned provision is therefore already implemented in the Polish legal system, on the basis of the provisions currently in force.

Article 28(1), point 3 establishes an exception that permits making works available through terminals (IT system end points) located on the premises of the authorized institution. In line with

⁹⁷³ M.in. ustawa z dnia 21 listopada 1996 r. o muzeach (Dz. U. z 2012 r. poz. 987) oraz ustawa z dnia 27 czerwca 1997 r. o bibliotekach (Dz. U. z 2012 r. poz. 642, z późn. zm.).

Article 5(3)(n) of the Infosoc Directive, it only allows access to the collections, thus excluding the possibility of copying or saving them on another medium. What is more, it restricts access in this way to the premises of authorized entities only. It should be stressed that it does not, therefore, authorize access to collections from another location, including online access. Also in the case of this exception, it is only valid for strictly defined purposes –research or cognitive ones (following the definition in the Infosoc Directive: 'for the purpose of research and private study'). There is a lack of clarification that these have to be institution's own collections (as was the case with the preservation exception in Article 28(1), point 2 and in the InfoSoc Directive.

Importantly, the application of both exceptions is further limited only to non-commercial activities. Thus the activities of the beneficiaries of the norm set in Article 28(1) must not be for financial gain ("these activities are not performed for direct or indirect financial gain"). It should be stressed, however, that, in accordance with the established practice of these institutions, the collection of fees within the limits necessary to cover the costs of their activities does not constitute a direct or indirect financial gain⁹⁷⁴.

Particular limitations

Importantly, Article 28 introduces the following specific restrictions:

Firstly, reproduction for the purpose of supplementing, preserving or protecting collections may not lead to an increase in the number of copies of the works or to an increase in the collections that are lent or made available by the institutions under this provision. Such activity must be considered as exceeding the scope of the authorized use, entailing legal liability.

Secondly, the exception to the distribution right does not apply if the act of distribution is based on a prior agreement with the rightholder. This fulfils the premise of the Infosoc Directive, according to which such communication is only possible for works 'which are not subject to purchase or licensing terms. The term 'purchase or licensing terms' should be understood as 'requiring that the rightholder and an establishment, such as a publicly accessible library, referred to in that provision must have concluded a licensing agreement in respect of the work in question that sets out the conditions in which that establishment may use that work'⁹⁷⁵.

9.1.1.2 Advertising the public exhibition or sale of artistic works

Scope of the exception

⁹⁷⁴ Justification to the draft Act of 11 September 2015 amending the Copyright and Related Rights Act and the Gambling Act.

⁹⁷⁵ Judgement of the court of 11 September 2014 in case C-117/13 Technische Universität Darmstadt.

The exception for the purpose of advertising the public exhibition or sale of artistic works is provided in Article 33³ of the Copyrights and Related Rights Act, which states:

‘1. Works may be used for the purpose of advertising a publicly accessible exhibition or a public sale of works, to the extent justified by the promotion of that exhibition or sale and excluding other commercial use.

2. The use referred to in paragraph 1 concerns in particular publicly accessible exhibitions in museums, galleries, and exhibition halls, and includes using works in advertisements, catalogues, and other materials distributed to promote an exhibition or sale and exhibiting copies of works or making them available in any other manner for these purposes’.

Beneficiaries

Beneficiaries of this exception include museums, galleries and other entities that own exhibition spaces and that organize publicly accessible exhibitions or sales of works. However, this is not a closed catalogue of institutions entitled to exercise this right. The Polish legislator provides only examples of beneficiaries of this provision (through the use of the term "in particular").

Purpose of the exception

This provision is an implementation of Article 5(3)(j) of the Infosoc Directive into the Polish legal system, introducing the possibility for cultural institutions to use works for strictly defined advertising purposes. The purpose for which the use can be made under the exception is specified as advertising of a publicly accessible exhibition or public sale of works (e.g. a public auction and sale conducted by an auction house). The scope of such use must be justified by the promotion of such an exhibition or sale. The possibility of other commercial uses beyond promotion is explicitly excluded. In accordance with the provisions of the regulation, the forms of use indicated therein include the use of works in materials distributed as part of the promotion, as well as the exhibition of copies of works, or making the available in any other way for these purposes.

Paragraph 2 of Article 33³ provides examples of places where works may be made available within the scope and purpose of paragraph 1, including in this non-exhaustive list the possibility of using the works in advertisements, catalogues, but also in other materials distributed for the promotion of an exhibition or sale.

It should be noted that the previous wording of this provision only referred to the use of distributed copies of works for the purpose of advertising the public exhibition or sale to the

public, narrowing the application of the exception to distributed copies⁹⁷⁶. Currently, based on the amendment of the Act on Copyrights and Related Rights of 11 September 2015, the exception is no longer restricted to copies (egzemplarze) of a work, understood as its physically existing, material analogue copy⁹⁷⁷. The current regulation allows for the online promotion of exhibitions and sales, in line with the possibility explicitly allowed by the Infosoc Directive (Article 5(3)(j)). The aim of the regulation is therefore to enable the promotion of public exhibitions and sales via the Internet. In addition, the 2015 amendment removes the premise of making available, making it possible, for example, to promote online an exhibition containing items, which have not previously been made available to the public in any way with the author's consent.

What is more, the use of works in this case is possible not only in materials published for the purpose of promoting an exhibition or sale, but in all materials distributed for that purpose. Therefore the scope of this form of permitted use has been extended to promotional activities carried out on the Internet.

Prior to the amendment, the Act included Article 33, point 2, which allowed the distribution of works displayed 'in collections accessible to the public, such as museums, galleries, exhibition halls, but only in catalogues and publications published for the promotion of these works, as well as in reports on current events in the press and television, but within the limits justified by the purpose of the information'. The current regulation does not refer to the issue of informational use of publicly exhibited works, which may be used in the course of distribution by professional media in the form of reports on current events (e.g. reports from a public exhibition or sale). This is due to the fact that this type of permitted use - informational use - is widely regulated in the content of Article 26 of the Copyrights and Related Rights Act.

Particular limitations

In contrast to the Infosoc Directive, in which this exception refers to 'artistic works', the Polish regulation covers works in general, so it should be assumed that it concerns a wider range of subjects. However, these must be works accessible to the public.

⁹⁷⁶ "Wolno w celu reklamy wystawy publicznej lub publicznej sprzedaży utworów korzystać z egzemplarzy utworów już rozpowszechnionych, w zakresie uzasadnionym promocją wystawy lub sprzedaży, z wyłączeniem innego handlowego wykorzystania."

⁹⁷⁷ Justification to the draft Act of 11 September 2015 amending the Copyright and Related Rights Act and the Gambling Act..

9.1.1.3 Text and Data Mining

9.2 Specific regime in respect to particular types of works

9.2.1 Orphan works

In the Polish Copyrights and Related Rights Act, the permitted use of orphan works is introduced by Articles 35⁵ – 35⁹, which constitute a fairly faithful transposition of the Directive 2012/28/EU [the Orphan Works Directive]. The Directive was implemented into the Polish legal order only in 2015, by the already mentioned Act of 11 September 2015 amending the Copyrights and Related Rights Act and the Gambling Act.

Types of works

Following the provisions of the Orphan Works Directive, orphan works are deemed to be works subject to copyright protection, for which the rightholders are not known, or, if they are known, which cannot be found, despite a diligent search. Therefore, it is impossible to obtain appropriate permissions to use them.

The Orphan Works Directive requires a precise indication of the types of works that may be considered orphaned. The scope of the Polish regulation is covered in Article 35⁵:

- 1) works published in books, daily newspapers, periodicals, or other forms of publication in print,
- 2) audiovisual works and works ordered or incorporated into audiovisual works or fixed in videograms, within the scope of using an audiovisual work or a videogram as a whole,
- 3) works fixed in phonograms

All the above mentioned types of works must be in the collections of authorized institutions.

Importantly, independent works of art and photography were excluded from the scope of the proposed regulation, following the solution adopted by the Orphan Works Directive. Orphan works of this kind will be covered by this exception only to the extent that they are included in the above types of publications (e.g. as illustrations or photographs in a book).

It should also be noted that the regulation covers works which have been first published (i.e. copies of which have been made available to the public with the author's consent), and in the absence of publication, transmitted within the EU or EEA.

Works that have never been published or broadcast may be considered orphaned if they were previously disclosed as part of the collections of a given institution and with consent of the rightholder (e.g. if the deceased rightholder entrusted his or her work to the institution while still alive, thus exercising his or her right to decide on the first disclosure of the work to the public), and at the same time there are no circumstances that would allow to state that the rightholder (author and his or her legal successors, including the heirs) would oppose the digitization and disclosure of such works using digital technologies.

In addition, in respect of collections of public service broadcasters (public service broadcasting organizations), produced by these entities, on their behalf or commissioned by them to third parties (including co-production with such third parties, the regulation covers only works produced before 1 January 2003 with regard to the acquisition by such broadcasters of exclusive rights.

Beneficiaries

In accordance with Article 35⁵ (2), the entities authorised to use orphan works contained in their collections are, by analogy with the exceptions provided for in Article 28, "Archives, educational institutions, universities, research institutes pursuing the activity referred to in Article 2.3 of the Act of 30 April 2010 on Research Institutes, research institutes of Polska Akademia Nauk [the Polish Academy of Sciences] pursuing the activity referred to in Article 50.4 of the Act of 30 April 2010 on the Polish Academy of Sciences, libraries and museums". In addition, the exception covers cultural institutions run by state and local government – as defined by the Act of 25 October 1991 on Organising and Conducting Cultural Activities (Journal of Laws of 2012, item 406, as amended), whose statutory task is to collect, protect and disseminate film or phonographic heritage⁹⁷⁸, as well as public radio and television organisations, i.e. public radio and television broadcasting units as defined by the provisions of the Act of 29 December 1992 on Radio and Television Broadcasting (Journal of Laws 2011, item 226, as amended)⁹⁷⁹.

It should be stressed that in the case of archives and cultural institutions responsible for film or sound heritage there is no requirement for the orphan works to be publicly accessible. The other categories of institutions must meet the criterion of public accessibility.

⁹⁷⁸ This includes following institutions: the National Film Archive, the Institute of Music and Dance, the National Audiovisual Institute, the Fryderyk Chopin Institute or the Feature and the Documentary and Feature Film Studios.

⁹⁷⁹ Telewizja Polska S.A., Polskie Radio S.A. and regional radio companies.

Importantly, these bodies must always register in the EU orphan works database before using an orphan work. The obligation to assess whether a given institution is entitled to use the work lies with the minister responsible for culture and the protection of national heritage protection, to whom the application should be addressed and who decides on the registration⁹⁸⁰.

In view of the limitation of the scope of the orphan works exception to only two fields of exploitation, i.e. reproduction and making available in such a way that allows anyone to access it from a place and at a time of their choosing, the provisions on orphan works apply only to those rightholders that own copyright in the said fields.

Subject matter

Use of orphan works under this exception is only possible in the specific fields of exploitation, i.e. the reproduction and communication of those works to the public in such a way that everyone can access them from a place and time of their choice (online accessibility)⁹⁸¹.

Furthermore, use may be made only for specific purposes relating to the fulfilment by authorized institutions of their public mission, namely the fulfilment of their statutory tasks that serve the public interest. These include in particular the preservation and restoration of the collections and making available works that are part of the collections for cultural and educational purposes.

The terms of reference therefore make it possible to make works available online and to protect them from the destructive effects of time, as well as to use them, for example, as part of scientific research carried out in authorized institutions.

The institutions may earn revenue from the exploitation of orphan works, but only to a certain extent - to cover the costs of digitization and of making orphan works available to the public.

Diligent search

Pursuant to Article 35⁶ of the Act on Copyrights and Related Rights, the use of an orphaned work must be preceded by the so-called diligent search of rightholders of copyright in the works. Before using a work that may be considered orphaned, entities entitled to use that work carry out a diligent and bona fide search for each of the rightholders of copyrights in that work. The search consists of checking information on those entitled in sources appropriate for particular categories of works. Article 35⁶ of the Act on Copyrights and Related Rights defines the principles of conducting diligent searches.

⁹⁸⁰ Art. 35⁷ of the Copyright Act.

⁹⁸¹ Art. 35⁵ (2) of the Copyright Act.

A diligent search is conducted in the EU (or EEA) Member State in which the work was first published or broadcast. In addition, detailed regulations in this respect concern audiovisual works and unpublished works. In the case of an audiovisual work, where the producer of the work is known, the search should be carried out in the Member State of the EU (or EEA) in which it is established or has its permanent residence. For unpublished works, however, the search should be carried out in the Member State of the EU (or EEA) in which the entity which made the work available to the public is established. If, in the course of a diligent search, it has become apparent that information on the rights holders may be located in countries other than those referred to above, this information should be checked against the relevant sources in those countries.

Entities required to carry out a diligent search may either carry out the search themselves or have it carried out by a third party, including a copyright or related rights management organization.

A diligent search shall be deemed to have been carried out for works that are listed as orphan works in the EU database of orphan works, which is an expression of the principle of mutual recognition of orphan status between EU Member States. This principle authorizes the use of works recognized as orphan works in another EU Member State and entered into the EU orphan works database, without the need to carry out a search again. The orphan work thus obtains this status in all Member States (thus avoiding the costs of repeated searches).

Entities authorized to use orphan works are obliged to keep information about searches that have been carried out by them.

The list of sources, the verification of which is required within the framework of diligent search, and guidelines on the method of documenting information on the results of diligent searches, taking into account the need to ensure a uniform standard of documenting diligent searches, have been included in a separate executive act to the Act - the Regulation of the Minister of Culture and National Heritage of 23 October 2015 regarding the list of sources to be checked in the scope of diligent search for the persons entitled to works and objects of related rights which can be considered as orphan works, and the manners in which the results of the search are recorded. The list includes, inter alia, the sources listed in the Annex to the Orphan Works Directive, taking into account the need to conduct diligent searches and the availability of information on rightsholders in varied sources of information.

End of the orphan work status

A rightholder, who holds economic copyrights to a work deemed to be orphaned, may demand from the entity which has entered that work into the database of orphan works, or from its legal successor, that the orphan status of that work be declared to have expired, provided that the

rightholder demonstrates the rights to that work. The rightholder is therefore entitled, at any time, to invalidate the orphan status of a work by registering rights to the work.

Compensation

Pursuant to Article 35⁸(5), if the rightholder – if found – is entitled to fair compensation for the use of the work as an orphan work. The Orphan Works Directive leaves EU Member States free to choose the circumstances in which such compensation is paid. In the Polish regulation, the criteria on the basis of which the amount of such compensation is determined are the following:

- the nature and scope of the use of an orphan work,
- the amount of revenue obtained from such exploitation,
- damage caused to the rightful owner in connection with this use.

The aim of this provision is to not impose an excessive financial burden on public institutions which, acting in the public interest, make orphan works available to citizens for cultural and educational purposes. In addition, it should be noted that compensation will be paid only if the rightholder wishes to exercise his right to receive it ("the rightholder may request "). The provision therefore constitutes only an entitlement and not a mandatory requirement.

Other particularities

In accordance with the provisions of the Directive, the Act excludes the application of provisions concerning orphan works in the case of concealment of authorship, stating that they do not apply in a situation in which the author has not disclosed his authorship (his intention was to remain anonymous), which is one of the elements of the author's moral rights specified in Article 16(2) of the Act. In this situation, the producer or publisher replaces the author in the exercise of the copyright, and in case of their absence - the competent collective copyright management organization⁹⁸².

It should also be noted that a similar situation, as in the case of orphan works, applies to Article 33, point 3 of the Act, which provides the possibility of distribution of published artistic and photographic works, in relation to which it is difficult to obtain a permit to use them, due to the fact that reaching an agreement with the author meets obstacles which are difficult to overcome. However, the scope of its application is limited to dissemination in encyclopedias and atlases. In this situation, the author is entitled to remuneration.

⁹⁸² Art. 8(3) of the Copyright Act.

9.2.2 Out-of-commerce works

The issue of out-of-commerce works is regulated in Articles 35¹⁰ – 35¹² of the Polish Copyright and Related Rights Act. These rules were introduced into the Polish legal system by the amendment of 2015. These provisions regulate certain ways of using this category of works and constitute a statutory authorization for collective copyright management organizations to manage out-of-commerce works which have not been entrusted to them by the entitled persons themselves. This solution is largely modelled on the German regulation to solve the problem of out-of-commerce works.

Types of works

Pursuant to Article 35¹⁰, paragraph 1 and 2, out-of-commerce works are defined as those works that were first published on the territory of the Republic of Poland before 24 May 1994, in books, newspapers, magazines or other forms of publication in print, if those works are not available to the public in commercial trade conducted with the consent of those entitled to the economic copyrights to those works with regard to the right of reproduction and of making them available to the public in such a way that everyone can have access to them at a place and time chosen by them (making them available online), or in the form of copies placed on the market (currently in trade) in a number meeting the rational needs of the recipients or by making them available online. When determining the availability of works, the trading in copies of works in respect of which the right to permit further trading in such a copy on the territory of the Republic of Poland, through the introduction of the original or a copy of the work on the territory of the European Economic Area, was exhausted is not taken into account.

It is important to note that the provisions concerning works not available in commercial trade do not apply to translations into Polish of works expressed in a foreign language (Article 35¹⁰ paragraph 5).

Beneficiaries

The following institutions are authorized to use works which are not commercially available pursuant to Article 35¹⁰, paragraph 2: “archives, educational institutions, entities referred to in Article 7, paragraph 1, points 1, 2 and 4-8 of the Act of 20 July 2018 - Law on higher education and science, and cultural institutions”.

Subject matter

The authorized institutions may reproduce in their collections out-of-commerce works and make them publicly available online. Importantly, such use can only take place on the basis of an agreement with the collecting society chosen to act as licensor (Article 35¹⁰, paragraph 2).

D2.2 Public

The authorization of the organization to represent those rightsholders, who have not entrusted their rights to the management of the rights, shall arise as long as the rightsholder entitled to the work in question has not submitted a written objection to the management of their rights within 90 days of the inclusion of the work in the relevant register of out-of-commerce works. Therefore, the submission of an objection excludes the possibility of being represented by a collecting society (Article 35¹⁰, paragraph 3). After the expiry of the statutory time limit for making an objection, the rightsholder to the work may still submit to the collecting society an appropriate written declaration of cessation of authorization, on the basis of which the authorization is waived with respect to certain forms of representation by the collecting society (Article 35¹⁰, paragraph 4).

A register of out-of-commerce works, referred to in Article 35¹¹, is held by the Minister in charge of culture and the protection of national heritage, The register is public and available to the public. It shall contain such information as the title of the work, the name or pseudonym of the author (or a mention of anonymity), the publisher of the work, the date of first publication and an indication of the collecting society which applied for the entry of the work into the list. The abovementioned objections and statements by the authors of the work shall also be noted in the register. The inclusion of a work in the register of out-of-commerce works shall be made upon request of the collecting society.

Pursuant to Article 35¹², the designation of a collective management organization authorized to manage rights to out-of-commerce works is made by way of a competition, organized by the Minister in charge of culture and the protection of national heritage, for a maximum period of five years. However, more than one collecting society may be appointed, provided that they operate jointly. The competition and its results shall be public.

The application form for inclusion of an out-of-commerce work in the register of out-of-commerce works and guidelines for running a competition to select the collective copyright management organizations are contained in separate executive acts to the Act - Regulation of the Minister of Culture and National Heritage of 22 October 2015 on a model application form for inclusion in the list of out-of-commerce works and Regulation of the Minister of Culture and National Heritage of 23 October 2015 on a competition for a collective copyright management organization authorized to conclude agreements on the use of out-of-commerce works. The regulation concerning the competition guidelines includes, among other things, the required scope of information to be included in the competition notice, the scope of the competition documentation and the competition procedure.

CDSM

At the end of July 2020, the Polish government launched an initial public consultation on the implementation of the CDSM Directive, which lasted until the end of September 2020. Nineteen

questions were addressed to potentially interested parties, aimed at clarifying the most important issues concerning the adaptation of law to the changing nature of digital exploitation of copyrighted works. The questions included the following questions about Article 8 of the CDSM Directive, concerning the use by cultural heritage institutions of out-of-commerce works and other subject matter:

- Can the requirement of representativeness of collective management organizations for the purposes of licensing of out-of-commerce works, as laid down in Article 8(1)(a) of the Directive, be regarded as being met, taking into account the definition of a representative organization contained in Article 10 of the Act of 15 June 2018 on collective management of copyright and related rights?

- Is it necessary, pursuant to Article 8(5) of the Directive, to introduce additional requirements for the licensing of out-of-commerce works (Article 8(1) of the Directive) or their use within the scope of the exception (Article 8(2) of the Directive)? If so, what requirements and in which areas of creativity (music, films, literature, journalism, etc.)?

Until now, the government has not yet provided a proposal for the implementation of the Directive.

9.2.3 Works of visual arts in the public domain

In connection with the public consultation announced by the Polish Government on the implementation of the CDSM Directive, as mentioned above, a question was also asked about Article 14 of the CDSM, concerning works of visual art in the public domain: "Does and to what extent does Article 14 of the Directive concerning works of visual art in the public domain require implementation through a new specific provision, taking into account the current grounds for copyright protection and provisions on the duration of protection of the work?"

In connection with the public consultation announced by the Polish Government on the implementation of the CDSM Directive, a question was also asked about Article 14 of the CDSM, concerning visual works in the public domain: "Does Article 14 of the Directive, concerning visual works in the public domain, require implementation through a new specific provision, taking into account the current provisions on works that are subject to copyright and the term of protection?"

Until now, the government has not yet provided a proposal for the implementation of the Directive.

9.2.4 Non-original photographs

The Polish legislator did not provide for special separate regulations with regard to non-original photographs. The protection for the general category of photographic works has been provided for in Article 1 of the Act on Copyrights and Related Rights, where photographic works have been indicated in a list of works which are the subject of copyright.

In accordance with the general principles, which apply to all types of copyrighted works, based on the Polish Copyright Act, photography may be a copyrighted work if it is a manifestation of creative activity of an individual nature. Therefore, not every photograph will be a copyrighted work, but only one that meets the statutory requirements. On the other hand, a photograph taken as part of the digitization process, which is meant to constitute a faithful, documentary representation of an object, does not meet these criteria. Such interpretation is an expression of the established line of jurisprudence of Polish courts - among others, the Supreme Court judgment of 25 January 2006, I CK 281/05, OSNC 2006/11, the judgment of the Court of Appeal in Gdańsk of 8 November 2012. I ACa 602/12, judgment of the Supreme Court of 26 June 1998, I PKN 196/98, OSNP 1999, judgment of the Supreme Court of 10 May 1976, IV CR 127/76, OSNC 1977. In accordance with the above mentioned case law, "copyright protection (...) does not apply to purely registered photography" and the nature of the work of a photographer performing digitalization of the collection does not consist in creative activity. Thus, no separate, independent copyrights are created in relation to the digital copies created in the process of digitization of collections - digitization does not lead to the creation of new copyrights.

According to the aforementioned case-law, digitization is a strictly technical process aimed at making the most faithful copy of a work, digitizing the work, faithfully reproducing it, informing the recipient of an existing creation, passing on knowledge of something that already exists, and not the realization of one's own creative vision. There is no room for individual creative input, what is more, the realization of the photographer's vision is in this case even inadvisable. The role of digitization is purely registrative, reproducible, not leading to changes in content. It is only a form of multiplication, a separate field of exploitation of the existing work, and does not lead to the creation of a new work. The technical activities of the digitization process are the result of the application of knowledge, efficiency, equipment and technology and are typically documentary in nature. Each photographer should implement certain standards and strive to achieve a standardized result. If a photograph deviates from certain technical standards and shows an expression of the author's individuality, it is a photograph taken incorrectly, contrary to the intended effect of the digitization process.

9.2.5 Databases

In the Polish legal system, the protection of databases occurs under copyright law when a database meets the characteristics of a copyrighted work (ensuring protection under the Copyrights and Related Rights Act of 4 February 1994), as well as under the Database Protection Act of 27 July 2001. The protection resulting from both of the abovementioned acts is independent from one another (Article 1 of the Act on the protection of databases), therefore the legislator has provided for a double regime of database protection, in accordance with the system adopted in the Database Directive.

Copyright protection

Article 3 of the Copyright Act regulates all kinds of compilations of works, including databases. It states that “Collections, anthologies, selections and databases which have the characteristics of a work shall be covered by copyright even if they contain unprotected materials, provided that their selection, arrangement or composition are creative, without detriment to the rights to the works used”. The provision specifies that they may even contain unprotected materials and yet be protected as long as the selection, arrangement or combination adopted in them is creative. Therefore, the recognition of a database as a work is determined by the fulfilment of one of three creative elements: the selection, arrangement or composition of data. Moreover, databases are protected without prejudice to the rights in the works used in the database.

It is worth noting that in relation to databases which meet the characteristics of a copyrighted work, in the case of a willingness to create a derivative work, an appropriate permission of the author is necessary not only to dispose of and make use of the derivative work, but also to dispose of and use the study (a dependent work), but also to create it (Article 2(2) of the Copyright Act).

Sui-generis right protection

According to the legal definition of Article 2(1), point 1 of the Database Act, a set of data or any other materials and elements meeting specific requirements will be considered a database. The data, materials and elements must be: collected according to a specific system or method and individually accessible in any way, including by electronic means. This database must also require a significant investment effort in terms of quality or quantity in order to prepare, verify or present its contents. The key to protection is therefore not the creative nature of the selection, but the effort incurred. Importantly, computer programs used to draw up or use databases are not protected (Article 4).

Beneficiaries

The rights granted by the Act on Database Protection are granted to the producer of the database and the legal successor (Article 6(1), Article 2(2)). Within the statutory meaning (Article 2(1), point 4), a database producer is a natural or legal person, or an organisational unit without legal personality, which bears the investment when establishing the database. However, the Act introduces a presumption that the producer is a person whose surname or a company whose business name has been disclosed on the copies of the database or has been made public in connection with the dissemination of the database in any other way (Article 6(2)).

Scope of application

The protection granted under the Act (Article 6(1)) includes an exclusive and transferable right to:

- download the data,
- reuse the data, in whole or in part, substantial in term of quality or quantity.

The extraction of data shall be understood as the taking over or transfer (permanent or temporary) of the contents of a database to another medium, in whatever way or form (Article 2(1), point 3). The secondary use means making the database publicly available in any form, in particular through dissemination, direct transfer or rental (Article 2(1), point 4). What should be noted, in the light of Article 3, is that lending is not considered a form of extraction or re-use of databases.

Where a database has been made available to the public in any way, the producer may not prohibit a user who lawfully uses the database from downloading or reusing for any purpose any part of its contents which is not essential in terms of quality or quantity. Such use must not, however, prejudice the normal use of the databases or harm the legitimate interests of the producer (Article 7).

The Act defines circumstances in which it is possible to use a significant part, in terms of quality or quantity, of a database that has been disseminated, thus introducing the institution of so-called authorized use. The regulation allows for:

- personal use, but only from non-electronic contents of the database;
- quotation – for the purpose of illustration, and for teaching or research purposes, solely for non-commercial purposes (the necessary condition is to indicate the source);
- use for the purpose of internal security, judicial or administrative proceedings,
- use for the benefit of the disabled.

It is not permitted to download or re-use a database that is reproducible and systematic, and when such use contradicts normal use and causes an unjustified prejudice to the legitimate interests of the producer.

Term of protection

The statutory period of protection of databases shall apply for 15 years, starting from the year following the creation of the database. However, if the database has been made available to the public within that period, its protection shall be extended to 15 years from the year following that in which it was made available . Upon expiry of these periods, protection shall cease. Where any change is made to the contents of a database which is substantial in terms of quality or quantity (consisting, inter alia, in supplementing, amending or deleting parts of the database which have the characteristics of a substantial new effort), the period of protection shall be counted separately⁹⁸³.

9.3 Other copyright matters in a nutshell

9.3.1 The public lending derogation

Article 28 (1), point 1 of the Copyright Act formulates the exception for specific lending activities. It stipulates that the institutions indicated in the provision may "lend, as part of their statutory tasks, copies of disseminated works, if these activities are not performed for direct or indirect financial gain". Therefore, the application of the exception has been made conditional on the fulfilment of additional conditions: conducting activities pursuing statutory objectives and the condition of non-commercial character of activities, according to which the activities of the beneficiaries of the standard in Article 28(1) cannot be aimed at achieving a financial benefit.

However, paragraphs 5-6 of the same article additionally introduce to the Polish legal system the institution of public lending right (regulated at the EU level in Directive 2006/115/EC). It constitutes an additional entitlement to receive remuneration for lending, related to the use of works on the basis of the abovementioned exception for public libraries.

The lending of copies is understood, in accordance with the definition in Article 6(1), point 8 of the Act on Copyrights and Related Rights and in a manner consistent with the Infosoc Directive, as a transfer for a limited period of time, not aimed at direct or indirect financial gain. It may be

⁹⁸³ Art. 10 ust. 1 ustawy o ochronie baz danych.

made only by institutions accessible to the public, i.e. institutions which create the possibility of lending copies of works to a wide range of people.

Beneficiaries

This includes a preservation exception, as well as an exception for research and private study via dedicated terminals

Under Article 28(1), those entitled to benefit from this exception are, by analogy with the preservation exception and the exception for research and private study via dedicated terminals: " Educational institutions, universities, research institutes pursuing the activity referred to in Article 2.3 of the Act of 30 April 2010 on Research Institutes (Journal of Laws 2018, item 736), research institutes of the Polish Academy of Sciences pursuing the activity referred to in Article 50.4 of the Act of 30 April 2010 on the Polish Academy of Sciences (Journal of Laws 2017, items 1869 and 2201), libraries, museums, and archives".

However, the beneficiaries of the public lending right are only public libraries, within the meaning of the Act of 27 June 1997 on libraries (Journal of Laws 2018, items 574 and 1669). Therefore, the creation of the right to remuneration is connected with the lending of copies of works only by public libraries. In view of the above, the right to remuneration will not be created by lending of works by other entities indicated in Article 28(1). Such a solution corresponds to the solutions adopted in many other EU Member States.

Types of works

The public lending exception covers copies of distributed works. Therefore, entitled entities have the possibility to lend only those works which have been previously made available to the public in any way with the consent of the author, in accordance with the definition of a published work in Article 6(1), point 3 of the Copyright Act. What is more, the provision concerns only copies (*egzemplarze*), understood as physically existing, material, analogue copies⁹⁸⁴.

The scope of public lending right includes copies of works expressed in words, created or published in the Polish language in a printed form. Thus, the Polish regulations explicitly state that lending of copies of phonograms and videograms, as well as e-books and audiobooks is excluded from the scope of public lending right. It is worth noting that in Poland, lending from collections of public libraries of works other than written works constitutes only a small percentage of all works that are being lent. Covering such lending with the right to remuneration would not

⁹⁸⁴ Justification to the draft Act of 11 September 2015 amending the Copyright and Related Rights Act and the Gambling Act..

correspond to the scale of actual use of library collections in relation to the number of beneficiaries⁹⁸⁵.

It should also be emphasized that Article 28(5) makes the right to remuneration dependent exclusively to the lending of a copy of written works created or published in the Polish language. Therefore the Polish legislator limits the scope of the regulation to authors creating in the national language, treating public lending right primarily as an instrument of the cultural policy of the state, intended to encourage creativity in the national language, supporting the development of the national language and literature. The application of the criterion of the creation and publication of a work in the national language is objective in nature and is not related to the nationality of the author.

Compensation system

Rightholders are entitled to remuneration for lending activities conducted by public libraries. Detailed rules for determining and paying that remuneration are laid down in Articles 35¹-35⁴ of the Act on Copyrights and Related Rights. The remuneration is due upon fulfilment of a specific condition – the rightholder needs to submit to the relevant collective copyright management organization a written statement of intent to receive remuneration for lending. Pursuant to Article 28(5), the following entities are entitled to receive the remuneration:

the author of a work expressed in words, created and published in the Polish language;

the translator into Polish of a work expressed in words, created in a foreign language and published in Polish;

the co-author of a work referred to in subparagraph (1) whose contribution is an artistic or photographic work;

the publisher of a work expressed in words and published in Polish.

This means that the Polish system of public lending right supports authors and publishers of works that are originally created in the Polish language, as well as translators and publishers of works translated into the Polish language. The catalogue includes authors of artistic or photographic works, provided that they constitute co-authors' contributions to a given work (the condition for granting those authors the right to remuneration for library loans is the purpose of the contributions created by them - they must be created especially for a given written work). The regulation covers situations in which the contributions of the author of the text and the author of

⁹⁸⁵ Justification to the draft Act of 11 September 2015 amending the Copyright and Related Rights Act and the Gambling Act..

the graphic layer lead to the creation of one co-authored work, within the meaning of Article 9 of the Copyright Act.

The calculation of the remuneration shall be based on information on lending of works in a given calendar year provided by public libraries, collecting societies and the minister responsible for culture and national heritage protection. On the basis of that information, the collecting society shall divide among the entitled rightholders the funds available for paying out lending fees.

Compensation for rightholders

The Polish Copyright Act stipulates that the remuneration referred to above is not payable for the lending of a copy of a work for use only within the premises of a public library (Article 28(6) of the Copyright Act). Thus, it stipulates that the creation of the right to remuneration is connected with the lending of copies of works outside, and not with making them available on the premises of the institution.

The above rules concerning the payment of compensation to rightholders also do not apply to lending of copies by the National Library. Taking into account the range of users who can lend the National Library's collections, it cannot be regarded as an institution accessible to the public. Collections are lent to libraries, not to individual readers, and materials borrowed from the National Library may be made available only in the reading room of the ordering library.

9.3.2 Moral rights

According to Article 16 of the Copyright Act, “the author’s moral rights shall protect the link between the author and their work which is unlimited in time and not subject to any waiver or transfer”. They are an expression of the author's personal, inextricable mental bond with his or her work. They are characterised by their unlimited scope of application, unlimited in time - they are valid indefinitely. They are not subject to sale (so they cannot be traded) and cannot be revoked. Therefore, even the transfer of all property rights will not cause a definite breaking of the bond existing between the work and its author (Article 49(2) of the Copyright Act).

The provision of Article 78 of the Copyright Act, which provides for the protection of moral right, stipulates that an author whose moral rights have been threatened by someone else's action may demand that such actions are ceased. If an infringement has occurred, he may also demand the removal of its effects and demand that the infringer makes a public statement on the issue, of appropriate content and form. If the infringement was intentional, then the court may oblige the offender to make an appropriate monetary compensation.

Types of moral rights

The Polish legislator indicates an open catalogue of moral rights (the term "in particular" has been used), distinguishing the following moral rights:

- 1) to be an author of the work;
- 2) to sign the work with the author's name or pseudonym, or to make it available to the public anonymously;
- 3) to have the contents and form of the author's work inviolable and properly used;
- 4) to decide on making the work available to the public for the first time;
- 5) to control the manner in which the work is used.

The right of attribution

The right of attribution is tantamount to the possibility for an author to request third parties to recognize the authorship of a work. It is associated with the absolute requirement to provide information about the author and thus correctly attribute authorship of the work that is being used.

The right to sign a work with one's name or pseudonym or to make it available anonymously

It is tantamount to being able to sign the work in the way one chooses - with one's name or pseudonym, and to making it available anonymously. It is up to the creator to decide, according to his will, how the work is to be signed.

The right to the inviolability of the content and form of the work and its fair use

The right to the inviolability of content and form is also defined as the right to preserve the integrity of a work, which is identical, inter alia, to the prohibition on making changes to the work being digitized - it should be made available in the form established by the author. In the Polish jurisprudence and doctrine, the introduction of new elements, omitting certain fragments or giving a new title is considered a violation of integrity. However, reliable use of a work concerns, among other things, the context and circumstances in which the work is presented.

Right to decide on the making the work available to the public for the first time

According to this right, it is the creator who decides whether he wants his work to be made available, and when. This right can otherwise be described as the right to decide on the publication of a work. With reference to the definition in Article 6(1), point 3, a published work is a work which, with the author's consent, has been made available to the public in any way.

Right to control the manner, in which a work is used

Detailed regulations enabling the exercise of this right are contained in Article 60 of the Act on Copyrights and Related Rights. According to it, the user of a work is obliged to allow the author to carry out author's supervision before the work is disseminated. If the author does not carry out the supervision in due time, he shall be deemed to have agreed to the dissemination of the work. As a general rule, the author is not entitled to separate remuneration for the performance of copyright supervision (unless it is stipulated otherwise in the contract). Otherwise, in the case of a work of art, the author has the right to exercise supervision for remuneration. Copyright supervision over architectural and architectural-urbanistic works is governed by separate provisions - Articles 17 and 21 of the Construction Law Act of 7 July 1994 (Journal of Laws 2018, item 1202, as amended).

Importantly, violations of personal rights are punishable. Article 115 of the Act on Copyrights and Related Rights stipulates that whoever infringes the rights of the person concerned may be liable to prosecution if he or she:

- usurps the authorship or misleads others as to the authorship of the whole or part of another person's work,
- disseminates the work to others, either in its original version or in a derivative form, without attributing the name or pseudonym of the author,
- publicly distorts the work,
- in order to achieve a financial gain, violates another person's personal rights in a manner other than that mentioned above,

Term of protection

Polish regulation states that moral rights are unlimited in time, so they never expire. But what if the author dies? Rights are in force, but who can exercise them and claim their protection? The Polish legislator points out that after the death of the author, the person entitled to exercise the author's personal rights of the deceased and to assert the protection of those rights is the spouse, or failing that, the descendants, parents, siblings, descendants of siblings. An action for the protection of moral rights may also be brought by the authors association competent for the given type of works or by the collecting society which managed the copyright of the deceased author. Unless the author expressed a different will and indicated other entity(ies) for this purpose (Article 78(2) of the Copyright Act).

9.3.3 Adaptation right

Derivative rights are regulated in the Polish Copyright Act in Articles 2 and 46. According to them, a derivative work (*opracowanie*) is created as a result of the use of someone else's work in such a way that one's own creative input is involved - it is a creative derivation of someone else's work. As a result, we are dealing with a work that contains elements of the work of two people: the author of the original work and the author of the study. For a work to be considered a derivative work, it must contain sufficient creative elements from the previous work so that the new work conveys the content of the previous one. Article 2(1) states that the derivative work is created in particular through translation, alteration and adaptation. In paragraph 4, the legislator specifies that a work which has been created by mere inspiration from another author's work shall not be considered a derivative work ("a work created under the inspiration of another author's work shall not be considered a derivative work").

Term of protection and assignment

A derivative work is subject to copyright without prejudice to the right to the original work. The work is therefore subject to the same rules, including the same period of protection, as any other copyrighted work.

Scope

Exercising the derivative right requires obtaining permission from the author of the original work to manage and use the work. Thus, the possibility of using the work depends on the consent of the author or the holder of the right to the original work, unless the author's economic rights to the original work have expired. In such a case, the preparation of the work itself is not conditional on having the consent. The situation is different in the case of the creation of derivative databases that meet the characteristics of a copyrighted work - here the consent for the creation of a dependent work is also required.

The Act allows for the withdrawal of consent if the derivative work has not been exploited within five years from the date when consent was granted. If remuneration has been paid for the authorization, it is not refundable. The Act also requires that copies of the derivative work must properly attribute the author and the title of the original work.

In addition, Article 46 provides that in the case of an agreement transferring economic copyrights, the author retains the exclusive right to authorize the exercise of the derivative copyright, even though the agreement provides for the transfer of the entire economic copyright (unless the agreement provides otherwise and the parties have agreed to transfer the derivative right as well - but this must be clearly indicated in such an agreement).

9.4 Other rules on matters relevant for CHIs

9.4.1 Protection of public domain/cultural heritage

Polish law lacks a definition of the public domain. What is more, no provision explicitly uses this concept.

Unprotected works / works excluded from copyright protection

It is worth mentioning Article 4 of the Copyright Act, which excludes certain categories of products from copyright protection, even though they meet all the features of a work under Article 1 of the Act. According to the regulation, the copyright shall not cover:

- 1) legislative acts and their official drafts;
- 2) official documents, materials, logos and symbols;
- 3) published patent specifications and industrial design specifications,
- 4) simple press information.

For cultural institutions, point 2) is of particular importance, as official signs and symbols are often found in the collections of these institutions (especially in museum collections). According to Polish case-law, this category of products includes, among others, coats of arms, flags, emblems, banners, insignia, bugles, anthems, seals, stamps, punches, badges, orders, decorations, postage stamps, means of payment (banknotes, coins, cash), which have an official character. This provision therefore expands the range of works that cultural institutions can use without fear of copyright infringement.

Protection of old photographs

It should be noted that there is a special regulation in the Polish legal system of the right to so-called old photographs, i.e. those which were created before the entry into force of the currently binding Copyright Act, and which were subject to protection under the previously existing provisions (the Copyright Act of 29 March 1926 and the Copyright Act of 10 July 1952).

Pursuant to the current Copyright Act (Article 124(1), point 3), there is the so-called "revival of rights" - with the entry into force of the current regulation (4 May 1994), the previously expired copyrights became effective again if they enjoy protection under the current act: " The copyright protection of which under previous regulations has expired, but which under this Act continue to

be protected except for the period between the expiry of protection under the previous act and entry into effect of this Act ".

This is the case with photographic works created in the years:

- 1926-1952 - under the Copyright Act of 29 March 1926,
- 1952-1994 - on the basis of the Copyright Act of 10 July 1952

In order for such photographs to be protected, the author had to make a clear reservation of copyrights to the work:

- In accordance with the 1926 law, it had to be shown on the prints,
- According to the 1952 law, it had to be shown on the work.

According to these laws, the author could decide whether the photograph was to constitute a work and be protected by copyright.

Under Article 124, copyrights have returned to the creators of photographic works, but only if they have reserved the copyrights - otherwise they have never been protected, so there are no rights that could be 'revived'. Therefore, in the absence of appropriate copyright information (on the prints or on the work, depending on the period in which the photograph was created), photographs from that period will not be protected.

9.4.2 Open Data Directive

In August 2020, a draft law on open data and re-use of public sector information, implementing Directive 2019/1024 (Open Data Directive) into Polish law, was made available and submitted to public consultation. Currently, the legislative work is at the stage of internal consultations of the document.

Among the most important changes for cultural institutions in relation to the current regulation in this area - the Act of 25 February 2016 on the re-use of public sector information (Journal of Laws 2016, item 352), there is a new provision that simplifies the rules for the re-use of public sector information held by libraries, archives and museums.

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10 Annex V – Spain

10.1 Copyright-related provisions

10.1.1 Exceptions and limitations

In Spain, the consolidated text of the law of intellectual property (*Texto Refundido de la Ley de Propiedad Intelectual*) provides in its Article 37 for the exceptions and limitations to cultural organizations to carry out certain acts without the authors' authorization. This Article is divided in three parts depending on the right that is affected: the first one shows the exceptions to the reproduction right, the second one to the lending right and the third one shows the exceptions to the communication to the public right.

10.1.1.1 *Preservation exception*

With regards to the preservation exception, we will only focus in the first paragraph, according to which 'the copyright holders may not oppose the reproductions of the works, when they are made without profit by museums, libraries, sound libraries, film libraries, newspaper libraries or archives of public ownership or integrated into institutions of a cultural nature or scientific and reproduction is made exclusively for research or conservation purposes'⁹⁸⁶.

It must be mentioned that the introduction of the 'preservation exception' in Spanish law came only after the adoption and implementation of the Infosoc Directive, when the Law 23/2006 was adopted in Spain. This law added the reference to 'preservation purposes' to the possibilities of making reproductions of the works without authorization of the rightholder, adding it to the already established 'scientific purposes' on Article 37(1).

Beneficiaries

Reproductions of works are allowed only for the following beneficiaries: 'museums, libraries, sound libraries, film libraries, newspaper libraries or archives of public ownership or integrated into institutions of a cultural nature or scientific'.

Contrary to Article 5.2.c)⁹⁸⁷ of the Infosoc Directive⁹⁸⁸, the Spanish legislator also included 'newspaper libraries and sound libraries' as beneficiaries. However, the Spanish legislator

⁹⁸⁶ The Spanish Intellectual Property Law.

⁹⁸⁷ Infosoc Directive.

⁹⁸⁸ See analysis of Article 5 of the Infosoc Directive in Deliverable 2.1.

imposes stricter conditions on the character of the institutions as Article 37(1) does not classify such organisms through its activity but through the public or private character of the institution: institutions therefore need to be publicly owned⁹⁸⁹ or need to be integrated in institutions of a cultural or scientific nature. It is generally agreed by the doctrine that this is not an exhaustive closed list and hence other institutions could be also beneficiaries of the exception as long as they pursue the objective of archiving or custody of works whose material form is still unknown or other institutions that carry out cultural promotion's activities as long as they comply with the statutory requirements⁹⁹⁰. Yet, while the Infosoc Directive includes the possibility of educational establishments to benefit from such exception, they are not included under the Spanish IP law.

Purpose of the exception

The reproduction of the work needs to be for non-profit purposes and the purposes need to be preservation (or research).

However, the text lacks certain details, as nothing is said in the text on what is understood by 'preservation'. As Serrano Fernandez explains, it can be understood as the reproduction in the sense of the direct or indirect fixation of all or part of the work, with provisional or permanent character, that would allow making copies of the work⁹⁹¹. Normally, can be generally understood that carrying out a copy of the work to avoid the work to be lost or to be damaged in the future is allowed. However, in her views, it is not as clear that making a copy to replace such work for the work itself, e.g. in a library, could be done⁹⁹². It also seems, in her views, that the impossibility to obtain another (same) work due to the fact that such work may be out-of-commerce or highly priced in the market could allow beneficiaries to rely on this exception as well. On top of this, if the beneficiaries only have one work or one copy of the work or only in one format (e.g. only in physical format), institutions could make reproductions of such works under the exception.

Yet, the author considers that digitizing the whole collection is not allowed under this exception as the provision refers to 'specific acts of reproduction'⁹⁹³.

With regards to the specific reference to 'non-profit purposes', the legislator excludes the possibility for the beneficiaries of such exception to generate revenues though the reproductions of these works when the beneficiaries rely on this exception. Yet, the obtention of copies against payment of a fee is not excluded.

⁹⁸⁹ Triaille and others (n 22) 275.

⁹⁹⁰ Serrano Fernández (n 14) 100.

⁹⁹¹ Serrano Fernández (n 14) 107.

⁹⁹² Serrano Fernández and others (n 40) 46.

⁹⁹³ Serrano Fernández (n 14) 107.

In her views, the second limitation of such exceptions relies on the fact that the provision lacks further description on the conditions under which the copies of the work may be allowed or the number of copies that could be allowed under this exception⁹⁹⁴. The provision does not specify whether making copies of digital works is allowed under the exception⁹⁹⁵.

10.1.1.2 Research and private study standing in dedicated terminals (Infosoc Directive)

The Spanish legislator opted for introducing such exception in the third paragraph of Article 37 of the Spanish IP law:

‘The communication of works or their making available to specific people of the public for research purposes will not need authorization from the author when it is carried out through a closed and internal network through specialized terminals installed for this purpose in the premises of the establishments mentioned in the previous section and provided that such works appear in the collections of the establishment itself and are not subject to acquisition or license conditions. All this without prejudice to the author's right to receive equitable remuneration’.

The Spanish legislator therefore establishes that beneficiaries of this exception can actually make the works available to the public for scientific purposes through a closed network on the premises of the institutions. The established specific conditions of this exception are:

- (i) it cannot be done for the general public but it is addressed to specific individuals that need to get access for scientific research;
- ii) through a closed and secured network e.g. an intranet;
- iii) the access need to be obtained through specific devices installed in the specific institutions, forbidding such access in the individuals’ devices.

Beneficiaries

The beneficiaries of this exception are listed in the first paragraph of Article 37 (see previous section), which are the following: museums, libraries, sound libraries, film libraries, newspaper libraries or archives of public ownership or integrated into institutions of a cultural nature or scientific.

Purposes of the exception

⁹⁹⁴ Serrano Fernández and others (n 40) 47.

⁹⁹⁵ Serrano Fernández (n 14) 114.

To be able to benefit from this exception, the consultation of such works need to be done for research purposes. Unlike Article 5.3.n) of the Infosoc Directive⁹⁹⁶⁹⁹⁷ that included personal study as a purpose for this exception, the Spanish legislator did not include such possibility. Hence it is only valid for research purposes and this exception does not allow for the user to make any copy of the work or even to download it into another device⁹⁹⁸. Furthermore, works falling under the exception are only those works in the collections of the institutions. Works that are subject to acquisition or licences do not fall under the exception. This requisite is problematic as digital works are normally under a license. Works that an institutions has through e.g. interlibrary loan should not fall under the scope of the exception⁹⁹⁹. The making available of works is not open to the general public but only to those people that request it¹⁰⁰⁰.

In order to provide access to a work though a digital internal and secured network, the work needs to be previously digitized. In this line, all the acts to digitized the works should be implicitly authorized. Yet, other acts such as downloading the work are not allowed under the exception¹⁰⁰¹.

The Spanish legislator does not introduce any mechanism or entity that could control that the use of the work is actually carried out according to the established purposes, and this has been criticized by the doctrine¹⁰⁰².

Further, the Spanish legislator imposes the condition according to which the authors should receive an equitable remuneration from the use of their works under this exception¹⁰⁰³.

10.1.1.3 Advertising the public exhibition or sale of artistic works

This exception is not included in the Spanish IP law.

10.1.1.4 Text and Data Mining

At the moment of writing this deliverable, there is no a draft text of the implementation of the CDSM Directive available.

⁹⁹⁶ Infosoc Directive.

⁹⁹⁷ See the analysis of the exceptions and limitations of the Infosoc Directive carried out in the Deliverable 2.1.

⁹⁹⁸ Bercovitz Rodríguez Cano and others (n 80) 121.

⁹⁹⁹ Bercovitz Rodríguez Cano and others (n 80) 120.

¹⁰⁰⁰ Serrano Fernández and others (n 40) 58.

¹⁰⁰¹ Serrano Fernández and others (n 40) 49.

¹⁰⁰² Serrano Fernández (n 14) 124.

¹⁰⁰³ Triaille and others (n 22) 315.

10.2 Specific regime in respect to particular types of works

10.2.1 Orphan works

Article 37bis of the Spanish IP law transposes into national law the provisions set up in the Orphan Works Directive¹⁰⁰⁴ (which needs to be conceived together with the Royal Decree 224/2016¹⁰⁰⁵ that sets up the applicable legal regime for orphan works) that regards to permitted uses by certain institutions of the uses of orphan works¹⁰⁰⁶.

Types of works

Alike the Infosoc Directive, this Article establishes that orphan works are those works that after having carried a diligent search, authors cannot be located or traced. Yet, this Article included within the scope of the exception those works owned by different rightholders when not all of them have been identified or have not been located ‘without prejudice to the rights of the owners who have been identified and located and, where appropriate, the need for the corresponding authorization’¹⁰⁰⁷. In these cases, for CHIs to use the works, the attribution of the works to those authors that have been identified is required¹⁰⁰⁸.

Not all the works in CHIs’ collections can get the ‘orphan’ status under Spanish law. Paragraphs a) and b) of Article 37bis provides for a list of types of works that could be considered orphans after a diligent search is carried out:

a) ‘Cinematographic or audiovisual works, phonograms and works published in the form of books, newspapers, magazines or other printed material that appear in the collections of educational centres, museums, libraries and newspaper libraries accessible to the public, as well as archives, sound libraries and film libraries.

b) Cinematographic or audiovisual works and phonograms produced by public broadcasting organizations up to and including December 31, 2002, and which appear in their archives’¹⁰⁰⁹.

Works embedded in these works that form part of such works fall also under the scope of the exception.

Beneficiaries

¹⁰⁰⁴ Orphan Works Directive.

¹⁰⁰⁵ Spanish Royal Decree 224/2016, of May 27, by which the orphan works legal regime is established.

¹⁰⁰⁶ See analysis of the Orphan Works Directive in Deliverable 2.1

¹⁰⁰⁷ The Spanish Intellectual Property Law art.37bis.2.

¹⁰⁰⁸ The Spanish Intellectual Property Law art 37bis.3.

¹⁰⁰⁹ The Spanish Intellectual Property Law art.37bis.4.

‘Educational centres, museums, libraries and newspaper libraries accessible to the public, as well as public broadcasting organizations, archives, sound libraries and film libraries’ are included as beneficiaries of the exception provided by Article 37bis. It is important to highlight the difference between the first group of beneficiaries- educational centres, museums, libraries and newspaper libraries- that need to be publicly accessible and the second group of beneficiaries- public broadcasting organizations, archives, sound libraries and film libraries- whose ownership needs to be public¹⁰¹⁰.

Subject matter

The above-mentioned beneficiaries can therefore reproduce the works for the purposes of digitization, making available to the public, indexing, cataloguing, conservation or restoration, and make available to the public.

Yet, these acts must be ‘carried out non-profit and in order to achieve objectives related to its mission of public interest , in particular the conservation and restoration of the works that appear in its collection and the facilitation of access to it for cultural and educational purposes’¹⁰¹¹. In this context, the uses of works need be made for non-commercial purposes although CHIs can generate certain amount revenues in order to cover the digitization costs and the costs related to the making available of the works. These costs cannot be covered by any other institution. Obtaining reproductions of the orphan works can be subject to a fee¹⁰¹².

Diligent search

As enacted by the Orphan Works Directive, an orphan work can only acquire the orphan status after a diligent search has been carried out. As a general rule, these works can be used when these works were published or broadcasted in one of the Member States of the EU. According to the Royal Decree 224/2016, the search needs to be carried out in the Member State where the works was published for the first time, or where it was broadcasted by the first time. In the case of audiovisual works where the film producer has his/her main residence in one Member State, the search needs be carried out in that Member State. In case of various film producers residing in different Member states, the search needs to be done in all those countries.

The Annex of the Royal Decree establishes a list of sources that can be used to conduct the diligent search. The list refers to legal deposits, library catalogues, databases of collective management organizations or databases from collective associations, depending on the type of work, among others.

¹⁰¹⁰ Bercovitz Rodríguez Cano and others (n 80) 122.

¹⁰¹¹ The Spanish Intellectual Property Law art 37bis.4.

¹⁰¹² Spanish Royal Decree 224/2016, of May 27, by which the orphan works legal regime is established. art.3.3.

The Spanish legislator introduces another requirement for Spanish institutions apart from those ones required under the Orphan Works Directive to conduct the diligent search¹⁰¹³. The results of such search must be registered and shared with the specific national authority¹⁰¹⁴ - in Spain, the *Subdirección General de Propiedad Intelectual del Ministerio de Cultura y Deporte*- that will also share this information with the EU Intellectual Property Office as required by the Orphan Works Directive. The institution has to communicate the potential uses of the orphan works and any change in the status of the works to the responsible authority.

End of the orphan work status

As required by the Orphan Works Directive, the orphan status of a work can end at any time if the rightholders are located or identified. In this case, the rightholder may ask the national authority or the beneficiary, after proving its ownership of the work, to conclude the orphan status of his/her work¹⁰¹⁵. In this case, the rightholder has the right to obtain a compensation for the uses that have been made of his/her work¹⁰¹⁶ during the time the work was considered 'orphan'.

Compensation

The Royal Decree 224/2016 establishes certain criteria that need to be taken into account for determining the compensation due to the rightholder:

- i) the use of the orphan work
- ii) the non-commercial purpose if such uses are carried out by the cultural institution
- iii) the potential harm caused to the rightholder(s)¹⁰¹⁷.

Such compensation shall be agreed between the rightholder and the cultural institution. In the absence of agreement, the amount of the compensation will be decided by the national authority – in Spain, the *Sección Primera de la Comisión de Propiedad Intelectual*-¹⁰¹⁸.

10.2.2 Out-of-commerce works

At this moment there is no draft law implementing the CDSM Directive in Spain.

¹⁰¹³ Bertoni, Guerrieri and Montagnani (n 140) 141.

¹⁰¹⁴ Spanish Royal Decree 224/2016, of May 27, by which the orphan works legal regime is established. art.4.7.

¹⁰¹⁵ Spanish Royal Decree 224/2016, of May 27, by which the orphan works legal regime is established. art.7.

¹⁰¹⁶ The Spanish Intellectual Property Law art 37bis.7.

¹⁰¹⁷ Spanish Royal Decree 224/2016, of May 27, by which the orphan works legal regime is established. art.7.2.

¹⁰¹⁸ Spanish Royal Decree 224/2016, of May 27, by which the orphan works legal regime is established. art.7.3.

10.2.3 Works of visual arts in the public domain

At this moment there is no draft law implementing the CDSM Directive in Spain.

10.2.4 Non-original photographs

Under the Spanish IP law, in the same way that Article 6 of the Term Directive, grants copyright protection for ‘photographs and those expressed by a procedure analogous to photography’ in its Article 10.1.h). Yet, this Directive also allows EU Member States to provide for further protection of exclusive rights to those photographs that are not considered original enough to be granted copyright protection¹⁰¹⁹.

Neighbouring right

In Spain, the legislator opted for using such possibility and introduced an exclusive right in its Article 128 for the protection of non-original photographs (simple photographs). The protection of these photographs relies on the certain commercial, documentary or scientific value that simple photographs may still have¹⁰²⁰. According to this article, the person that takes a photograph (or any reproduction in an analogous manner) can obtain the exclusive right of authorizing its reproduction, distribution and communication to the public. The reference to the ‘analogue procedure’ opens the door to include those digital photographs or those analogical photographs that are made without a film.

The exclusive right granted to these photographs is narrower than the copyright protection as authors of original photographs. The exclusive right offers the rightholder the possibility to authorize the reproduction, distribution and communication to the public of the photograph. However, this right does not confer protection against the making of two identical photographs but against the making of copies of the photograph itself. It must be noted that the photographers of such photographs are not granted moral rights neither the adaptation right, among others¹⁰²¹.

Definition of non-original photographs

According to Bercovitz, the law does not provide for a definition of a ‘simple photograph’ but such recognition is made in opposition to those photographs whose level of originality grants them copyright protection. In this context, the doctrine understands that these photographs aim at reproducing common objects and daily events, even with a high technical level.

¹⁰¹⁹ See Deliverable 2.1 for the analysis of the Term Directive and the protection of photographs at EU level.

¹⁰²⁰ Bercovitz Rodríguez Cano and others (n 80) 289.

¹⁰²¹ Román (n 249) 1088.

Spanish courts have set the bar of originality for photographs high and consider that it needs to be assessed case by case taking account of the intellectual effort of the author when making the photograph. In this context, the Spanish case-law has denied copyright protection, for instance, to certain photographs reproducing religious images, public located sculptures, or photographs for a collection of swimming suits¹⁰²².

In addition, it is broadly understood by the doctrine that the protection granted in Article 128 is extended to those photographs that are taken by security machines, e.g. a satellite. Yet, a certain intellectual creativity is required in order to be granted such protection. For this reason, there are photographs that will not obtain this kind of protection, for instance photographs made by machines, or made as a simple reproduction of a document. A photograph of an artwork will nevertheless be granted such protection.

Authorship

The owner of this right is the photographer or the person that takes the photograph. Nevertheless, in those cases where there is more than one person involved in the process, e.g. one person involved in the creative process and another person involved in the technical process such as in the photo printing, the person that actually takes the photograph (not the person involved in a preparatory or printing phase) will be considered the author of the work. For collective works, in the sense of Article 8 of the Spanish IP law, the ownership would belong to the entities that finances the work. In those cases where the photographs are taken by machines, the responsible company will be considered the rightholder.

Term of protection

The protection granted under Article 128 is certainly shorter than the copyright protection since it has a duration of twenty-five years 'counted from January 1 of the year following the date of taking the photograph or reproduction'¹⁰²³. The period of protection starts running from the moment the photograph is communicated to the public. In the absence of publication, it starts running from the moment of the making of the photograph which is considered as the moment when the image is 'captured' in a film or any other medium, namely the moment of first fixation¹⁰²⁴.

¹⁰²² Bercovitz Rodríguez Cano and others (n 80) 292.

¹⁰²³ The Spanish Intellectual Property Law art.128.

¹⁰²⁴ Román (n 249) 1092.

10.2.5 Databases

Following the two-tier protection regime established by the Database Directive, the Spanish legislator regulates¹⁰²⁵, on the one hand, original databases within the works that can be protected by copyright (Book I) and, in the other hand, the databases protected by the sui-generis rights are regulated in Book II together with other related rights. It must be noted that the Spanish legislator transposed the Directive almost literally¹⁰²⁶.

Copyright protection

Article 12 of the Spanish IP law, which forms part of the provisions addressing the ‘author’s rights, regulates the system of protection of databases and ‘collections’ that deserve copyright protection. In this context, the Spanish IP law grants copyright protection to ‘collections of third party works, data or other independent elements such as anthologies and databases that by the selection or arrangement of their contents constitute intellectual creations, without prejudice, where appropriate, to the rights that may subsist on their contents’¹⁰²⁷.

Paragraph 2 of the same article provides for a definition of databases. According to this article, databases are those ‘collections of works, data, or other independent elements arranged in a systematic or methodical manner and individually accessible by electronic means or other means’. This definition of databases is also applicable to the databases protected by the sui-generis right explained in the next section.

The Spanish IP law considers this type of works as ‘derivative works’ in the sense that they integrate complete or parts of other works. Yet, databases can also constitute independent works when they select and arrange other elements that do not constitute a ‘work’, e.g. enumeration of information or data¹⁰²⁸. Another type of databases, mixed databases or collections can also be found when they integrate works capable of being protected by copyright and other elements and/or data.

It must be noted that the protection granted only refers to the structure of the database or collection in the sense that it is the ‘form of expression of the selection or arrangement of their contents, not being extensive to them’.

¹⁰²⁵ The EU provisions with regards to databases was transposed into the Spanish Intellectual Property law through the adoption of the Law No. 5/1998 of March 6, 1998, on the Incorporation in Spanish Law of Council Directive 96/9/EEC of March 11, 1996 on the Legal Protection of Databases.

¹⁰²⁶ See Bently and others (n 257).

¹⁰²⁷ The Spanish Intellectual Property Law art.12.1.

¹⁰²⁸ Bercovitz Rodríguez Cano and others (n 80) 76.

For databases and collections to be granted copyright protection, they need to be original with the meaning that they are its author's intellectual creations. In these cases, their original character mainly depends on the selection and arrangements of works or other elements in the database or collection. For instance, a routine or commonly-used criteria for the arrangement of works such as alphabetic or chronologic arrangements will not lead to copyright protection as the originality level would not be considered enough.

Sui-generis right protection

The sui-generis right applicable to non-original databases is introduced in the Title VII of the Spanish IP law (Articles 133 to 137). The Spanish IP system grants a sui-generis right for databases protecting the 'substantial investment, qualitatively or quantitatively evaluated, carried out by its manufacturer, whether of financial means, use of time, effort, energy or others of a similar nature, to obtain, verify or present its content'¹⁰²⁹.

Similar to the Database Directive, the threshold for the sui-generis right is that a qualitatively and/or quantitatively substantial investment has been made with regard to obtaining, verifying or presenting the specific contents. As Bercovitz explains, the verification of the database entails the accuracy and completeness assessment of all the elements included in the database. With regards to the presentation of the contents, this task requires the systematic or methodological arrangement of the contents of the database¹⁰³⁰. The concept of substantial investment raises certain problems due the difficulties that Courts face when assessing whether a substantial investment has or has not been made, except from those cases where a high economic investment was made¹⁰³¹. The Spanish legislator does not provide a definition of the concept of 'substantial investment' but expands this investment to 'time, effort or energy', apart from the already-mentioned financial investment¹⁰³².

Beneficiaries

The rightholder in Spanish law is the 'manufacturer or producer of the database', who, according to the third paragraph of Article 133, is the natural or legal person that makes the substantial investment aimed at obtaining, verifying or presenting the content of the database¹⁰³³. To obtain this protection the rightholder must be a national of an EU Member State or otherwise have his/her permanent residence in one of the EU countries¹⁰³⁴. This right is also applicable to those

¹⁰²⁹ The Spanish Intellectual Property Law art.133.1.

¹⁰³⁰ Bercovitz Rodríguez Cano and others (n 80) 304.

¹⁰³¹ See *Judgement of the Madrid Court number 13 of 24 July 2001, case Aranzadi v El Derecho*.

¹⁰³² Bently and others (n 257) Annex 6.

¹⁰³³ The Spanish Intellectual Property Law art.133.3(a).

¹⁰³⁴ The Spanish Intellectual Property Law art.203.1.

companies that have their official residence in one of the Member States. This right can be assigned or licensed.

Scope of application

The rightholder 'may prohibit the extraction and / or re-utilization of the whole or substantial part of the database'. The Spanish legislator opted for introducing the same terminology as the Database Directive, making a reference to the 'extraction' and 're-utilization' in order to differentiate this right from the traditional 'author's rights'¹⁰³⁵. This differentiation of the 'substantial part of the database' is especially relevant as the rightholder cannot prevent the legitimate user from extracting or re-utilizing non-substantial parts of the database.

Importantly, the sui-generis right and the copyright protection on the database or on the contents of the database are not exclusive and may be cumulative¹⁰³⁶.

Term of protection

Following the Database Directive, the duration of the protection is fifteen years since the finalization of the creation of the database¹⁰³⁷. Importantly, the database will not be protected by the sui-generis rights during the time prior to its conclusion¹⁰³⁸. Yet, when the database was communicated to the public before this period, the term of protection will start running from the moment the database was communicated to the public¹⁰³⁹. This communication to the public must be legally carried out.

To conclude, each modification of the database that generates a new substantial investment will raise a new term of protection of fifteen years¹⁰⁴⁰.

10.3 Other copyright matters in a nutshell

10.3.1 The public lending derogation

The second paragraph of Article 37, establishes that specific institutions will not need the authorization of the rightholder for the loans they make. This exception needs to be read

¹⁰³⁵ Gemma Minero, 'Protección Jurídica de Las Bases de Datos: Estudio de La Aplicación de La Directiva 96/9/CE Tres Lustrós Después de Su Aprobación y Comentario a La Primera Evaluación Realizada Por La Comisión Europea En 2005' [2011] Pe.i., Revista de propiedad intelectual 28.

¹⁰³⁶ The Spanish Intellectual Property Law art.133.4.

¹⁰³⁷ The Spanish Intellectual Property Law art.136.1.

¹⁰³⁸ Bercovitz Rodríguez Cano and others (n 80) 315.

¹⁰³⁹ The Spanish Intellectual Property Law art.136.2.

¹⁰⁴⁰ The Spanish Intellectual Property Law art.136.3.

altogether with Article 19(4) that regulates the lending right within the distribution right in the Spanish copyright law.

Beneficiaries

According to the Spanish law, these institutions are: ‘museums, archives, libraries, newspaper libraries, sound libraries or film libraries of public ownership or that belong to non-profit entities of general interest of a cultural, scientific or educational nature, or to educational institutions integrated in the Spanish educational system’¹⁰⁴¹.

It must be noted that although this provision does not mention that these institutions must be publicly accessible, this requisite is nevertheless already established under paragraph 4 of Article 19 which requires that loans need to be made through publicly accessible institutions¹⁰⁴².

In addition, educational systems are, unlike the preservation exception, included as beneficiaries of this exception (e.g. a school or high-school library)¹⁰⁴³.

Although Article 37(2) does not establish the requirement of lending for non-profit, Article 19(4) only allows the lending of works for non-commercial purposes.

Types of works

The Spanish IP law does not impose any limitation to the types of works that can fall under this exception. Yet, with regards to the possibility of lending e-books, attention needs to be given to the CJEU judgement of *Openbare Bibliotheken*¹⁰⁴⁴¹⁰⁴⁵. In brief, the CJEU ruled that loans of e-books should be regarded as having the same characteristics as lending printed books¹⁰⁴⁶. Therefore, libraries could, under the public lending derogation, provide e-lending as long as authors are remunerated for the use of their works. Nevertheless, e-lending needs to be treated in the same way as the lending of traditional books – one copy, one user¹⁰⁴⁷.

Compensation system

This exception requires the payment of a compensation to the rightholders for the loans made through the institutions ‘in the amount determined by Royal Decree’¹⁰⁴⁸. In Spain this

¹⁰⁴¹ The Spanish Intellectual Property Law art 37.2.

¹⁰⁴² Serrano Fernández (n 14) 116.

¹⁰⁴³ Bercovitz Rodríguez Cano and others (n 80) 119.

¹⁰⁴⁴ *Vereniging Openbare Bibliotheken v Stichting Leenrecht (C-174/15) EU:C:2016:856*. (n 339).

¹⁰⁴⁵ Further explanation can be found in Deliverable 2.1.

¹⁰⁴⁶ *Vereniging Openbare Bibliotheken v Stichting Leenrecht (C-174/15) EU:C:2016:856*. (n 339) para 53.

¹⁰⁴⁷ Janssens and Michaux (n 342).

¹⁰⁴⁸ The Spanish Intellectual Property Law art.37.2.

compensation is made through the collective management organizations. The amount that will need to be paid to the rightholders for the loans made by the institutions is determined by a lump sum¹⁰⁴⁹. It must be noted that the CJEU in its *Vewa* case¹⁰⁵⁰ established that setting a lump sum remuneration is contrary to the Rental and Lending Directive¹⁰⁵¹ as such remuneration should be determined by the number of works made available and the number of borrowers of the public establishment that carries out the lending.

Exemption to compensate rightholders

The Infosoc Directive introduces the possibility for Member States to exempt certain establishments from the compensation system. In this context, the Spanish legislator makes use of such possibility by exempting

- i) 'publicly owned establishments that provide services in municipalities with fewer than 5,000 inhabitants;
- ii) libraries of educational institutions integrated into the Spanish educational system'¹⁰⁵².

10.3.2 Moral rights

Although Spain ratified the Berne Convention in 1886, the Spanish copyright system only explicitly introduced the moral rights in the intellectual property law of 1987. Nevertheless certain provisions could be found in earlier versions of the law and other related laws¹⁰⁵³. Since then, moral rights are recognised in Article 14 of the Spanish IP law.

As established in this article, the moral rights are exclusive rights that belong to the author of the work and that are inalienable and irrevocable.

Types of moral rights

The right of disclosure or divulgation.

¹⁰⁴⁹ This amount is established in the Spanish Royal Decree 624/2014, of July 18, which develops the right of remuneration to authors for the loans of their works carried out in certain establishments accessible to the public.

¹⁰⁵⁰ *Vereniging van Educatieve en Wetenschappelijke Auteurs (VEWA) v Belgische Staat (C-271/10) EU:C:2011:442* (n 355).

¹⁰⁵¹ Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

¹⁰⁵² The Spanish Intellectual Property Law art.37.2.

¹⁰⁵³ Law 17/1966, of May 31, on intellectual property rights in cinematographic works. art.4 and art.6.

This is the first moral right that is included in the first paragraph of Article 14. According to it, the author has the right to decide if his/her work can be disclosed and the manner how it should be disclosed.

This right needs to be read altogether with the definition of ‘disclosure’ that the law explicitly provides: ‘the disclosure of a work is understood as any expression of the work that, with the consent of the author, makes it accessible to the public for the first time and in any form’¹⁰⁵⁴. In this regard, the author’s right of disclosure must be connected to whether the work has been made accessible to the public. The law does not establish any requirement concerning the ‘form’ on how the work is made known to the public. Therefore any manner that could be appropriate for the public to get to know the work is, in principle, allowed by the law¹⁰⁵⁵.

On the contrary, the author has the right to oppose to the disclosure of his/her work. Hence, if the work was disclosed without the author’s authorization, the disclosure should be considered as illegal¹⁰⁵⁶.

The right of attribution (or paternity right).

Under the Spanish IP law, the author has the right to claim the recognition as author of his/her work. This is explicitly established in the third paragraph of Article 14. However the Spanish IP law contains other provisions that specify, for certain situations, the right of attribution. This is the case of paragraph 2 of Article 14 which also provides the right of the author to disclose his work under his name, anonymously or under a pseudonym. In this scenario, the author will always be able to disclose his identity. Another provision related to the right of attribution is shown in relation to the publishing contracts, where the publisher has the obligation to mention the author¹⁰⁵⁷.

The right of integrity.

The right of integrity is the right of the author to ‘demand respect for the integrity of the work and prevent any deformation, modification, alteration or attack against it that prejudices his legitimate interests or undermines his reputation’¹⁰⁵⁸ as provided in paragraph 4 of the same article. The Spanish legislator broadens the situations, in comparison with the Berne Convention¹⁰⁵⁹, in which the author can claim his right of integrity by introducing the reference to ‘legitimate interests’. Although assessing the concept of ‘legitimate interests’ is an arduous

¹⁰⁵⁴ The Spanish Intellectual Property Law art.4.

¹⁰⁵⁵ Rogel Vide and others (n 457) 46.

¹⁰⁵⁶ Bercovitz Rodríguez Cano and others (n 80) 134.

¹⁰⁵⁷ The Spanish Intellectual Property Law art.64.1.

¹⁰⁵⁸ The Spanish Intellectual Property Law art.14.4.

¹⁰⁵⁹ The Berne Convention art.6bis, only mentions ‘his honour or reputation’.

task, it seems clear for the doctrine that it refers to the moral or personal interests of the author, excluding the economic interests from such assessment¹⁰⁶⁰. In the Spanish case-law, the Supreme Court has adapted its criteria to assess whether specific situations would entail an attack to the moral right of integrity. In early cases, the Supreme Court stated that most of the modifications made to the work would entail an infringement of the right of integrity¹⁰⁶¹. However this approach has changed over the years as now the Court establishes that the scope of the modification needs to be taken into account¹⁰⁶²¹⁰⁶³.

The author's right of integrity is also a matter that the Spanish law foresees in relation to publishing contracts¹⁰⁶⁴, music and theatre performances¹⁰⁶⁵ and audiovisual and cinematographic works¹⁰⁶⁶.

The right of modification.

Spanish law grants the author the right to modify the work as long as he/she respect the rights acquired by third parties and the requirements for the protection of cultural goods when the cultural goods have been declared officially protected under Spanish cultural heritage laws, in its paragraph 5 of Article 14.

This right can be easily confused with the transformation right, explained in Section 10.3.3. Although there are different theories that can explain the differences between the moral right of modification and the economic right of transformation, the clearest distinction relies on the substantial character of the modification of the work. Most of the doctrine agrees on following the criterion of the generation of a new derivative work. When this is the case, namely that the modification is so substantial that a new work is created, it would be due to the right of transformation. On the contrary, the right of modification would allow a modification of a less substantial character that would not generate a new work, but a modified version of the work¹⁰⁶⁷.

This right, unlike other moral rights, can be exercised by the author relying on different reasons that do not need to have a 'moral character'. Modifications of the works can be made, for instance, due to a need of updating the work or for esthetical reasons¹⁰⁶⁸.

¹⁰⁶⁰ Bercovitz Rodríguez Cano and others (n 80) 137.

¹⁰⁶¹ See *STS 421/1991, 3 June 1991 of the Spanish Supreme Court* (n 444).

¹⁰⁶² See *STS 1082/2006, 6 November 2006 of the Spanish Supreme Court* (n 445).

¹⁰⁶³ Bercovitz Rodríguez Cano and others (n 80) 139.

¹⁰⁶⁴ The Spanish Intellectual Property Law art.64.1.

¹⁰⁶⁵ The Spanish Intellectual Property Law art.78.2.

¹⁰⁶⁶ The Spanish Intellectual Property Law art.92.2.

¹⁰⁶⁷ Bercovitz Rodríguez Cano and others (n 80) 140.

¹⁰⁶⁸ Bercovitz Rodríguez Cano and others (n 80) 141.

The right of retraction.

The right of retraction allows the author to withdraw a work from circulation 'due to a change in their intellectual or moral convictions' after providing compensation to the rightholders of economic rights¹⁰⁶⁹.

Hence the law allows the artist to reverse the assignment contract according to which the work was going to be commercially exploited. By introducing such right, the legislator protects the will of the author by allowing him to make decisions, even after signing any (commercial) agreement, in relation to the circulation in trade of his/her work in case the author regrets at any moment having the work in the commercial trade¹⁰⁷⁰.

The law, on the other hand, does not require to give the material work back to the author (in case the work is fixed in a material form). In order to protect third parties' rights, in case the author wishes at any time to resume the exploitation of the work, the previous rightholder enjoys a preferential treatment to exploit it 'under conditions reasonably similar to the original ones'.

The right of access

This is a particular moral right contemplated under the Spanish IP law which gives the author the opportunity to 'access the unique or rare copy of the work, when it is in the physical possession of another person, in order to exercise the right of disclosure or any other'¹⁰⁷¹.

Although the Spanish law does not provide any definition of 'unique or rare copy of the work', the doctrine understands that it would normally refer to works of visual arts, e.g. a painting or sculpture, which cannot be replaced or substituted by any other work or copy of the work¹⁰⁷².

Therefore, this right gives the author the possibility to obtain the work in order to exercise any moral or economic right that is attributed to him. It seems clear that the right to access the work must have the purpose of exercising any other right, moral or economic, on the work, and not only having access to the work *per se*¹⁰⁷³. Nevertheless, in order to offer a certain protection to the holder of the work, there are certain limitations, e.g. the author cannot ask for the moving of the work in the sense that access to the work needs to be made in a manner that does not pose problems to the holder of the work. In addition, the author will compensate the third party for any damages or losses incurred.

¹⁰⁶⁹ The Spanish Intellectual Property Law art.14.6.

¹⁰⁷⁰ Rogel Vide and others (n 457) 154.

¹⁰⁷¹ The Spanish Intellectual Property Law art.14.7.

¹⁰⁷² Rogel Vide and others (n 457) 176.

¹⁰⁷³ Rogel Vide and others (n 457) 185.

Term of protection

The Berne Convention establishes that moral rights must have the duration, at least, until the expiration of economic rights¹⁰⁷⁴. The moral rights under the Spanish jurisdiction can be exercised *post-mortem*, namely, after the death of the author. This is expressly established under Article 15.

However, not all the moral rights observed in the previous article can last after the author's death but only the rights of divulgation, attribution and integrity. The rest of the moral rights expire with the death of the author. Nonetheless, while the integrity and paternity right have a permanent character, the divulgation right will expire 70 years after the author's death (as the economic rights).

This is of special importance in relation to works in the public domain, analysed in Section 10.4, as Article 41 of the Spanish IP law provides that works in the public domain will still need to observe the paternity and integrity rights (for those works that were protected by copyright).

After the author's death, the exercise of the above-mentioned rights corresponds to the 'natural or legal person to whom the author has expressly entrusted it by means of a last will'. In case of absence of a last will, the exercise of the rights will correspond to his heirs¹⁰⁷⁵. In case that these persons do not exist or cannot be located, the State, the autonomous Communities or the cultural institutions will exercise such rights¹⁰⁷⁶.

Other particularities

Right of disclosure and access to culture

In relation to the right of divulgation, the Spanish legislator introduces a particular provision which is the only provision contemplated under the Spanish IP law that provides any practical arrangement on how to exercise the moral rights after the authors' death.

In this context, when the successors of the authors exercise the right to not disclose a work and exercise it in a manner that infringes Article 44 of the Spanish Constitution¹⁰⁷⁷ on access to culture, Article 40 on the Spanish IP law allows any person with a legitimate interest to ask the national Court to intervene (in order to disclose the work). It is generally understood that this provision

¹⁰⁷⁴ The Berne Convention art.6bis.

¹⁰⁷⁵ The Spanish Intellectual Property Law art.15.2.

¹⁰⁷⁶ The Spanish Intellectual Property Law art.16.

¹⁰⁷⁷ Article 44 of the Spanish Constitution of 1978 establishes that 'the public authorities will promote and protect access to culture, to which everyone has the right'.

would be mostly exercised by cultural associations or cultural institutions¹⁰⁷⁸. This provision has been considered by the doctrine as a limitation to the right of (non) disclosure¹⁰⁷⁹.

10.3.3 Adaptation right

In Spanish IP law, the adaptation right has been included as (literally) translated ‘transformation right (in Spanish, *‘derecho de transformacion’*). This right was included into the Spanish IP law in Article 21 within the Second Section on exclusive exploitation rights, together with the right of distribution, reproduction or communication to the public.

The first paragraph of this article provides a definition of the concept of transformation: ‘the transformation of a work includes its translation, adaptation and any other modification in its form from which a different work is derived. In the case of a database referred to in Article 12 of this Law will also be considered transformation, the rearrangement of the same’.

The Spanish legislator regulates in a broad manner the concept of transformation in the sense that any modification in its form that originates another work is subject to the transformation right. Among these manners of modification, the translation of the work and the adaptation of the work- as a modification of a work to another type of work , e.g. from a novel to a cinematographic work- are explicitly mentioned in Article 21. Yet, the reference to ‘any modification’ broadens its scope to any form of modification in order allow any type.

Not all modifications would lead to originate a derivative work. So as to be considered as a derivative work, the transformation of the original work needs to be creative enough where any unsubstantial modification must be excluded. Other modifications of a work that originate a complete independent work (but may have found inspiration in the original work) are neither considered as transformations of the original work¹⁰⁸⁰.

Derivative works and composed and independent work.

As seen, the transformation right normally entails the creation of a new work, a derivative work or a ‘composed work’. For this reason, the relevant definitions given by the Spanish IP law needs to be explained. Article 9 defines a ‘composed work’ as ‘a new work that incorporates a pre-existing work without the collaboration of the author of the latter, without prejudice to the rights that correspond to him and his necessary authorization’¹⁰⁸¹.

¹⁰⁷⁸ Bercovitz Rodríguez Cano and others (n 80) 147.

¹⁰⁷⁹ Rogel Vide and others (n 457) 116.

¹⁰⁸⁰ Mariscal (n 499) 63.

¹⁰⁸¹ The Spanish Intellectual Property Law art.9.

Article 11 provides also a list of 'derivative works': '1. Translations and adaptations. 2. The revisions, updates and annotations. 3. The compendia, summaries and extracts. 4. The musical arrangements. 5. Any transformations of a literary, artistic or scientific work'.

Term of protection and assignment

As other exclusive author's rights, the term of protection for this rights is established for 70 years after authors' death¹⁰⁸².

The transformation right can be assigned and revoked. In case it is assigned, it must be noted that under Spanish law the assignment of this right only applies to the specific types of transformation¹⁰⁸³. For instance, if the right is assigned to translate a novel, the assignment only applies to this specific mode of transformation and it cannot be used for any other transformation of the work, e.g. adapting the work into a cinematographic work¹⁰⁸⁴.

Scope

The transformation of a work entails the creation of a new work and that entail new regime of protection of the new work that is based on a pre-existing work. In this regard, the second paragraph of the article grants the copyright protection to the author of the work resulting from the transformation of the original work. This is without prejudice of the right of the author of the original work to authorize the exploitation of the new work for the whole duration of protection.

Two rights are therefore converging in the final derivative work: i) the right of the author of the derivative work and ii) the rights of the author of the original work. If the author of the original work is the one transforming the work, both rights will belong to the same person¹⁰⁸⁵.

To end, it must be noted that the right of transformation is closely linked to the moral rights of integrity and modification, analysed in Section 10.3.2.

¹⁰⁸² The Spanish Intellectual Property Law art.26.

¹⁰⁸³ The Spanish Intellectual Property Law art.43.1.

¹⁰⁸⁴ Mariscal (n 499) 57.

¹⁰⁸⁵ Mariscal (n 499) 61.

10.4 Other rules on matters relevant for CHIs

10.4.1 Protection of public domain/cultural heritage

Despite a lack of definition of public domain works in the Spanish laws, the Spanish legislator introduces certain provisions that apply to works in the public domain in their relationship with authors' and related rights.

Public domain works and the moral rights of the author

First of all, Article 41 of the Spanish law introduces 'conditions for the use of works in the public domain' where it states that, while public domain works can be used by anyone (due to the lack of IP protection on the work), the moral rights of paternity and integrity need to be observed. Despite the fact that there can be several types of works in the public domain, only works that have fallen in the public domain as result of the expiration of the copyright-related protection, fall under the scope of this article¹⁰⁸⁶.

This provision has been heavily criticized by the doctrine as it is considered that once a long time, e.g. 100 or 200 years, passes since the authors' death, the protection of the cultural good should be the interest that prevail and not the protection of the authors' image or reputation¹⁰⁸⁷.

Unpublished works in the public domain

The first paragraph of Article 129 concerning unpublished works in the public domain, rules that 'any person who lawfully discloses an unpublished work that is in the public domain, will have the same exploitation rights over it that the author would have enjoyed'. Therefore, any person that discloses such work would enjoy all the rights included within Article 17 and Article 21- distribution, reproduction, communication to the public and transformation rights. However, this person will not enjoy the moral rights protection.

There are three limitations to the provision of this article: i) the work in public domain needs to be original to qualify for copyright protection; ii) the work must be unpublished (this is an absolute requirement as otherwise it would not fall under the scope of this provision) and iii) works must be in the public domain as a result of the expiration of copyright protection¹⁰⁸⁸.

Disclosure of these works is not reserved to publishers but the disclosure can be made by anyone. On top of this, the works can be distributed or communicated to the public by any other means.

¹⁰⁸⁶ Rogel Vide and others (n 457) 237.

¹⁰⁸⁷ Bercovitz Rodríguez Cano and others (n 80) 144.

¹⁰⁸⁸ The Spanish Intellectual Property Law 301.

Importantly, the protection granted by the law is provided to the person that discloses the work by distributing, reproducing it or communicating it to the public, in the sense that the person that makes this effort should benefit from the protection and not the person that ‘discovers’ the work but gives it to a third party for its disclosure¹⁰⁸⁹.

Finally, the disclosure needs be made by any legal means provided that it respects the rights of integrity and paternity of the author.

Unprotected works

In similar terms, the second paragraph of Article 29 grants the possibility to ‘publishers of works not protected by the provisions of Book I of this Law, enjoy the exclusive right to authorize the reproduction, distribution and public communication of said editions’.

In this context, the provision approximates the protection of paragraph 1 of this article concerning unpublished works, to works that are not protected by copyright as long as the edition has certain level of creativity ‘by their typesetting, presentation and other editorial characteristics’. Works falling within the scope of the provision are those works in the public domain or certain data or information that do constitute a work before the editing. Hence this protection is only provided to the edition of the work and not on the work before or isolated from the editing. Therefore the publisher cannot enforce his rights against the reproduction or distribution of the ‘unprotected work’¹⁰⁹⁰.

This provision could be used to get protection over digital versions of public domain works. However it does not seem evident to find such ‘creativity’ in the edition of works that could lead to the obtention of such protection. This seems to be the case of the National Spanish library which uses this provision even for digital copies of printed books whose creativity raises certain doubts¹⁰⁹¹.

Longer term of protection

In Spain the law of 1879 envisaged a duration of the term of copyright protection lasting 80 years *post mortem* of the author that was reduced by a law of 1987 to 60 years post mortem. However, the Term Directive¹⁰⁹² harmonized the term of protection at EU level increasing such protection to 70 years after the authors’ death. Due to the little time that passed between the law of 1987

¹⁰⁸⁹ Bercovitz Rodríguez Cano and others (n 80) 302.

¹⁰⁹⁰ Bercovitz Rodríguez Cano and others (n 80) 303.

¹⁰⁹¹ Ameneiros Rodríguez and Varela-Orol (n 536) 4.

¹⁰⁹² See Deliverable 2.1 for further analysis of the Term Directive.

and the adoption of the Term Directive, in practical terms, it seems that the system changed from a system of 80 years to 70 years post mortem¹⁰⁹³.

Given that the Term Directive allows for Member States to keep a longer period of protection as long as they were already in place before 1 July 1995, the Spanish legislator kept a 80 years copyright protection for all those authors that dies before 7 December 1987¹⁰⁹⁴. As a result, a number of Spanish author enjoy a longer protection of exclusive rights than other authors in the EU, e.g. Pablo Picasso or Vicente Aleixandre¹⁰⁹⁵. This provision also applies to other European authors as it was stated by the CJEU in the case *Phil Collins*¹⁰⁹⁶ where the Court ruled that any advantage given in a Member state to its nationals should also be provided to a national of the other EU Member States.

Rights of the owners of certain works of arts

The general rule of author's rights according to which the owner of the physical work does not mean that have the exclusive rights to exploit it has been explicitly introduced in the Spanish IP code: 'the purchaser of the ownership of the medium to which the work has been incorporated will not have, by this title alone, any right to exploit the latter'¹⁰⁹⁷.

Diverging by this general rule, the Spanish legislator introduced an exception to this principle. According to the second paragraph of Article 56, it is presumed that an author of visual arts or photographic works when selling his work to a third party, will also transfer the right of public exhibition, even if they work was not disclosed, unless this right was expressly excluded in the transfer act. Therefore the law provides for a presumption, without which, the owner of the physical work would not be allowed to exhibit such work in a museum or any other exhibition¹⁰⁹⁸. Yet, being a presumption and not an obligation, the author of the work may still oppose to the exercise of such right 'when the exhibition is carried out under conditions that damage his honor or professional reputation'¹⁰⁹⁹. The law does not impose any form for the opposition of the author to prevent the owner from exercising this right but the burden of proof falls on him. It must be taken into account that when the author retains the right of public exhibition, the author will need to exercise his right access in accordance with Article 14.7 of the Spanish IP code under certain restrictions¹¹⁰⁰ as seen in Section 10.3.2.

¹⁰⁹³ Bercovitz Rodríguez Cano and others (n 80) 103.

¹⁰⁹⁴ The Spanish Intellectual Property Law Fourth transitory provision.

¹⁰⁹⁵ Angelopoulos (n 550) 9.

¹⁰⁹⁶ *Collins and Patricia Im- und Export v Imtrat and EMI Electrola (C-92/92) EU:C:1993:847* (n 551).

¹⁰⁹⁷ The Spanish Intellectual Property Law art.56.2.

¹⁰⁹⁸ Bercovitz Rodríguez Cano and others (n 80) 179.

¹⁰⁹⁹ The Spanish Intellectual Property Law art.56.2.

¹¹⁰⁰ Rogel Vide and others (n 559) 41.

10.4.2 Open Data Directive

The Spanish Government launched a public consultation until the end of July 2020. There is no draft of the text available yet.

11 Annex VI – Sweden

11.1 Copyright-related provisions

In Sweden, copyright law is governed by the Act on Copyright in Literary and Artistic Works (*Lag om Upphovsrätt till Litterära och Konstnärliga Verk*): Act 1960:729, of 30 December 1960, and has been last amended by the Law SFS 2020:540 of 18 June 2020.

11.1.1 Exceptions and limitations

The Infosoc Directive was implemented in the Swedish Copyright Act by a 2005 Law¹¹⁰¹. The Swedish implementation of the Infosoc Directive was delayed due to heated debates that took place at the Swedish Parliament¹¹⁰² which led the CJEU to declare that Sweden had violated its obligations under the EU Treaties¹¹⁰³.

Before the implementation of the Infosoc Directive, the Copyright Act already included a list of exceptions and limitations to copyright. After the adoption of the Directive some exceptions were modified in order to make them compatible with the Directive while other exceptions were left ‘intact’¹¹⁰⁴.

It must be noted that the Nordic countries, including Sweden, have a long tradition of the application of extended collective licenses (hereinafter ‘ECL’). This is reflected in the Swedish Copyright Act that included several provisions, including those ones in respect to exceptions and limitations, on the application of ECL. For this reason, Sweden, in conformity with the Recital 18 of the Infosoc Directive (which states that the Directive is without prejudice to national arrangements concerning rights’ management such as ECL), kept its rules on ECL and even introduced new ones in accordance with the new rules brought by the implementation of the Infosoc Directive¹¹⁰⁵.

Importantly, the three-step test¹¹⁰⁶ established in the Infosoc Directive and previously in international conventions¹¹⁰⁷ is not explicitly included in the Swedish Copyright Act. The Swedish legislator considered the three-step test to be too vague and, consequently, it could be

¹¹⁰¹ SFS 2005:359 of 8 June 2005 amendment to the Act 1960:729 on copyright in literary and artistic works.

¹¹⁰² Lindner and Shapiro (n 564) 916.

¹¹⁰³ *Commission v Sweden (C-91/04)*, EU:C:2004:739.

¹¹⁰⁴ Lindner and Shapiro (n 564) 935.

¹¹⁰⁵ Lindner and Shapiro (n 564) 936.

¹¹⁰⁶ The application of exceptions and limitations must be limited to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

¹¹⁰⁷ The Berne Convention art.9(2); The TRIPS Agreement art.13.

interpreted in a too flexible and broad manner, increasing the legal uncertainty with respect to the application of exceptions and limitations¹¹⁰⁸. Yet, its application is still compulsory in the Swedish national jurisdiction since the Swedish Supreme Court ruled in the *Wikimedia* case that the three-step test must be taken in consideration when interpreting the exceptions and limitations¹¹⁰⁹.

11.1.1.1 *Preservation exception*

The reproduction exception for preservation purposes of Article 5.2(c) of the Infosoc Directive is reflected in Section 16 of the Swedish Copyright Act, which reads as follows: ‘the governmental and municipal archival authorities, the scientific and research libraries operated by the community at large, and the public libraries are entitled **to prepare copies of works**, other than computer programs, **1. for purposes of preservation, completion or research (...)**’.

This exception existed in the Swedish copyright system even before the adoption of the Directive. However, the scope of the exception was much narrower given that it only allowed the beneficiary institutions to make reproductions of the works by reprography in order to provide a copy to the public using the library’s or archive’s facilities. Further, the exception only permitted to make copies of articles and short extracts of books for a user of the institution¹¹¹⁰.

The scope of the exception was then expanded after the implementation of the Infosoc Directive until its current reading.

Beneficiaries

The only institutions permitted to benefit from the exception are the following:

- a) the governmental and municipal archival authorities, which are further specified by the Archives Act¹¹¹¹.
- b) the scientific and research libraries operated by the community at a large (public authorities);
- c) public libraries.

Surprisingly, museums are not included as beneficiaries of the exception¹¹¹². The Swedish Copyright Act makes the distinction on the ownership of scientific and research libraries by only

¹¹⁰⁸ Lindner and Shapiro (n 564) 936.

¹¹⁰⁹ *Swedish Supreme Court of 4 April 2016 (NJA 2016 s 212)*.

¹¹¹⁰ Lindner and Shapiro (n 564) 939.

¹¹¹¹ Archives Act (1990:782) of 7 July 1990 (last amended by SFS 2019:866) Sec 7 and Sec 8.

¹¹¹² Museums in Sweden can carry out acts of reproduction for preservation purposes by relying on the general ECL system.

permitting libraries that are operated by public authorities to rely on the exception. Thus, private research or scientific libraries belonging to a company or organization are excluded from the scope of the exception. All public libraries are, nevertheless, allowed to benefit from the exception. In addition, the Swedish government may allow other archives and libraries that are accessible to the public, other than those mentioned above, to benefit from the exception¹¹¹³.

Purposes of the exception

The Swedish copyright law permits the beneficiary institutions to make reproductions of works for *preservation* purposes. Lacking a statutory definition of the term ‘preservation’, it should be understood as the possibility of making copies of works in order to preserve and to protect the institutions’ collections, e.g. works that are fragile and risk of being deteriorated. According to the doctrine, ‘a genuine need for protection must be at hand’ when making use of this exception. As a result, such genuine need for protection is the guide for determining the scope of acts allowed under the exception¹¹¹⁴.

All types of literary and artistic works can be reproduced under the exception. The law only excludes the possibility of making copies of computer programs from the scope. Yet, the works must be in the collection of the beneficiary institution¹¹¹⁵.

Further, the law does not impose any restriction on the number of copies permitted under the exception neither on the form of such copies as long as they are made for preservation purposes.

It must be noted that the exception of Section 16 also applies in relation to the rights of performing artists, producers of recordings of sounds or of moving images, radio and tv organizations, producers of catalogues as well as photographers¹¹¹⁶.

Finally, it must be noted that the Swedish legislator does not impose a remuneration system for the uses of such exception, except from the making available of copies under ECL (see below).

Other purposes

Due to the importance for CHIs, we include a brief explanation of the other permitted purposes of this exception. Section 16 also permits the beneficiary institutions to make reproductions of works for the purposes of research and ‘completion’. Given that the law does not define the term

¹¹¹³ Swedish Copyright Act Sec. 16.

¹¹¹⁴ Engdahl and others (n 33) 2.

¹¹¹⁵ Engdahl and others (n 33) 3.

¹¹¹⁶ Swedish Copyright Act Sec.45. 46, 48, 49.

of ‘research’, the doctrine considers that the ‘research needs to be reasonably qualified’ where papers or essays of ordinary students would a priori not fall under the scope¹¹¹⁷.

Section 16 of the Swedish Copyright Act also provides the possibility for beneficiary institutions to make reproductions of works for the purposes of ‘completion’ (or supplementary purposes). The term ‘completion’ should be understood as the need of keeping the library’s or archive’s own collection ‘intact’. In this regard, the Copyright Regulation further specifies the so-called ‘supplementary purposes’, which are, namely, when: i) ‘a copy of a work is incomplete; if a work has been published in parts, however, only the situation when the missing part cannot be acquired on the market is included, or when ii) copies of a work cannot be acquired on the market and the reproduction takes place at an archive or in a library which is entitled to receive statutory deposit copies of the type of productions’¹¹¹⁸.

The scope of the exception is narrower than it may seem at first sight since reproduction is only available in case a copy of a work is incomplete (but if the missing part of the work is available in commerce, it is not considered as an incomplete work) or when a work is commercially available and the reproduction take places in a library that is entitled to received certain copies, e.g. the National Library of Sweden¹¹¹⁹. Nevertheless, reproductions of entire books are not allowed.

Additionally, Section 11 of the Swedish Copyright Act obliges, even if the authorization from the author is not necessary when the institutions rely on any exception and limitation, the beneficiaries of the exceptions and limitations to respect the authors’ moral rights by requiring them to mention the source. Alterations of the work that are beyond of what is necessary for the use are also not allowed (right of integrity).

Collective licenses

Importantly, this exception does not cover any use involving the communication of the work to the public nor any transfer of the reproductions to the public. In order to be able to transfer such reproductions to the public, the Swedish legislator puts in place an ECL system, stated in Section 42 of the Copyright Act. According to this section, an ECL applies to the exploitation of works in an ‘certain way’, when there is an agreement in place concerning the exploitation of such works with an organization that represents a significant number of authors in an specific field in Sweden. This license gives the user the possibility to use the work in a determined manner even though the author may not be represented by the organization. In this regard, the author has the right to receive remuneration in equal terms as the authors represented by the organization¹¹²⁰.

¹¹¹⁷ Engdahl and others (n 33) 3.

¹¹¹⁸ Copyright Regulation SFS 1993:1212 of 25 November of 1993 (last amended by SFS 2018/1100) Sec. 2.

¹¹¹⁹ Engdahl and others (n 33) 2.

¹¹²⁰ Swedish Copyright Act Section 42.a.

Section 42(d) of the Copyright Act specifies the extended collective regime for libraries and archives. As seen above, Section 16 allows for the reproduction of works of certain beneficiaries, according to which libraries and archives, among others, can make copies of the work for the purposes of preservation, completion and research. In this context, Section 42(d) provides for the possibility to transfer, in other than paper form, individual articles, short sections or materials that for security reasons should not be disclosed in originals¹¹²¹. These works must be in the organizations' collections and must have already been disclosed. The provision does not cover any work that is not part of the own collection, excluding those works that have been subject to a loan or any other agreement¹¹²².

However, the extended collective mechanism will not apply in the case that the author of a work 'has issued a ban on the production or making available of copies, or if for other reasons there is special reason to assume that the author opposes the disposal'¹¹²³. Such special reasons could be of a very different nature, e.g. changes of opinion from a cultural, artistic or political point of view. Consequently, the beneficiary institution must take account of the author's opinion as the author may express its opposition to further uses, e.g. making the works available to the public or even that such further uses must be carried out according to a certain manner.

In conclusion, the ECL could be used by libraries or archives in order to make reproductions and communicating the works to the public under two conditions (i) these works have lawfully been made public and (ii) that there is no special reason to assume that the author would oppose such use.

11.1.1.2 Research and private study standing in dedicated terminals

The exception established in Article 5.2 (n) of the Infosoc Directive has not been implemented by the Swedish legislator.

11.1.1.3 Advertising the public exhibition or sale of artistic works

Section 24 of the Swedish Copyright Act implements the exception stated in Article 5.2(j) of the Infosoc Directive which entails an exemption to the author's right of reproduction. According to this provision, works of arts can be depicted in 'a pictorial form' when the only purpose of the depiction is the advertisement of an exhibition or of a sale of a work of arts. The provision further

¹¹²¹ Westerlund (n 246) 46.

¹¹²² Engdahl and others (n 33) 9.

¹¹²³ Engdahl and others (n 33) 8.

specifies that such reproduction is only allowed ‘to the extent necessary’ for the promotion of the exhibition or a of a sale¹¹²⁴.

Only works of art are falling under the exception. In addition, the legislator narrows even more the scope of the exception by adding the reference to ‘the extent necessary’ for advertising or sale of the exhibition. It is not clear whether preparatory acts then could fall under the scope of the exception. Further, the Swedish legislator does not impose any restriction on the beneficiaries of this exception.

With regards to the concept of depiction, the Swedish Supreme Court ruled in a case concerning ‘the freedom of panorama’ (first paragraph of the exception provided in Section 24 that ‘the depict concept was intended to permit reproductions of the work of art by painting, sketch, photography or other technology by which the work of art is reproduced in plane level (two-dimensionally)’¹¹²⁵. Further, the Court ruled that the concept of depiction needs to be read in conjunction with the three-step test.

The exception is not subject to any remuneration to the rightholders.

11.1.1.4 *Text and Data Mining*

To our knowledge, the Swedish government launched a public consultation on Articles 3 to 12 of the CDSM Directive in February 2020. However, there is no draft law available yet.

11.2 Specific regime in respect to particular types of works

11.2.1 Orphan works

The Swedish Copyright Act regulates the permitted uses of orphan works in its Sections 16a and seq., which were introduced by a 2014 Law¹¹²⁶ implementing the Orphan Works Directive¹¹²⁷. According to Section 16(a), ‘publicly accessible libraries, educational establishments and museums as well as archives and film or audio heritage institutions are entitled to prepare copies of literary works in writings and cinematographic works, and make such works available to the public in such a way that members of the public may access the work from a place and at a time individually chosen by them (...)’.

¹¹²⁴ Swedish Copyright Act Sec.42.2.

¹¹²⁵ *Bildupphovsrätt i Sverige ek.för (BUS) vs Wikimedia Sverige (Case nr Ö 849-15)* [14].

¹¹²⁶ SFS 2014: 884 of 8 July of 2014 (Orphan works in the collections of cultural heritage institutions).

¹¹²⁷ For a further analysis of the Orphan Works directive see Deliverable 2.1.

Types of works

The possibility granted to the beneficiary institutions to make the works available to the public is only allowed when, first, the work is declared as ‘orphan’ and the rightholder has not been identified¹¹²⁸. A work should be considered as orphan when, according to the Swedish Copyright Act, ‘all the right-holders are unknown, or it has not been possible to find them’¹¹²⁹ after a diligent search has been carried out and has been recorded by the beneficiary institutions. However, when the work has several rightholders but only at least one is still unknown, the provisions will only apply in regard to those rightholders.

Second, the work must be part of the beneficiary’s own collections. Third, the work must be in relation to the European Economic Area, in the sense that it must have been published in one of the countries belonging to the EEA, when a work is published, or when a work has been broadcasted, it must have been made available to the public in one of those countries. In addition, there may not be reasons to assume that the rightholder would oppose to such uses.

Yet, not all the works can fall under the exception but only copies of literary works in writings, cinematographic works and sound recordings¹¹³⁰. It excludes maps and databases as the definition of literary works ‘is confined to narrative based literary works’. The term sound recordings, ‘is deemed to cover both the “audio” in audiovisual works as well as ‘phonograms’¹¹³¹.

Beneficiaries

Following Section 16 of the Swedish Copyright Act, only publicly accessible libraries, archives, museums and educational establishments as well as archives and film or audio heritage institutions are allowed to benefit from the exception to use the orphan works under specific conditions. Additionally, the fifth paragraph of that Section imposes the condition for film and audio heritage institutions that they ‘must have been entrusted by the community at large to manage the film or audio heritage’.

Further, also a public service sound radio or television organization may be permitted to use orphan cinematographic works ‘which have been produced by, or for, such an organization before January 1, 2003’¹¹³² (alike in the Orphan Works Directive).

¹¹²⁸ Swedish Copyright Act Sec. 16a.1.

¹¹²⁹ Swedish Copyright Act Sec.16b.

¹¹³⁰ The Swedish Copyright Act only refers to sound recordings in Sec. 46.

¹¹³¹ Bertoni, Guerrieri and Montagnani (n 140) 151.

¹¹³² Swedish Copyright Act Sec.16a.

Importantly, the beneficiary institution must be located in one of the EEA Member States¹¹³³.

Subject matter

The uses carried out by the beneficiary institutions must be carried out for not-profit making purposes. Further, the exploitation of the orphan works are carried out according to the public-interest mission of such institutions, namely, for acts of ‘reproduction, for the purposes of digitization, indexing, cataloguing, preservation, restoration or making available to the public of the work’.

Any commercial purpose is excluded from the scope of the exception. However, the provision permits the generation of certain revenues which must be exclusively oriented to cover the digitization costs and the making available of the orphan works.

Finally, the rightholders that are already known must be indicated.

Diligent search

As seen, a work can only be declared orphan after a diligent search has been carried out by the beneficiary institutions. According to Section 16(c), such diligent search needs to be performed in a ‘good faith’ and for each individual work that the institution plans to exploit.

The diligent search is required to be carried out in ‘in the country where the work was first published or, in the absence of publication, where it was first broadcast in sound radio or television’¹¹³⁴. In the absence of publication or broadcasting, when a work was made legally available, the search must be carried out in the country where the beneficiary institution is located.

For cinematographic works, the diligent search must be carried out where the producer has his residence or headquarters (as long as it is in a EEA country).

With regards to the sources that need to be consulted for carrying out the diligent search the law provides two different regimes. For diligent searches in Sweden, the Copyright Act establishes that they need to be ‘suitable’ for each type of work. Yet, it does not further specify the type of sources but refers to the sources mentioned in the Annex of the Orphan Works Directive. Concerning diligent searches in other countries, the law refers to the applicable provisions in that other country.

¹¹³³ Swedish Copyright Act Sec.16a.4.

¹¹³⁴ Swedish Copyright Act Sec. 16c.

Moreover, when there is evidence suggesting that information on certain rightholders could be found in other countries, sources from those other Member States should also be consulted¹¹³⁵.

With regards to the record of the diligent search's results, further rules are established in the Section 3 of the Copyright Regulation. The beneficiary institutions must inform the Patent and Registration Office, who will transmit the EUIPO the information on the results of the search, the potential uses of the work and the end of the orphan works status¹¹³⁶.

End of the orphan work status

The second paragraph of Section 16(b) establishes the end of the orphan work status, namely when a rightholder reappears and identifies himself to a beneficiary.

Compensation

If the rightholder appears and therefore the orphan work status comes to an end, the right-holder has a right to a fair compensation from the beneficiary that was using his works¹¹³⁷ for the period that his works were in use.

11.2.2 Out-of-commerce works

As seen in Section 11.1.1.1, Section 16 of the Swedish Copyright Act states the exception for preservation, completion and research purposes. The extension of the exception to those uses for 'completion' and its subsequent regulation has an impact on the regime for out-of-commerce works. Additionally, Section 2 of the Copyright Regulation extends the possibility to make reproductions of works that are incomplete or that are commercially unavailable for those institutions that should receive statutory deposit copies.

Apart from these provisions, there is no other legal regime specifically stated for the use of out-of-commerce works in the Swedish copyright system. Nevertheless, the use of ECL is widely used within the Nordic countries, including Sweden¹¹³⁸ and have been considered as a potential solution for the uses of out-of-commerce and orphan works for CHIs¹¹³⁹. This system could solve the matter of first, mass-digitization of works by CHIs, and second, its online dissemination by

¹¹³⁵ Swedish Copyright Act Sec. 16c.

¹¹³⁶ Copyright Regulation SFS 1993:1212 of 25 November of 1993 (last amended by SFS 2018/1100) Sec. 3.

¹¹³⁷ Swedish Copyright Act Sec. 16b.

¹¹³⁸ Tryggvadottir (n 213).

¹¹³⁹ Johan Axhamn, 'Cross-Border Extended Collective Licensing: A Solution to Online Dissemination of Europe's Cultural Heritage?' in Stefan Gradmann and others (eds), *Research and Advanced Technology for Digital Libraries*, vol 6966 (Springer Berlin Heidelberg 2011) 501 <http://link.springer.com/10.1007/978-3-642-24469-8_59> accessed 13 February 2020.

extending a freely negotiated agreement between an institution and a CMO to other rightholders that are not represented by the CMO, under certain conditions. Through these agreements the issue of rights clearance for CHIs can be certainly facilitated.

In Sweden, the general provisions for ECL' uses is envisaged in Section 42 of the Swedish Copyright Act. Such general provisions permit new agreements in other areas that are not yet specified in the laws without having to amend the legislation each time¹¹⁴⁰. The general ECL provisions do not specify the works covered by the agreement, the uses or the users of such licenses. These specifications are left to the contracting parties that will need to determine the uses and the purposes or the activities covered. The only requirement for using ECL is that individual licensing is 'impracticable' and thus, they are mainly used in 'mass-use' situations when it is difficult to predict the number of works that will be used¹¹⁴¹. In addition, ECL provides for an opt-out system for rightholders in order to provide certain guarantees for rightholders.

Specific provisions for ECL to be used by archives and libraries are included in Section 42(d) of the same Act. These licenses have been considered as a solution for the problem of out-of-commerce works by archives and libraries. An agreement may cover all the works of the CHIs' collections for their reproduction and for further uses of such copies, which may be communicated to the public unless there are reasons to think that the author could oppose to such use (see Section 11.1.1.1)

It must be noted that the Copyright Act states that only works in the own collections that have been made public may form part of the ECL. One needs to read Section 8 of the Swedish Copyright Act in order to understand when a work has been made public. According to this, a work is understood to be published when 'it has legally been made available to the public', namely, 'when copies thereof have been placed on the market or otherwise distributed to the public with the author's consent'¹¹⁴². In consequence, the author's attitude is decisive to assess when a work has been made legally to the public. All modes of communication to the public are involved within the term 'made available to the public', in particular, distribution, exhibition, performance to the public, rental or lending and making available¹¹⁴³.

As observed, only works that have been made available to the public can form part of the ECL, excluding from the scope unpublished works. However, if there is an agreement with rightholders or there are instructions from them on how unpublished works could be used for libraries and archives, it could override the provisions under the copyright legislation¹¹⁴⁴.

¹¹⁴⁰ Tryggvadottir (n 213) 177.

¹¹⁴¹ Tryggvadottir (n 213) 177.

¹¹⁴² Swedish Copyright Act Sec. 8.

¹¹⁴³ Swedish Copyright Act Sec. 2.3.

¹¹⁴⁴ Tryggvadottir (n 213) 184.

Finally, the author has a right to obtain remuneration for the exploitation of his works. The amount and conditions of the remuneration should be specified in the agreement. The distribution of the remuneration must be in accordance with the principle of equal treatment, so the rightholders that are not represented by the CMO should receive the same remuneration than those ones represented¹¹⁴⁵.

11.2.3 Works of visual arts in the public domain

To our knowledge, the Swedish government launched a public consultation on Articles 3 to 12 of the CDSM Directive in February 2020. However, there is no draft law available yet.

11.2.4 Non-original photographs

In Swedish copyright law photographs were not protected by copyright until 1994¹¹⁴⁶, date when they were included in the Swedish Copyright Act under Section 1.5. Accordingly, photographic works may be granted copyright protection as long as the work has acquired certain ‘work-height’, which means that the work needs to have a certain level of originality and distinctiveness, in the sense that two people, independent from each other could not achieve the same result. As a result of copyright protection, these photographs enjoy the protection of 70 years post mortem.

Neighbouring right

The Swedish Copyright Act also grants an exclusive right for protection of photographs that do not achieve a certain level of originality or the ‘work height’ and, thus, are not granted copyright protection as a work of art. This exclusive right is envisaged in Section 49(a) and it is provided to anyone that produce a ‘photographic image’. This right applies independently of whether the image is issued in its original form or in an altered form. Further, the right also applies regardless of the technology used for the creation of the photographic image.

The scope of protection of these works is much narrower than the protection granted under copyright. For instance, in order to commit an infringement of this work is required that the photographic image is created by using the originator’s photograph, involving direct copying¹¹⁴⁷. However this right could be infringed, e.g. by painting using certain parts of the photograph as a motive, as the Swedish Supreme Court ruled¹¹⁴⁸.

¹¹⁴⁵ Swedish Copyright Act Sec. 42.a.

¹¹⁴⁶ SFS 1994: 190 of 14 april of 1994 amending the Act (1960: 729) on copyright in literary and artistic works.

¹¹⁴⁷ Westerlund (n 246) 61.

¹¹⁴⁸ NJA 1967, 264, NIR 1968, 129 (*Gell Stalformar*), (n 247).

It must be noted that moral rights of attribution and integrity also applies to the exclusive right for producers of non-original photographs¹¹⁴⁹.

Definition of non-original photographs

Although the Swedish copyright law does not provide any definition of ‘photographic image’, it provides for a broad concept of photographic work by stating in paragraph 2 of Section 49(a) that ‘a photographic image is also meant an image that has been produced by a procedure comparable to photography’. In addition, the first paragraph states that the right applies to the image regardless of the technology used for the creation of the photograph.

Authorship

The exclusive right stated in Section 49(a) of the Copyright Act is provided to ‘anyone’ that produces a photographic image that do not acquire the required level of originality for copyright protection.

However, there is a second situation where this right applies. Sometimes, there are cases of original photographs that do deserve copyright protection but that not only the photographer taking the picture (the author of the work) is involved but also an additional person. In these cases, this person that, for instance, may have arranged the subject, could also benefit from this exclusive right of protection, in addition to the authors’ protection¹¹⁵⁰.

Term of protection

The term of protection of the non-original photographic works lasts 50 years ‘after the year in which the image was produced’¹¹⁵¹ in accordance with other neighbouring rights provided for in the Swedish law.

11.2.5 Databases

Sweden had already certain rules for the protection of catalogues before the adoption of the Database Directive. The first protection of databases under Swedish law was introduced in the Swedish copyright act in 1960 granting protection to databases where both time and economic

¹¹⁴⁹ Swedish Copyright Act Sec. 49.4.

¹¹⁵⁰ Andersson (n 243).

¹¹⁵¹ Swedish Copyright Act Sec. 49.a.3.

investment had been made¹¹⁵². These provisions were amended by a 1997 Law¹¹⁵³ implementing the Database Directive¹¹⁵⁴.

Copyright protection

Databases may be granted copyright protection under Swedish copyright law as literary and artistic works long as they are original, as stated in Section 5 of the Copyright Act: ‘anyone who, by compiling works or parts of works, has created a literary or artistic collection has copyright to it, but his right does not restrict the right to the special works’. The requirement of originality has been confirmed by the Swedish Supreme Court in the *Nummer Banken* case where the Court ruled that a systematically organized catalogue of articles had distinctive and original character or the so-called ‘work height’¹¹⁵⁵.

Therefore authors of databases enjoy the same protection through their works as authors of literary and artistic works, lasting for 70 years post mortem.

It must be noted that regarding exceptions and limitations with regards to databases, the Swedish legislator forbids the use of the ‘private copying exception’ for digital reproductions of digital databases¹¹⁵⁶. In addition, temporary copies of databases are also not allowed in Swedish law. Yet, this prohibition should only be applied when the temporary copy covers a large part of the database and thus it would be considered a ‘copy’¹¹⁵⁷.

Further, with regards to the mandatory exception established under Article 6.1 of the Database Directive, according to which ‘the performance by the lawful user of a database or of a copy thereof of any of the acts listed in Article 5 which is necessary for the purposes of access to the contents of the databases and normal use of the contents by the lawful user shall not require the authorization of the author of the database’, the Swedish Copyright Act diverts from the Directive in the sense that ‘the person who has the right to use the compilation may dispose of it in the manner necessary for him to be able to use the compilation for its intended purpose’¹¹⁵⁸.

With regards to the rights and obligations of the lawful user, it must be noted that the Swedish Copyright Act does not implement such provisions¹¹⁵⁹.

¹¹⁵² Ola Nilsson, ‘Rights to Software and Databases: From a Swedish Consulting Perspective’ (Jönköping University, Jönköping International Business School, JIBS, Commercial Law 2009) 17.

¹¹⁵³ SFS 1997: 790 of 6 November of 1997 amending the Act (1960: 729) on copyright in literary and artistic works.

¹¹⁵⁴ See Deliverable 2.1 for a further analysis of the Database Directive.

¹¹⁵⁵ *Swedish Supreme Court, NJA 20 of April of 1995, Nummer Banken*.

¹¹⁵⁶ Swedish Copyright Act Sec. 12.

¹¹⁵⁷ Andersson (n 243).

¹¹⁵⁸ Swedish Copyright Act Sec. 26.g.5.

¹¹⁵⁹ Bently and others (n 257) 74.

Sui-generis right protection

As seen, before the adoption of the Database Directive, the Swedish Copyright Act already had protection for compilations and catalogues, which was amended to align it with the protection granted under the Directive. Its current wording is stated in Section 49(a) which provides that ‘anyone who has produced a catalogue, a table or another similar product in which a large number of information items have been compiled or which is the result of a significant investment, has an exclusive right to prepare copies of the product and to make it available to the public’.

The Swedish Copyright Act lacks a definition of a ‘database’. Yet, the Swedish preparatory acts defined the database as a ‘collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means’¹¹⁶⁰.

Beneficiaries

Concerning the ownership of this exclusive right, the Database Directive states that the owner of the database is the ‘is the person who takes the initiative and the risk of investing’¹¹⁶¹. However, the Swedish Copyright Act does not explicitly establish any requirement for the ownership of the database by just referring to ‘anyone who has produced a catalogue, a table or another similar product’¹¹⁶².

Scope of protection

Thus, the sui-generis right grants the protection to databases in two situations: i) when a large amount of data has been compiled and, ii) when the database is the result of a substantial investment. The meaning of the substantial investment refers mainly to the creation of the database but also to the maintenance of the database¹¹⁶³.

The producer of a database has therefore the exclusive right to make copies of the database and to make it available to the public.

With regards to the exceptions allowed, the Swedish legislator opted for including several exceptions in similar terms as for databases protected by copyright, e.g. exception for people with disabilities, research or teaching purposes, among others¹¹⁶⁴.

Term of protection

¹¹⁶⁰ Westerlund (n 246) 56.

¹¹⁶¹ Database Directive Rec. 41.

¹¹⁶² Swedish Copyright Act Sec.49.

¹¹⁶³ Westerlund (n 246) 56.

¹¹⁶⁴ Swedish Copyright Act Sec. 49.3.

The duration of this exclusive right lasts, alike the Database Directive, 15 years after the work was produced. However, if the work was made available to the public within the 15 years from the production of the database, the duration of the database lasts 15 years after the data the work was made available to the public¹¹⁶⁵.

The period of 15 years can be renewed after modifying versions of the database and can be renewed indefinitely¹¹⁶⁶.

11.3 Other copyright matters in a nutshell

11.3.1 The public lending derogation

The Rental and Lending Directive¹¹⁶⁷ harmonized the exclusive rights of authors for rental and lending. The Directive also provides the possibility of Member States to introduce an exception to the exclusive right of lending for the benefit of libraries as long as a compensation system is established¹¹⁶⁸.

In the Swedish Copyright Act, the rental and lending exclusive rights of the author are not explicitly mentioned. Yet, the right to lend is implicitly stated in Section 19 on the distribution of copies. According to this provision, a copy of a work may be freely distributed after the work has been transferred in the EEA. Therefore, when a library has purchased a book has the right to lend it and the author cannot oppose to such lending¹¹⁶⁹. This has been understood as a cultural-policy choice made by the Swedish legislator in order to safeguard the free access to culture and literature. Therefore, the Swedish legislator opted for introducing , instead of an exclusive right, a remuneration right for the public lending¹¹⁷⁰.

The public lending right system was established in Sweden in 1955, being one of the first countries to introduce such regime, together with other Nordic countries (Denmark 1946, Finland 1961)¹¹⁷¹. Nevertheless this regime was modified leading to a new regime in 1999. The implementing rules of the system are stated in an Ordinance¹¹⁷², instead of the Copyright Act.

¹¹⁶⁵ Swedish Copyright Act Sec. 49.2.

¹¹⁶⁶ Andersson (n 243).

¹¹⁶⁷ For further analysis of the Rental and Lending Directive see Deliverable 2.1.

¹¹⁶⁸ Rental and Lending Directive Art.5.

¹¹⁶⁹ 'The Board of Swedish Authors' Fund Annual Report for the Year 2018 with Financial Accounting' (The Swedish Authors' Fund 2018) 6.

¹¹⁷⁰ 'Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the Public Lending Right in the European Union, 12 September 2002, COM(2002) 502 Final.' (n 313).

¹¹⁷¹ 'Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the Public Lending Right in the European Union, 12 September 2002, COM(2002) 502 Final.' (n 313).

¹¹⁷² Ordinance (1962: 652) on the Swedish Authors' Fund.

Beneficiaries

It follows from the Ordinance that libraries are the only beneficiaries of such system. Section 3 further clarifies that the term ‘libraries’ in the sense of this law refers to public libraries and school libraries.

Types of works

Not all the copies of literary and artistic works can be lent since computer programs in a machine-readable form and cinematographic works are excluded from lending¹¹⁷³. As a result, lending of cinematographic works always need the authors’ consent. The system is mainly aimed at public lending of books, phonograms and printed music¹¹⁷⁴. The Rental and Lending Directive also excludes from the lending buildings and works of applied art.

It must be noted that in Sweden, e-books are not covered by the public lending. Therefore remuneration for the loans of e-books needs to be made in agreement with authors and publishers¹¹⁷⁵. Yet, discussions on this matter continue, especially after the CJEU judgement on the VOB case¹¹⁷⁶ and may be changed in the future.

Compensation

This system, regulated by the Law 1962:652 which was last modified in 2019, entails a right of compensation for authors for the loans of their works made by libraries. The provisions referring to authors ‘shall also apply to illustrators, visual artists and photographers in the case of such literary works which essentially consist of illustrations, visual art or photographs’¹¹⁷⁷.

The compensation is paid by the State and it is managed by the Swedish Authors’ Fund depending on the ‘number of home loans of physical copies from libraries and for the number of physical reference copies of the work’¹¹⁷⁸. The Law established rules for the specific calculation of the fees to be paid and how the remuneration must be distributed. At the beginning, the fees were set by the State unilaterally although this has changed with time and nowadays the fees are commonly agreed between the government and authors associations (the Swedish Writers’ Association, the Swedish Illustrators’ Association and the Swedish Photographers’ Association¹¹⁷⁹). It must be

¹¹⁷³ Swedish Copyright Act Se. 19.1 & 2.

¹¹⁷⁴ ‘Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the Public Lending Right in the European Union, 12 September 2002, COM(2002) 502 Final.’ (n 313).

¹¹⁷⁵ Annika Bergström and others, *Books on Screens: Players in the Swedish e-Book Market* (2017) 70.

¹¹⁷⁶ *Vereniging Openbare Bibliotheken v Stichting Leenrecht (C-174/15) EU:C:2016:856.* (n 339).

¹¹⁷⁷ Ordinance (1962: 652) on the Swedish Authors’ Fund Sec.3.2.

¹¹⁷⁸ Ordinance (1962: 652) on the Swedish Authors’ Fund Sec. 5.

¹¹⁷⁹ Ordinance (1962: 652) on the Swedish Authors’ Fund Sec.4.

noted that the law exempts authors from remuneration 'if the total compensation is less than an amount corresponding to compensation for 2,000 loans of works in original'¹¹⁸⁰.

Importantly, the system is only aimed at Swedish authors, writers that write in Swedish or that are Swedish residents. For translators, they must translate from or to Swedish in order to form part of the compensation system¹¹⁸¹. The Swedish system was questioned by the European Commission in the case 2003/2193 since it was suspect of discrimination in the internal market. Nevertheless, the case was closed as 'it is felt that appropriate balancing needs to be maintained between the fundamental principle of non-discrimination on the basis of nationality and the principle that Member States should be supportive of national and regional diversity by setting up funds to promote local culture or language'¹¹⁸².

Finally, apart from a remuneration system, the amount collected by the Fund is also aimed at providing 'scholarships and grants to individual authors of literary works, grants to the authors' organizations for efforts to strengthen the position of literary authors, and contributions to special purposes relating to literary activities'¹¹⁸³.

Exemption to compensate

The Swedish system does not include any exemption of the remuneration for any type of beneficiary.

11.3.2 Moral rights

Although moral rights are not harmonized at EU level¹¹⁸⁴, certain moral rights are enshrined under Section 3 of the Swedish Copyright Act, closely linked to the ones included in Article 6bis of the Berne Convention. Moral rights, in contrast to the economic rights, are not subject to any exception or limitation and are therefore absolute and non-transferable¹¹⁸⁵ rights that belong to the original creator¹¹⁸⁶. Accordingly, the moral rights need to be respected when using the work under a certain exception or limitation, e.g. quotation, reporting on current events, among others¹¹⁸⁷, as established in the second paragraph of Section 11: 'when a work is reproduced in public on the basis of this chapter, the source shall be stated to the extent and in the manner

¹¹⁸⁰ Ordinance (1962: 652) on the Swedish Authors' Fund Sec. 6a.

¹¹⁸¹ Ordinance (1962: 652) on the Swedish Authors' Fund Sec. 5.3 & 5.4.

¹¹⁸² 'Report of the 5th European Public Lending Right Conference Proceedings, 2008. Bucharest 19-21 September 2008, European Writers' Congress 2008 & Fédération Des Associations Européennes d'écrivains A.I.S.B.L.' (n 384) 10.

¹¹⁸³ Ordinance (1962: 652) on the Swedish Authors' Fund Sec.7.

¹¹⁸⁴ See Deliverable 2.1 for further analysis of the moral rights in the EU.

¹¹⁸⁵ See Swedish Copyright Act Sec.27.1.

¹¹⁸⁶ Westerlund (n 246) 52.

¹¹⁸⁷ Rosén (n 417) 3.

required by good practice, and the work may not be altered to a greater extent than the use requires'. In addition, these rights cannot be transferred by contract, as stated in Section 27.1 of the Copyright Act.

Types of moral rights

Attribution right

Some earlier provisions acknowledging a certain type of paternity right were found in the previous Swedish copyright law. They were subsequently amended until the introduction of a more elaborated right in the current Swedish Copyright Act¹¹⁸⁸.

The moral right of attribution is granted in the first paragraph of Section 3 establishing that 'when copies of a work are prepared, or when the work is made available to the public, the name of the author shall be stated to the extent and in the manner required by proper usage'. Thus, the Swedish law confers the authors the right to be named with respect to his work, 'as required by the relevant 'custom and good practice'¹¹⁸⁹ although the concept of 'proper usage' differs considerably between the 'total lack of attribution to a very dominant exposure of the author's name'¹¹⁹⁰. As a result, the assessment of the concept of usage is left to the courts depending on the uses of works in a specific industry.

The reasons why the attribution of a work to his author may not be awarded are extremely limited and therefore an author should not be denied to claim his authorship, even in cases of anonymous works¹¹⁹¹.

Few court cases are based on the right of attribution. However, the Swedish Courts have consistently favoured the author when a lawful user of a work protected by copyright does not include the author's name¹¹⁹².

Right of integrity

The second paragraph of Section 3 of the Copyright Act provides that 'a work may not be altered in a manner which is prejudicial to the author's literary or artistic reputation or to his individuality, nor may it be made available to the public in a form or in a context which is prejudicial to the author in the manner stated'.

¹¹⁸⁸ Rosén (n 417) 2.

¹¹⁸⁹ Westerlund (n 246) 51.

¹¹⁹⁰ Rosén (n 417) 4.

¹¹⁹¹ Rosén (n 417) 4.

¹¹⁹² *Swedish supreme court, NJA 1993, Ahlsén.*

In this regard, the Copyright law grants the author the possibility to i) prohibit the alteration of his work and, ii) prohibit the make it available in a form or in a context that the author may oppose to as long as these uses are prejudicial for the authors' artistic or literary reputation or individuality. This right aims at protecting the authors' artistic personality¹¹⁹³. The concept of 'reputation' refers to the concept of the author in the eyes of others while the concept of 'individuality' refers to the author's personal relationship with his work¹¹⁹⁴. Alterations of the work relate to the changes made in a single copy of the work or on the work as such. Restorations are normally not infringing the author's integrity even when the restorations lose the 'original character of the work'¹¹⁹⁵. In those cases where the author has reviewed and approved the alterations made, there is no infringement of the right of integrity¹¹⁹⁶.

Therefore, third parties must refrain from using the authors' work in any form that the author may oppose to or, otherwise, such uses could constitute an infringement of the moral right of the author, including those uses which would increase the value of the work or the reputation of the artist¹¹⁹⁷.

Whether this kind of alterations lead to an infringement of the right of integrity needs to be assessed case by case. Most of the court cases in the area of moral rights relate to the right of integrity. The Swedish courts have clarified that the concept of being 'prejudicial for the authors' reputation' is an objective matter which does not depend on the 'originators' notion'¹¹⁹⁸. In the Max Walters case, the Supreme Court ruled that not only the author's must be offended by a certain exploitation of his work but the infringement has to be taken place in an objective sense¹¹⁹⁹.

Term of protection

The duration of the moral rights in Swedish national law are the same as the economic rights. They last 70 years post mortem of the author¹²⁰⁰ after which the works enters in the public domain (with some exceptions such as the one for joint works of audiovisual works¹²⁰¹). Yet, any legal proceedings of a potential infringement may always be 'prosecuted by the author's surviving spouse, relatives in the right ascending and descending ranks or siblings'¹²⁰².

¹¹⁹³ Rosén (n 417) 5.

¹¹⁹⁴ Axhamn (n 545) 522.

¹¹⁹⁵ Axhamn (n 545) 521.

¹¹⁹⁶ Axhamn (n 545) 523.

¹¹⁹⁷ Westerlund (n 246) 52.

¹¹⁹⁸ Westerlund (n 246) 52.

¹¹⁹⁹ *Swedish Supreme Court, NJA 1979 (Max Walters)* (n 449).

¹²⁰⁰ Swedish Copyright Act Sec.43.

¹²⁰¹ Swedish Copyright Act Sec. 43.

¹²⁰² Swedish Copyright Act Sec. 59.2.

Particularities

The Swedish Copyright Act provides the possibility to waive the moral rights stated in Section 3. Accordingly, the third paragraph of this Section states that ‘the author may, with binding effect, waive his right under this article only in respect of uses which are limited in character and scope’. However, according to Rosén, the general principle is that moral rights cannot be waived except for certain limited uses of the work. This is certainly valid for literary and artistic works but other works such computer programs or cinematographic may be subject of being waived¹²⁰³. Such statement is provided in Section 40(a) of the Swedish Copyright Act, which according to Rosén, could be understood as the will of the legislator to waive moral rights in computer programs granting all ‘copyright’ to the employer¹²⁰⁴.

11.3.3 Adaptation right

Given that the adaptation right, enshrined in the Berne Convention, has not been harmonized at EU level, Member States have introduced this right in different ways. Some of them including them as part of the right of reproduction while other Member States stating the right of adaptation as a separate economic right¹²⁰⁵.

In Sweden, the adaptation right is considered as part of a broad reproduction right¹²⁰⁶ and therefore included in Section 2, which grants the author of a work ‘the exclusive right to dispose of the work by producing copies of it and by making it available to the public, be it in original or altered manner, in translation or adaptation, in another literary or artistic form or in another technological way’.

Given that the adaptation of works may lead to the creation of independent works, the exclusive right of the author to dispose the work by authorizing or prohibiting translations or adaptations, or to transform it in other literary or artistic ways is completed by the grant of exclusive copyright protection to the author of such adaptations or derivative works. The adaptation author’s right is enshrined in Section 4 of the Copyright Act: ‘a person who has made a translation or an adaptation of a work or converted it to another literary or artistic form, shall enjoy copyright in the work in the new form, but he is not entitled to exploit it in violation of the copyright in the original work’.

Adaptations of work may constitute new works as long as they are original enough and achieve certain level of uniqueness in comparison to the original work. In general terms, derivative works

¹²⁰³ Rosén (n 417) 3.

¹²⁰⁴ Rosén (n 417) 11.

¹²⁰⁵ See Deliverable 2.1 for a further analysis of the adaptation right at EU level.

¹²⁰⁶ Mireille van Eechoud and others, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Alphen aan den Rijn : Kluwer Law International, 2009) 84.

do not always qualify for copyright protection when they lack a distinctive character from the original work. For instance, in the case *Skriet*¹²⁰⁷, the Court ruled that a doll whose appearance was really similar to the Munch's painting, *Skriet*, did not constitute an independent not an original work and thus infringed copyright of the original work. Interestingly, the infringement was caused even with the creation of a completely other form (a plastic doll).

The original work may be protected by copyright or another exclusive right or may be already in the public domain. In the former case, the author of a derivative work needs to get the permission of the author of the original work in order to avoid infringement of his rights¹²⁰⁸ as clearly stated in the last sentence of Section 4. Further, it must be noted that the copyright protection to the derivative work will arise, if appropriate, automatically without taking into account whether the adaptation has been carried out with or without the original work's author's permission.

In addition, the second paragraph of Section 4 introduced an interesting provision according to which 'if a person, in free association with another work, has created a new and independent work, his copyright shall not be depending on the right in the original work'¹²⁰⁹. This provision was introduced under the Copyright Act in order to regulate those cases where a work is created with a certain inspiration from another work but the original work and the new work are not too close in order to consider the new work as an adaptation of the previous one. It seems that in reality drawing the line to assess whether the new work is not an imitation of the original work is a complex task¹²¹⁰.

11.4 Other rules on matters relevant for CHIs

11.4.1 Protection of public domain/cultural heritage

Special provisions on digital content

Legal provision on digital reproductions of works of fine arts

Section 23 of the Swedish Copyright Act introduces an interesting provision that is worth to be mentioned. According to this section, works of art cannot be reproduced in digital form in connection with a text in a critical presentation. Therefore, the reproduction of works of arts in connection with text in critical articles can only be used in analogue reproductions¹²¹¹. In addition,

¹²⁰⁷ *Judgment of the Svea Court of Appeal 1997-11-28, DT 17, T 1534/96, Skriet.*

¹²⁰⁸ Andersson (n 243).

¹²⁰⁹ Swedish Copyright Act Sec. 4.2.

¹²¹⁰ Lisette Karlsson, 'Copyright and the Parody Problem - An Examination between the UK, Sweden and Canada' (Lund University 2013) 30.

¹²¹¹ Lindner and Shapiro (n 564) 940.

reproductions of fine arts cannot be reproduced in connection with commercial scientific presentations.

In other words, published works of arts may be reproduced ‘in connection with the text of a non-commercial scientific presentation, in connection with the text in a critical presentation, but not in digital form and in a newspaper or magazine in connection with an account of a daily event, but not if the work has been created to be reproduced in such a publication’ as long as they are reproduced in accordance with good practices and only for such purposes¹²¹².

Exclusion of digital content from the private copying exception

While we are not assessing the private copying exception in detail, it should be mentioned for our further evaluation within the inDICEs project that the Section 12.2.3 of the Swedish Copyright Act excludes the possibility of reproducing copies of published works for private uses in relation to ‘copies in digital form of compilations in digital form’.

Protection of works in the ‘cultural interest’

An special provision related to the protection of the cultural interest is envisaged in Section 51 of the Swedish Copyright Act. According to the doctrine, this is a sort of moral right that lasts perpetually after author’s death as long as ‘cultural interests’ are infringed¹²¹³. In this regards, the legal provision states that ‘if a literary or artistic work is reproduced in public in a way that violates the interests of spiritual cultivation, a court may, on the action of an authority determined by the Government, impose a ban on reproduction by a fine. What has now been said shall not apply to reproductions that take place during the author's lifetime’.

Thus, this grants the State, through the actions carried out by specific authorities, the possibility to request the courts to issue an injunction in order to stop the reproduction of a work that would undermine the cultural interest under the payment of a penalty. It must be noted that this provision should be applied carefully. It is not sufficient, according to Axhamm that a single person questions the re-issue of an older work but it should appear questionable for an ‘educated public’ in general. This safeguard should only address cases of true violations of the cultural heritage or the classical masterpieces¹²¹⁴. The only sanction that is envisaged in the prohibition is an economic penalty.

The authorities that could bring an action to the court are the Royal Swedish Musical Academy, the Swedish Academy and the Royal Swedish Academy of Fine Arts¹²¹⁵.

¹²¹² Swedish Copyright Act Sec. 23.

¹²¹³ Rosén (n 417) 3.

¹²¹⁴ Axhamn (n 545) 527.

¹²¹⁵ Copyright Regulation SFS 1993:1212 of 25 November of 1993 (last amended by SFS 2018/1100) Sec. 6.

This State's protection has not had that much relevance so far as no case has ever been brought to Court. Yet, the Swedish Royal Music Academy has examined two cases in the light of the Section 51 provision, which, although they did not lead to legal proceedings before the Court, serve to prevent the recording company from making an arrangement of Grieg's Anitra's Dance¹²¹⁶. It has been discussed among the doctrine that this provision may be outdated and has no longer relevance¹²¹⁷.

Unpublished works

For unpublished works, the Section 44(a) of the Copyright Act grants the exclusive economic rights for the person who publishes it subsequently and for the first time during 25 years after the date the work is published.

11.4.2 Open Data Directive

By the time of writing these lines, there is no draft available in Sweden of the draft text implementing the Directive.

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¹²¹⁶ Rosén (n 417) 8.

¹²¹⁷ Axhamn (n 545) 528.

12References

Alleaume C, 'Les exceptions au bénéfice des bibliothèques, des musées et des services d'archives' (2007) n° 39 Legicom 25

Ameneiros Rodríguez R and Varela-Orol C, '¿Dominio público o copyfraude de copias digitales? Prácticas en bibliotecas patrimoniales españolas' (2018) 21 Anales de Documentación

Ana-Maria Marinescu, 'The Public Lending Right' [2019] Challenges of the Knowledge Society 916

Andersson H, 'Comments of the Law (1960: 729) on Copyright in Literary and Artistic Works' <<https://lagen.nu/1960:729#P49>>

Angelopoulos C, 'The Myth of European Term Harmonisation: 27 Public Domains for the 27 Member States' [2012] SSRN Electronic Journal <<http://www.ssrn.com/abstract=2145862>> accessed 13 February 2020

'Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d'auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE' <<https://economie.fgov.be/sites/default/files/Files/Intellectual-property/Avis%20Conseils%20Propri%C3%A9t%C3%A9%20intellectuelle/Avis-CPI-19062020.pdf>>

Axhamn J, 'Cross-Border Extended Collective Licensing: A Solution to Online Dissemination of Europe's Cultural Heritage?' in Stefan Gradmann and others (eds), *Research and Advanced Technology for Digital Libraries*, vol 6966 (Springer Berlin Heidelberg 2011) <http://link.springer.com/10.1007/978-3-642-24469-8_59> accessed 13 February 2020

Axhamn J, 'The Nordic Countries', *Moral rights* (2nd., Sweet & Maxwell; London 2016)

Battisti M and Schöpfel J, 'Quel paysage juridique pour l'exploration de données ?' (2017) Volume 54 I2D Information, donnees documents 25

Bellivier F, 'Rémunération Des Prêts En Bibliothèque' [2003] Revue trimestrielle de droit civil (Paris, France : 1980) 558

Benabou V-L, 'Rapport de La Mission Du CSPLA Sur Les "Œuvres Transformatives"' (2014)

Bently L and others, 'Study in Support of the Evaluation of Directive 96/9/EC on the Legal Protection of Databases' (European Commission DG Communications Networks, Content & Technology 2018)

Bercovitz Rodríguez Cano R and others, *Manual de Propiedad Intelectual* (8th edn, Tirant lo Blanch 2018)

Berenboom A and others, *Het Belgische Auteursrecht: Artikelsgewijze Commentaar. Huldeboek Jan Corbet; Le Droit d'auteur Belge Commentaire Par Article. Hommage à Jan Corbet* (Fabienne Brison and Hendrik Vanhees eds, 4de herziene druk, Bruxelles : Larcier 2018)

Bergström A and others, *Books on Screens: Players in the Swedish e-Book Market* (2017)

Bertoni A, Guerrieri F and Montagnani ML, 'ENDOW Report 2: Requirements for Diligent Search in 20 European Countries · Copyright Cortex' (CIPPM Bournemouth University, CREATE University of Glasgow, IViR University of Amsterdam, ASK Boconni University of Milan 2017)

Bonadio E and Bellezza M, 'Exceptions to Public Lending Rights and Authors' Remuneration: The ECJ in *Veva v Belgium*' (2011) 6 *Journal of Intellectual Property Law & Practice* 768

Cabay J and Lambrecht M, 'Remix Prohibited: How Rigid EU Copyright Laws Inhibit Creativity' (2015) 10 *Journal of Intellectual Property Law & Practice* 359

Depreeuw S, 'Title VII. Databases' in Fabienne Brison and Hendrik Vanhees (eds), *Het Belgische auteursrecht: artikelsgewijze commentaar. Huldeboek Jan Corbet; Le droit d'auteur belge commentaire par article. Hommage à Jan Corbet* (Bruxelles : Larcier 2015)

Durrande S and others, *Code de La Propriété Intellectuelle 2020, Annoté et Commenté* (20th edn, Dalloz, Paris 2020)

Dusollier S, 'Scoping Study on Copyright and Related Rights and the Public Domain' (Social Science Research Network 2011) SSRN Scholarly Paper ID 2135208 <<https://papers.ssrn.com/abstract=2135208>> accessed 23 March 2020

Engdahl J and others, 'AIPPI Report on Exceptions and Limitations to Copyright Protection for Libraries, Archives and Educational and Research Institutions - Sweden' (2015)

Fisher R and others, 'Annex.1 Legal Analysis. Study in Support of the Evaluation of Directive 96/9/EC on the Legal Protection of Databases' (European Commission DG Communications Networks, Content & Technology 2018)

Gautier P-Y, *Propriete Literaire et Artistique* (11e enrichie, Paris : PUF 2019)

Ginsbourg J, 'Droit d'auteur et Propriété de l'exemplaire d'une Œuvre d'art: Étude de Droit Comparé' (1994) 46 *Revue internationale de droit comparé* 811

Gotzen F, 'Section 1. - Copyright in General' in Fabienne Brison and Hendrik Vanhees (eds), *Het Belgische auteursrecht: artikelsgewijze commentaar. Huldeboek Jan Corbet; Le droit d'auteur belge commentaire par article. Hommage à Jan Corbet* (4de herziene druk, Bruxelles : Larcier 2018)

Jane C Ginsburg, “‘UNE CHOSE PUBLIQUE’? THE AUTHOR’S DOMAIN AND THE PUBLIC DOMAIN IN EARLY BRITISH, FRENCH AND US COPYRIGHT LAW’ (2006) 65 *Cambridge law journal* 637

Janssens M-C, ‘Invitation for a “Europeanification” of Moral Rights’, *Research Handbook on Copyright* (Edward Elgar Publishing 2017)

Janssens M-C, ‘General Exceptions to the Author’s Economic Rights’ in Fabienne Brison and Hendrik Vanhees (eds), *Het Belgische auteursrecht: artikelsgewijze commentaar. Huldeboek Jan Corbet; Le droit d’auteur belge commentaire par article. Hommage À Jan Corbet* (4de herziene druk, Bruxelles : Larcier 2018)

Janssens M-C and Michaux B, ‘Intellectual Property Rights: Copyright and Trademark Issues’ in Laurent Garzaniti and others (eds), *Electronic Communications, Audiovisual Services and the Internet. EU Competition Law & Regulation*. (Sweet & Maxwell; London 2020)

Janssens M-C and Puyraimond J-F, ‘Moral Rights’, *20 ans de nouveau droit d’auteur 20 jaar nieuw auteursrecht* (ANTHEMIS 2015)

Janssens M-C and Tryggvadottir R, ‘Facilitating Access to Orphan and Out of Commerce Works to Make Europe’s Cultural Resources Available to the Broader Public’ [2014] SSRN Electronic Journal <<http://www.ssrn.com/abstract=2538097>>

Karlsson L, ‘Copyright and the Parody Problem - An Examination between the UK, Sweden and Canada’ (Lund University 2013)

Lambrecht M, ‘Chapter VIII/I Legal Provisions for Orphan Works’ in Fabienne Brison and Hendrik Vanhees (eds), *Het Belgische auteursrecht: artikelsgewijze commentaar. Huldeboek Jan Corbet; Le droit d’auteur belge commentaire par article. Hommage À Jan Corbet* (Bruxelles : Larcier 2018)

Latreille A, ‘Société de l’information. La fouille de texte et de données à l’épreuve de la propriété intellectuelle’ [2017] *Cahiers Droit, Sciences & Technologies* 197

Léger P, ‘Liberté de Création et Droit d’auteur Évolutions En Matière d’emprunt Créatif à l’œuvre d’autrui’ (2020) 55 (1) *L’Observatoire* 83

Lindner B and Shapiro T, *Copyright in the Information Society: A Guide to National Implementation of the European Directive* (2nd ed., Cheltenham : Edward Elgar Publishing 2019)

Linklater-Sahm E, ‘The Libraries Strike Back: The “Right to e-Lend” under the Rental and Lending Rights Directive: Vereniging Openbare Bibliotheken’ (2017) 54 *Common Market Law Review* 1555

Macrez F, ‘L’exploitation numérique des livres indisponibles : que reste-t-il du droit d’auteur ?’ (2012) 12 *Recueil Dalloz* 749

Margoni T, 'The Digitisation of Cultural Heritage: Originality, Derivative Works and (Non) Original Photographs' [2014] SSRN Electronic Journal <<http://www.ssrn.com/abstract=2573104>>

Margoni T, 'Digitising the Public Domain: Non Original Photographs in Comparative EU Copyright Law' in John Gilchrist and Brian Fitzgerald (eds), *Copyright, Property and the Social Contract: The Reconceptualisation of Copyright* (Springer International Publishing 2018) <https://doi.org/10.1007/978-3-319-95690-9_8>

Mariscal P, *Derecho de Transformación y Obra Derivada* (1st edn, Tirant lo Blanch 2013)

Marzetti M, 'Paying for Works in the Public Domain? The "Domaine Public Payant" in the 21st Century' (2019) 4 *Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil*

Matulionyte R, 'A Central and Eastern European Perspective on EU Copyright Reform: The Case of Lithuania' [2019] *Cambridge handbook of intellectual property in Central and Eastern Europe* 259

Michaux B and Campolini P, 'Le Droit de Destination : Un Appendice Davantage Qu'un Droit Specifique' (2010) no:2010 *Auteurs & Media*

Minero G, 'Protección Jurídica de Las Bases de Datos: Estudio de La Aplicación de La Directiva 96/9/CE Tres Lustros Después de Su Aprobación y Comentario a La Primera Evaluación Realizada Por La Comisión Europea En 2005' [2011] *Pe.i., Revista de propiedad intelectual*

Mizaras V, 'Lithuanian Copyright: Historical and Modern Aspects and Trends of Development' (2007) 54 *Journal of the Copyright Society of the U.S.A.* 829

Nilsson O, 'Rights to Software and Databases: From a Swedish Consulting Perspective' (Jönköping University, Jönköping International Business School, JIBS, Commercial Law 2009)

Pouchard D, 'La valorisation des fonds photographiques, ou comment concilier le droit d'auteur et l'accès au patrimoine culturel' [2018] *In Situ* <<http://journals.openedition.org/insitu/17981>> accessed 11 February 2020

Rajan MTS, *Moral Rights: Principles, Practice and New Technology* (Oxford University Press 2011) <<https://www.oxfordscholarship.com/10.1093/acprof:osobl/9780195390315.001.0001/acprof-9780195390315>>

Reneaud F, 'La Loi Du 18 Juin 2003 (1) : Une Nouvelle Réglementation Du Prêt Public Des Livres Dans Les Bibliothèques' [2004] *La Loi du 18 Juin 2003 (1) : une nouvelle réglementation du prêt public des livres dans les bibliothèques* 65

'Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the Public Lending Right in the European Union, 12 September 2002, COM(2002) 502 Final.'

'Report of the 5th European Public Lending Right Conference Proceedings, 2008. Bucharest 19-21 September 2008, European Writers' Congress 2008 & Fédération Des Associations Européennes d'écrivains A.I.S.B.L.' (2008)

Rogel Vide C and others, *Museos y propiedad intelectual* (Editorial Reus 2012)

—, *Derechos morales de los creadores: características, ambito y limites* (Editorial Reus 2019)

Román FB, 'Los derechos sobre las fotografías y sus limitaciones' (2006) 59 Anuario de derecho civil 1065

Rosén J, 'Moral Right in Nordic Law' [2014] ALAI 13

Serrano Fernández M, *El Impacto de La Sociedad de La Información En La Propiedad Intelectual* (1st edn, Tirant lo Blanch 2019)

Serrano Fernández M, *Estudio de Los Límites a Los Derechos de Autor Desde Una Perspectiva de Derecho Comparado: Reproducción, Préstamo y Comunicación Pública En Bibliotecas, Museos, Archivos y Otras Instituciones Culturales* (1st edn, Editorial Reus 2017) <<https://elibro.net/es/lc/icam/titulos/46668>>

Simon Altaba M, 'El Derecho de transformación en la Ley de Propiedad Intelectual española' (PhD Thesis, Universitat Pompeu Fabra 2017)

Sterling JAL, *Sterling on World Copyright Law* (4th ed., London : Sweet & Maxwell 2015)

'The Board of Swedish Authors' Fund Annual Report for the Year 2018 with Financial Accounting' (The Swedish Authors' Fund 2018)

Travkina E, Sacco P and Morari B, 'Culture Shock: COVID-19 and the Cultural and Creative Sectors' (Organisation for Economic Co-operation and Development (OECD) 2020)

Triaille J-P, 'Specific Provisions on Databases' in Fabienne Brison and Hendrik Vanhees (eds), *Het Belgische auteursrecht: artikelsgewijze commentaar. Huldeboek Jan Corbet; Le droit d'auteur belge commentaire par article. Hommage À Jan Corbet* (Bruxelles : Larcier 2018)

Triaille J-P, *Study on the Application of Directive 2001/29 /EC on Copyright and Related Rights in the Information Society (the "InfoSoc Directive")* (European Union 2013)

Tryggvadottir R, *European Libraries and the Internet: Copyright and Extended Collective Licences* (Mortsel : Intersentia 2018)

van Eechoud M and others, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Alphen aan den Rijn : Kluwer Law International, 2009)

van Gompel S and Lavik E, 'Quality, Merit, Aesthetics and Purpose: An Inquiry into EU Copyright Law's Eschewal of Other Criteria than Originality' (2013) 236 *Revue internationale du droit d'auteur* 100

Vanhees H, *Handboek Intellectuele Rechten* (Antwerpen : Intersentia 2020)

Voorhoof D, 'Loans of Works' in Fabienne Brison and Hendrik Vanhees (eds), *Het Belgische auteursrecht: artikelsgewijze commentaar. Huldeboek Jan Corbet; Le droit d'auteur belge commentaire par article. Hommage À Jan Corbet* (Bruxelles : Larcier 2018)

Westerlund L, *Intellectual Property Law in Sweden* (Hendrik Vanhees (ed.) ed, Wolters Kluwer 2011)

Case-law

Arrêt n° 788 du 22 juin 2017 (15-28467 et 16-11759) - Cour de cassation - Première chambre civile ('Dialogue des Arrêt n° 788 du 22 juin 2017 (15-28467 et 16-11759) - Cour de cassation - Première chambre civile ('Dialogue des carmélites')

Belgian Court of Cassation 8 of May 2008, AM 2009

Belgian Court of Cassation 19 January 1956, Pas 1956, I, 484

Bildupphovsrätt i Sverige ek.för (BUS) vs Wikimedia Sverige (Case nr Ö 849-15)

Collins and Patricia Im- und Export v Imtrat and EMI Electrola (C-92/92) EU:C:1993:847

Commission of the European Communities v Kingdom of Belgium (C-433/02) EU:C:2003:567

Commission v Sweden (C-91/04), EU:C:2004:739

Cour de Cassation, Chambre civile 1, du 22 janvier 1991, 89-15617

Cour de Cassation, Chambre sociale, du 8 février 2006, 04-45203 (Jean Ferrat)

Cour de cassation, civile, Chambre civile 1, 30 janvier 2007, 04-15543 ('les Misérables')

Decision of the Supreme Court of Lithuania of 19 February 2003, civil case, J Jakitas v UAB Misogaires, No 3k-3-273/2003, category 78

Hewlett-Packard Belgium SPRL v Repobel SCRL (C-572/13) EU:C:2015:750

Judgement of the Madrid Court number 13 of 24 July 2001, case Aranzadi v El Derecho

Judgment of the Svea Court of Appeal 1997-11-28, DT 17, T 1534/96, Skriet

Marc Soulier and Sara Doke v Premier Ministre and Ministre de la Culture et de la Communication (C-301/15) EU:C:2016:878

NJA 1967, 264, NIR 1968, 129 (Gell Stalformar),

STS 421/1991, 3 June 1991 of the Spanish Supreme Court

STS 1082/2006, 6 November 2006 of the Spanish Supreme Court

Swedish Supreme Court, NJA 20 of April of 1995, Nummer Banken

Swedish Supreme Court, NJA 1979 (Max Walters)

Swedish supreme court, NJA 1993, Ahlsén

Swedish Supreme Court of 4 April 2016 (NJA 2016 s 212)

Technische Universität Darmstadt v Eugen Ulmer KG (C-117/13) EU:C:2014:2196

TGI Paris (17 February 1999, 'Les visiteurs II')

The Court of Appeal of Versailles (20 December 2001, D Pontoreau v Front National)

Vereniging Openbare Bibliotheken v Stichting Leenrecht (C-174/15) EU:C:2016:856

Vereniging van Educatieve en Wetenschappelijke Auteurs (VEWA) v Belgische Staat (C-271/10) EU:C:2011:442

Legal Acts

Act on Copyright in Literary and Artistic Works. Act 1960:729, of 30 December 1960 (last amended by SFS 2020:540 on 18 June 2020).

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 1994

Archives Act (1990:782) of 7 July 1990 (last amended by SFS 2019:866)

Belgian Code of Economic Law of 28 February 2013 (Copyright and neighbouring rights contained in Title 5 of Book XI in force since 1 January 2015)

Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, revised at Paris July 24, 1971 25 U.S.T. 1341; 1161 U.N.T.S. 3 (the Berne Convention)

Conseil d'État, 10ème - 9ème chambres réunies, 07/06/2017, 368208, Inédit au recueil Lebon

Consolidated Text of the Code de la propriété intellectuelle (Dernière mise à jour des données de ce code : 02 août 2020)

Consolidated Text of the Law on Intellectual Property, Regularizing, Clarifying and Harmonizing the Applicable Statutory Provisions (approved by Royal Legislative Decree No. 1/1996 of April 12, 1996, and amended up to Royal Decree-Law No. 26/2020 of July 7, 2020) 'The Spanish Intellectual Property Law'.

Copyright Regulation SFS 1993:1212 of 25 November of 1993 (last amended by SFS 2018/1100)

Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property

Decree No. 2015-506 of May 6, 2015 issued for the application of Articles L. 135-7, L. 212-3-1 and L. 212-3-3 of the Intellectual Property Code

Décret n° 2013-182 du 27 février 2013 portant application des articles L. 134-1 à L. 134-9 du code de la propriété intellectuelle et relatif à l'exploitation numérique des livres indisponibles du xxe siècle

Décret n° 2020-946 du 30 juillet 2020 relatif à la désignation de l'Institut national de la propriété industrielle en tant qu'organisme unique mentionné à l'article 1er de la loi n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases

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

Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property

Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights

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 2011

Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works (2012) OJ L299/5

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC 2019

European Commission, Memorandum of Understanding: Key Principles on the Digitisation and Making Available of Out-of-Commerce Works (2011)

French Heritage Code (last modified in January 2020)

Law 17/1966, of May 31, on intellectual property rights in cinematographic works.

Law amending the Law on Copyright and Related Rights of the Republic of Lithuania of 5 March 2003, 5 No. IX-1355

Law inserting Book XI 'Intellectual property' in the Code of Economic Law, and inserting the provisions specific to Book XI in Books I, XV and XVII of the same Code of 19 April of 2014

Law n ° 97-283 of March 27, 1997 transposing into the intellectual property code the directives of the Council of the European Communities n ° 93/83 of September 27, 1993 and 93/98 of October 29, 1993

Law n ° 2000-642 of July 10, 2000 regulating voluntary sales of furniture by public auction

Law No. 5/1998 of March 6, 1998, on the Incorporation in Spanish Law of Council Directive 96/9/EEC of March 11, 1996 on the Legal Protection of Databases

Law No. 85-660, of July 3, 1985, on Author's Rights and on the Rights of Performers, Producers of Phonograms and Videograms and Audiovisual Communication Enterprises

Law No. 2015-195 of February 20, 2015 on various provisions for adaptation to European Union law in the fields of literary and artistic property and cultural heritage

Law of 16 December 2014 No XII-1460 regarding the amendment of the Law of Authors Rights and Related Rights No VIII-1185

Law of 20 of July 2020 transposing Directive 2012/28 / EU of the European Parliament and of the Council of 25 October 2012 on certain authorized uses of orphan works

Law of 22 December of 2016 amending certain provisions of Book XI of the Code of Economic Law

Law of 31 August of 1998 transposing into Belgian law the European directive of 11 March 1996 on the legal protection of databases.

Law of June 27, 2016, Amending the Code of Economic Law for the Introduction of Freedom of Panorama

Law of May 22, 2005, on the Transposition into Belgian Law the European Directive 2001/29/EC of May 22, 2001, on the Harmonization of Certain Aspects of Copyright and Neighbouring Rights in the Information Society

Law on Copyright and Related Rights of the Republic of Lithuania, 18 May 1999 No VIII-1185 (last consolidated version of 1 July 2019)

Loi n° 2003-517 du 18 juin 2003 relative à la rémunération au titre du prêt en bibliothèque et renforçant la protection sociale des auteurs

Loi n° 2006-961 du 1er août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information

Loi n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet (1)

Loi n° 2012-287 du 1er mars 2012 relative à l'exploitation numérique des livres indisponibles du XXe siècle

LOI n° 2016-1321 du 7 octobre 2016 pour une République numérique

Order of the Minister of Culture of the Republic of Lithuania of 17 July 2015 No JV-480 concerning the compensation conditions for the former orphan works

Order of the Minister of Culture of the Republic of Lithuania of 28 January 2015 No JV- 46 concerning the sample list of sources for the diligent search of right holders of orphan works

Ordinance (1962: 652) on the Swedish Authors' Fund

Polish Act of February 4, 1994, on Copyright and Related Rights (Journal of Laws 1994, No. 24, item 83, as amended up Act of February 13, 2020)

Polish Act of June 27, 1997 on libraries (Journal of Laws of 2012, item 642, as amended) d.)

Polish Act of November 21, 1996 on museums (Journal of Laws of 2012, item 987)

Polish Database Protection Act of 27 July 2001 (Journal of Laws of 2001, No. 128, Item 1402)

Regulation of the Polish Minister of Culture and National Heritage of 23 October 2015 regarding the list of sources to be checked in the scope of diligent search for the persons entitled to works and objects of related rights which can be considered as orphan works, and the manners in which the results of the search are recorded

Royal Decree of 13 December 2012 relating to remuneration for public lending and withdrawing the Royal Decree of April 25, 2004 relating to remuneration rights for public lending of authors, performers, producers of phonograms and producers of

Royal Decree of 17 October of 2016 defining the appropriate sources for carrying out the diligent search of right holders in order to determine whether a work or a phonogram is orphan works or not

Royal Decree of 25 April 2004 on the remuneration rights for public lending of authors, performers, producers of phonograms and producers of first fixations of films

SFS 1994: 190 of 14 April of 1994 amending the Act (1960: 729) on copyright in literary and artistic works

SFS 1997: 790 of 6 November of 1997 amending the Act (1960: 729) on copyright in literary and artistic works

SFS 2005:359 of 8 June 2005 amendment to the Act 1960:729 on copyright in literary and artistic works.

SFS 2014: 884 of 8 July of 2014 (Orphan works in the collections of cultural heritage institutions)

Spanish Royal Decree 224/2016, of May 27, by which the orphan works legal regime is established.

Spanish Royal Decree 624/2014, of July 18, which develops the right of remuneration to authors for the loans of their works carried out in certain establishments accessible to the public.